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Israeli Judges in a Jewish State and the Decline of Refugee Protection

Iftach Cohen

Thesis submitted for assessment with a view to obtaining the degree of
Master in Comparative, European and International Laws (LL.M.)
of the European University Institute

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1. Preface

While writing the last parts of this L.L.M thesis, a mass influx of asylum seekers overwhelms Europe which seems to provide me with relevant and very telling anecdotes almost on a daily basis. As Germany is confronted with a record number of asylum seekers reaching its borders and challenging the limits of its capacity to facilitate the reception of so many of them, reports have indicated it has started to host some few dozen asylum seekers in the Nazi concentration camp of Buchenwald¹. Although the report has later turned out to be incorrect, the Israeli media have continued to proliferate it with a deep undertone of abomination, criticizing Germany for having resolved the asylum seekers' accommodation shortage "in bad taste"².

From a somewhat naïve point of view, this sudden eruption of outrage within the Israeli-Jewish public is not at all obvious; What seems to be clear is rather the truly remarkable irony of history when a death camp becomes a shelter for refugees and displaced people. But isn't it exactly what makes the alleged metamorphosis of Buchenwald so moving? Wouldn't it be possible to imagine also a different reaction to that story coming from the descendants of a people that have witnessed persecution and deprivation of due asylum through the complacency of the world's nations? Allegedly compelled by the obvious moral imperative of the Holocaust, wouldn't it be more appropriate for those descendants of Jewish Holocaust refugees to praise Germany instead of denouncing it for the unreserved efforts it has been making in order to meet the acute needs of present day asylum seekers and refugees?

It is quite explicit that the outrage expressed by the Israeli media has nothing to do with, for example, violation of human rights or deprivation of humanitarian needs, which Buchenwald is historically associated with, but rather with the Israeli-Jewish public's fear that Buchenwald, or any place or concept associated with the Holocaust, would be appropriated by others or applied to other similar situations involving others. In this case, and even on the expense of contemporary asylum seekers, Buchenwald the Signifier, must remain attached to only one particular Signified – the Jewish inmate it was designed for – rather than being thought of also as a place of refuge for those contemporary asylum seekers and refugees.

This sort of 'Holocaust possessiveness' is manifested time and again by Jewish and Israeli actors in their effort to establish and preserve the notion that the Holocaust is a categorically unique historical event. This ideological perception is one of the two central pillars of what

¹ L Willgress, '*Refugees Fleeing to Europe Living in Nazi Barracks at Buchenwald*', Dailymail, 11.9.2015 – www.dailymail.co.uk/.../Housed-notorious-concentration-camp-Refugees-fled-Europe-better-life-living-former-Nazi-barracks-Buchenwald-thousands-slave-labourers-died-subjected-medical-experiments.html

² 'Germany Not Housing Refugees at Buchenwald Concentration Camp', Haaretz, 14.9.2015; 'Symbolism Without Tact: Refugees Were Hosted in Nazi Concentration Camp', Israelhayom, 15.9.2015 – www.israelhayom.co.il/article/3136119; 'In Bad Taste: Refugees Are Being Housed at the Buchenwald Concentration Camp', ynet, 11.9.2015 – www.ynet.co.il/articles/0,7340,L-4700081.

Norman Finkelstein defines as ‘the Holocaust framework’, and is used by those actors who are constantly engaged in, and lead to the trivialization or the complete denial of the claimed genocidal experiences of other victim groups³.

committed to this central dogma for its desirable political consequences, that is, the distribution of the whole moral capital to be conferred on genocidal victim - groups to the Jewish people alone and, *inter alia*, shielding Israel from any criticism of its otherwise indefensible conducts, diaspora and Israeli Jews in different fields – Holocaust and genocides studies, diplomacy, politics and commemoration – engage in the contentious struggle over the Holocaust’s uniqueness and lead to the marginalization or the complete denial of the claimed genocidal experiences of other victim-groups.

This L.L.M thesis reviews the Israeli state of affairs in the asylum context, which may be best defined as ‘the denial of (contemporary) refugee-hood’. That state of affairs is exemplified, *inter alia*, in the un-typical governmental- minded judicial approach displayed by the Israeli judges when they decide on appeals against the administrative decision for not recognizing asylum seekers as refugees. While some academic attention has already been given to the virtually 0% refugee recognition rate at first instance of the Israeli administrative authority, the fact that the Israeli Courts have only twice so far begged to differ with the state and ordered the government to grant asylum seekers appellants the refugee status, was never before a subject to academic research.

The first section of the opening chapter provides an introduction to the Israeli asylum condition, with the illusory asylum requests being lodged in Israel at its center, while the second section of that chapter outlines the prevalent portrait of the Israeli Courts, especially in the international arena.

Although the fact that this thesis’ focal point is under-researched may be a sufficient reason to stage the Israeli judiciary in the asylum context at the center of even the most modest academic research, my motivation to do so is derived rather from the tension between the image of the Israeli Court as being extremely pro-active, perhaps the most daring Court in the world, and the Court’s actual performance in cases regarding disputes between the state and its non (Jewish) citizens. At the forefront of these cases, first and foremost, are those relating to the Palestinian Occupied Territories and their inhabitants, which were the subject of David Kretzmer’s seminal work⁴; those relating to the naturalization of the only 170 asylum seekers

³ N G Finkelstein, *The Holocaust Industry*, Verso, London, 2000, p.41

⁴ D Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, State University of New York Press, 2001

who were ever recognized as refugees in Israel⁵; and also, as I would like to suggest in this thesis, to asylum appeals concerning specifically the recognition of asylum seekers as refugees.

These types of cases unfold the discrepancy between the Israeli Court's bias in favor of omission in interfering with administrative decisions on the one hand, and its mostly proactive judicial approach in cases relating to all other disputes between the individual and the state on the other. What makes any study on this phenomenon within the Israeli Court's jurisprudence even more interesting and of high political importance, is that the perception of the Israeli judiciary as a robust liberal agent within Israeli society is still highly prevalent on the international level. The irony is that this very misconception about the Israeli Courts results in the attribution of legitimacy to the state of Israel, as being the only democracy in the middle-east, which in turn serves as a key pillar for the ones who seek to mitigate Israel's conducts specifically in relation to the territories it occupies and colonizes for the last 48 years, which then double the irony by producing for the Courts exactly those cases in which their most governmental minded judicial approach is being enacted. It is rather obvious that exposing the Court's bias in cases relating directly to the Occupied Territories is more relevant to the international community's concerns about Israel, but scrutinizing the Court's jurisprudence also in asylum cases, which just like the ones related to the Occupied Territories pose a challenge to the Zionist's ethos, may nevertheless help to constitute a paradigm regarding the limits of the Court's alleged daring judicial approach.

I would like to claim that the relation between this two types of case – the ones relating to the Occupied Territories and the asylum appeals – is vertical. It is so in the way that the creation and the maintenance of the uniqueness thesis about the Holocaust result in a sort of justification for some of Israel's illiberal and undemocratic conducts, and first and foremost its ongoing occupation of the Palestinian Territories.

The argument about the Holocaust's uniqueness implies that no other claimed example of genocide has actually been a-genocide, and so it brings about the exclusive allocation of the whole moral capital produced by the 'genocide-recognition industry' to the Jewish people, and more specifically to the Jewish state. This abundant moral capital is not the only source of justification that stems from the uniqueness thesis; the argument about the Holocaust's uniqueness, and the situation of the Holocaust right at center of Jewish-identity, creates a blunt distinction between Jews, who have indeed experienced such a genocide, and all other people, who have not. And so, in believing that anyone who has not been undertaken by a similar

⁵Y Livnat, '*Permanent Status in Country of Asylum*' (in Hebrew), immigrants in Israel: social and legal aspects, 2014

trauma, which is so deeply intertwined with their identity, cannot fully penetrate the meaning of their existence and truly understand their acts and motivations, the Jewish people and the Jewish state discard any criticism that comes from the outside of the Jewish world regarding Israel's expansionism and its ever growing appetite for militaristic power.

In this L.L.M thesis I am following a number of eminent scholars who have attributed those ideological and political motivations to the mainly Jewish and Israeli actors who devote themselves to the furthering of the uniqueness thesis in their respective fields of knowledge. In my view, from the culmination of those responsive activities emerges a pattern that can and should be applied to the Israeli judges in their abnormal reluctance from interfering in administrative decisions by recognizing present day asylum seekers as refugees.

In the larger scope, there is a lot in common between Jewish and Jewish-Israeli historians, diplomats or museum directors, with their persistent effort to reject the calls of other victim-groups for recognition of their own tragedy as a genuine genocide, and the Israeli judges that in the same vain derogate from the constitutive theoretical principles of their field of work when it comes to the dealing with the Holocaust.

As much as the Jewish-Israeli genocide scholar may fear the decline in value, morally and politically, of the Holocaust, as a result of possible recognition of other tragedies as additional valid examples *in line* with the Holocaust, which all belong to the general category of the definition '*genocide*', the Israeli judge must also believe that the Holocaust would lose its uniqueness if the legal definition of '*refugee*' is applied to the situation of contemporary asylum seekers. Conceptually situating them in the same group of the Jewish -refugees who fled from Nazi-Germany, might then dissipate the "Israeli advantage" in "justifiably" keeping the whole moral capital to itself.

In the second chapter I shall present and elaborate about the Holocaust's uniqueness thesis, and its promotion by its proponents in different fields, and especially within history studies.

What might make the definition '*refugee*' intimately associated with the Holocaust in the Israeli judges' mind is the Jewish context of the 1951 Convention relating to the Status of Refugees, and the conventional wisdom about Israel's historical commitment to the refugee protection regime it has established. For them, the Refugee Convention connotes so strongly to the Holocaust, that when they examine its applicability and implementation in a specific case, the memory of the Jewish-refugee who fled his Nazi perpetrators is being instantly evoked. In other words, the Jewish context of the Convention serves as a nexus between the Holocaust with its Jewish refugees and the contemporary forms of persecution and the refugees resulting from them. Rather than considering the international refugee law as their

only valid point of reference, the judges are more attached – consciously or not – to the Holocaust framework and to what lies at its center, the Holocaust's uniqueness. Compelled by the ideological imperative to distinguish the Holocaust from any other historical atrocity, and so to avoid such possible implication if comparing the legal situation of the Holocaust's refugees to the contemporary asylum seekers, the judges seem to mistake the *unique* form of persecution witnessed by the Jewish-refugees for the actual yardstick with which to measure the appellant's entitlement for the refugee status.

In the third chapter I examine the involvement of Israel and Jewish organizations in the drafting and acceptance of the Refugee Convention, as well as the sources for the conventional wisdom about Israel's historical commitment to the Convention, and its fallacy.

In the last chapter of this thesis I conduct an analysis of the figurative language used by the judges in trying to establish - through the allusions occasionally made by them to the Holocaust at large and more commonly to the Jewish context of the Refugee Convention - that when thinking about the asylum seeker appellant standing before them, they also bear in mind a phantom of the Jewish refugee, whose suffering's magnitude overshadows any possible fear of being prosecuted proclaimed by the actual appellant. Since present day asylum seekers do not withstand the unique standards of persecution witnessed by those poor phantoms of Jewish refugees, their asylum claims are inevitably being discarded and consequently they all pass for nothing but mere economical migrants, a fact that is exemplified in the nonexistent refugee recognition rate both at first instance and at the Court level.

2. Israel: a Safe Haven for Whom?

2.1. The Asylum Condition: Introduction

During the years 2006-2012 Israel was confronted for the first time in its history with large numbers of asylum seekers, mainly from Eritrea and Sudan. Until late 2013, when the construction of 230 km of surveillance fence along large parts of the Egyptian border was completed, several hundred African asylum seekers crossed the border on a monthly basis. In order to fulfill their right to seek asylum, these African asylum seekers were willing to risk their lives in a harsh journey through the Sinai desert, an infamous trade zone of weapons, drugs, and women⁶.

From its birth until this crucial period, Israel had had to deal with only a small number of requests for asylum lodged within its territory, and the issue of asylum seekers had therefore never before been considered to be of major concern to the Israeli society. Despite its central role in the drafting of the 1951 Convention Relating to the Status of Refugees, and its being a signatory to the convention already in 1954 and to the convention's 1967 protocol in 1968, Israel has never since then drafted a domestic refugee law, and not until 2001 was an administrative agency finally established in order to handle asylum applications.

In the past, the issue of asylum seekers has seldom made headlines in Israel, and when it has, it was always in relation to Israel's own initiatives to admit groups of asylum seekers as a humanitarian gesture. In 1977, for example, Prime Minister Menachem Begin authorized citizenship for several hundred Vietnamese refugees. Marooned in the South China Sea in a leaky boat, an Israeli captain took them in, bringing them to Israel after they had been denied refuge in Taiwan. Begin granted the refugees citizenship in his first act as newly-elected prime minister. He explained to President Carter: "*we never have forgotten the boat with 900 Jews, having left Germany in the last weeks before the Second World War... traveling from harbor to harbor, from country to country, crying out for refuge. They were refused... Therefore it was natural... to give those people a haven in the land of Israel*"⁷.

Indeed, the Israeli-Jewish public has never forgotten the atrocities of the Holocaust and the suffering of its victims. The memory of the Holocaust still occupies a central place in everyday life in the Israeli society, and society's notion of Jewish-Israelis as the direct heirs of the Holocaust victims is a key pillar of the Israeli-Jewish identity. But while the Israeli-Jewish public's collective memory of the Holocaust is still so vivid 70 years after the end of WW2, the somewhat natural ethical implications of the Holocaust apparently perceived by Prime

⁶ M Van Reisen, M Estefanos and C Reijken, '*Human Trafficking in The Sinai: Refugees Between Life and Death*', Wolf legal Publishers, Brussels, 2012

⁷ Lisa Goldman, *I remember when Israel rescued non-Jewish refugees*, +972 (Sep. 6, 2012) – <http://972mag.com/i-remember-when-israel-rescued-non-jewish-refugees/55387/>

Minister Begin do not seem to count that much when it comes to Israel's willingness to provide international protection to present day asylum seekers from Africa.

In Israel, only a very few of the tens of thousands of asylum seekers have been granted refugee status under the 1951 Convention relating to the Status of Refugees. Since the ratification of the convention, only 170 asylum seekers have been recognized as refugees by the Israeli administrative authority. In 2013, only six asylum seekers were granted the Geneva Convention status while 491 applicants were rejected⁸. This adds up to a recognition rate of 1.2%. In 2012, again only six asylum seekers were recognized as refugees, while 1,131 applicants were rejected (a recognition rate of 0.57%)⁹. And in 2011, eight asylum seekers were granted Geneva Convention status, while 4,270 applications were rejected (recognition rate of 0.19%)¹⁰. These figures are significantly low in comparison with the recognition rate of refugees in other liberal democracies, which range from 10% - 50%¹¹. The Israeli recognition rate for refugee status is more or less on the same scale of the notorious success rate at first instance of only 0.4% in Greece in 2008, a figure that was deemed to be so low that alongside some other troubling findings has brought the *European Court of Human Rights* to define asylum applications lodged in Greece as nothing more than '*illusory*'¹².

And yet, the asylum - condition in Israel is more multifaceted than what those dry figures reveal; Although Israel revokes almost all of the asylum applications lodged within its territory, it allegedly complies with the principle of *Non-Refoulement* with respect to 90% of the asylum -seekers it absorbs, that is, it refrains from forcefully expel them on the grounds that their lives and freedoms may be at risk if returned to their countries of origin¹³. The decision not to deport these mainly Sudanese and Eritreans nationals back to their countries of origin should nevertheless be considered within the broader context of the many restrictions imposed on them, whose sole aim is that of rendering their lives so miserable while staying within Israel's borders, as to evoke their will for 'voluntary return' to their countries of origin.

At the same time as it has been refraining from coercively deporting Eritreans and Sudanese - who still constitute the largest group of asylum seekers within its territory - Israel has failed to adhere to a consistent manner of defining its policy toward them in terms of temporary group protection or other sort of subsidiary protection. In the course of representing numerous asylum seekers in Israeli Courts over the first few years since the influx began, I repeatedly confronted with contradictory statements by the state in answer to the question of whether it

⁸ *No Refuge*, Hotline for Refugees and Migrants, Tel Aviv, 2014, p.11 (Mali Davidian, Freedom of information Law supervisor, Population and Immigration Authority, in her letter to advocate Elad Kahana, 2014)

⁹ Ibid., p.11

¹⁰ Ibid., p.11

¹¹ UNHCR Global Trends 2013, Annexes, Table 10 (June 2014) - <http://www.unhcr.org/globaltrends/2013-GlobalTrends-annex-tables.zip>

¹² See *M.S.S v. Belgium And Greece*, Application no. 30696/09 (21 January 2011)

¹³ HCJ 7385/13 *Eitan – Israeli Immigration Policy Center et al. V. the Israeli Government*, preamble 31 to the majority central opinion

applies a policy of temporary group protection with respect to these populations. In court, the state denied applying such a policy when asked whether the detention of one of my clients actually served a proper purpose; according to the Israeli Supreme Court's case-law, a person cannot be held in detention if he/she cannot be deported within a short period of time. Thus, in order to obscure the fact that a deportation process for a certain detainee was not to be furthered any time soon, the state had simply denied applying temporary group protection in relation to him/her. Instead, it attributed its evident lack of a deportation process to technical problems that may or may not be solved soon. At the same time, but in the framework of other legal procedures, when the question before the Court was whether a certain asylum seeker was entitled to go through an RSD procedure, the state proclaimed that due to temporary group protection applied to the population he/she belongs to, it has no duty to examine his/her individual asylum claims.

Over the course of the years, Israel has maybe used different terminology to define its policy towards Eritrean and Sudanese asylum seekers, but it remains undisputed that in practice it refrains from deporting them back to their countries of origin. Although its officials have used the term 'temporary group protection' in many formal documents¹⁴, at a certain point the Ministry of Interior completely stopped using this term and denied having ever applied such a policy in relation to Eritrean and Sudanese asylum seekers. The state probably realized that the rights given to these asylum seekers fall significantly short from the bundle of minimum rights provided for specific groups by other liberal-democracies in case they decide to employ a similar policy of temporary protection¹⁵.

Nowadays, the state uses the term 'temporary policy of *non-refoulement*' only in relation to the Eritrean asylum seekers.

In other words, Israel's policy of *non-refoulement* reflects its obligations under the international law and is in line with its domestic law, but at the same time Israeli officials insist on defining the Eritrean asylum seekers as mere '*mistanenim*' (Literately: infiltrators) who only seek to improve their economic condition by exploiting the state's generous asylum system. Instead of admitting the simple fact that the temporary group protection - or to give it its updated name, the 'temporary policy of *non-refoulement*' - indeed reflects the state's acknowledgment that these specific groups of asylum seekers are likely to face persecution if returned to their countries of origin, the state has chosen to fuel the public's hostility by using

¹⁴ *No Refuge*, p.15. (Haim Efraim, director of the Refugee Status Determination Unit, in his letter to the Hotline for Refugees and Migrants, 10.12.2009)

¹⁵ Compare – Council Directive 2001/55/EC on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of effort between Member States in receiving such persons and bearing the consequences thereof (See, especially, Articles 8, 12, 13, which concern the right to reside, work and the admittance to the welfare system); it is noteworthy to mention that the directive's provisions have never been triggered so far, and that the protection offered by it is destined to be of limited duration.

ever growing rejectionist rhetoric, detaining many of them for long periods, depriving all of them of work visas and limiting their presence to restricted areas.

These contradictory policies and declarations of the state, which one commentator defines as an intentional practice of "order disorder"¹⁶, were actually meant to render the lives of the already present asylum seekers so miserable they would rather "voluntarily return" to their countries of origin, and at the same time to deter others from crossing into the state in search of asylum.

It was not hard to reach that conclusion about the real, hidden, purpose behind Israel's contradicting policies. As one prominent scholar in the field of international refugee law once told me, all states' attitudes toward asylum seekers stem from the same secret motivation to get rid of them all, but Israel is the only one to actually admit it publically¹⁷. Indeed, it was the former Minister of Interior himself who revealed the real purpose behind the state's contradicting policies toward the African asylum seekers, stating he would lock 'infiltrators' up "to make their lives miserable"¹⁸. His successor, the former Minister of the Interior, Gideon Sa'ar, who in reaction to the Supreme Court's decision to set aside section 30a of Amendment no. 3 to the Prevention of Infiltration Law, which allowed asylum seekers to be held in detention for a period of three years, has publicly bragged about the hundreds of Eritreans and Sudanese nationals who due to their long stay in detention have decided to "voluntarily return" to their countries of origin¹⁹.

These are not only the abovementioned public statements of the Ministers of Interior that reveal the state's real intention behind its policy of the alleged 'temporary policy of *non-refoulement*'. Its actual purpose is being reveled also and mainly from the direct outcome of those very policies – the decision made by hundreds of African asylum seekers to give up their right to seek asylum and to be deported despite the state's acknowledgment of the risk they are likely to face if returning to their countries of origin. It cannot, in all sincerity, be claimed that the state's policy, whatever language it was couched in, was employed in good faith, which is a general principle of international law²⁰.

While until the end of 2013 Eritrean and Sudanese nationals were not allowed to go through the RSD process in order to determine their possible entitlement to the refugee status, other nationals' asylum requests were examined by the administrative authority and almost none of

¹⁶Y Paz, 'Order disorder: African asylum seekers in Israel and discursive challenged to an emerging refugee regime', New Issues in Refugee Research, UNHCR., 2011

¹⁷A conversation with Prof. Audrey Macklin, December 2014

¹⁸O Efraim, 'Yishai: Next phase – arresting Eritreans, Sudanese migrants', YNET (Aug. 16, 2012) - <http://www.ynetnews.com/articles/0,7340,L-426950,00.html> ('illegal migrants threat just as severe as Iranian nuke threat; says will lock infiltrators up to 'make their lives miserable')

¹⁹B Hartman, 'Sa'ar: Hundreds of migrants returned home in Jun', The Jerusalem Post, (Jun. 29, 2014); I will get back to the High Court of Justice's ruling in this case in the forth chapter.

²⁰C Burke, 'An Equitable Framework for Humanitarian Intervention', Hart Publishing, Oregon, 2013

them was granted the Geneva Convention status. For most of the period that I examine, that is, the years 2006-2012, only on some very few occasions was the state ordered by the Court to examine a certain Eritrean or Sudanese national's individual claims for asylum, and even then, under the Court's open eyes, the state has always reached a negative decision.

In early 2012, only a short time after the establishment of South Sudan, Israel declared the end of the temporary group protection for Sudanese nationals that were allegedly entitled to South Sudanese citizenship (none of the thousands of targeted Sudanese nationals were actually granted citizenship at that time by the new-born state). Following this decision, several Israeli NGOs filed a petition with the District Court of Jerusalem to overturn the policy change; the Court dismissed the petition, but on the condition that when the temporary group protection regime came to an end, the state would finally allow each and every one of the South Sudanese nationals to go through the RSD process before his/her deportation²¹. The protection regime indeed came to an end, but the condition laid down by the Court was of little help to the alleged South Sudanese nationals. Not one of them was granted the Geneva Convention status; the Court's decision in fact paved the way to the removal – by force or 'voluntarily' - of 1,158 South Sudanese²². Several of the returnees, including children, died shortly after their deportation due to medication shortage and lack of medical care²³.

Later on, as a result of the entry into force of Section 30a of the Prevention of Infiltrators Law in 2013, Eritrean and Sudanese nationals were finally allowed to file asylum applications and to go through the RSD procedure in order to determine their entitlement to the Geneva Convention status. In practice, the state examined applications from no one except for the asylum seekers who were held in detention under the abovementioned law.

From the figures the state revealed in Court, it seems that by March 2013, 444 applications of Eritrean nationals had been examined, only two of which were granted refugee status (less than 0.5%)²⁴. While the refugee recognition rate of Eritreans in Israel is virtually zero, the worldwide recognition rate of Eritreans in 2012 was 81.9%²⁵. In respect to Sudanese nationals, as of March 2014, decisions were taken in some 505 applications, and they were all negative. At the same time, the worldwide recognition rate of Sudanese in 2012 was 68.2%²⁶.

The Ministry of Interior informs the unsuccessful applicants about the negative decision in a standard letter, complemented by another standard letter, which states as follows –

²¹ The District Court of Jerusalem – sitting as a Court of administrative matters, Case 53765-03-12 *Asaf v. The Minister of Interior* (7.6.2012)

²² *No Refuge*, p.19

²³ N Arnon, 'expelled from Israel – died of Malaria in South Sudan', NRG, 24.8.2012

²⁴ HCJ 7146/12 *Gavrisali v. the Knesset*

²⁵ UNHCR Global Trends 2012, Annex (June 2013), Table 11- <http://www.unhcr.org/52a723f89.html>.

²⁶Ibid

..”it should be noted that, given the temporary policy of *non-refoulement* granted to Eritreans in Israel, due to the current situation in Eritrea, asylum seekers whose requests are rejected will not be returned to their country as long as the policy of *non-refoulement* stands”²⁷.

However, even if the Eritrean asylum seekers were not to ”be returned to their countries” in a direct coercive manner, many of them eventually chose to withdraw their asylum applications and leave Israel. The factors contributing to this ‘choice’ are many: their ongoing detention; the risk of being detained for long periods or even that of being arbitrarily detained for the second or third time after they were already released; their lack of access to the labor market; the extreme conditions of poverty they are forced to live in; and the many different forms of daily harassment they experience from the authorities themselves.

According to the data provided by the Ministry of Interior, 1,687 Sudanese and 268 Eritrean asylum seekers ‘voluntarily’ left Israel in 2013²⁸. And in 2014, 4,005 Sudanese and 1,214 Eritrean asylum seekers were ‘voluntarily’ removed²⁹.

At this point a few facts may be noteworthy, concerning the human rights condition in Eritrea, which nationals constitute the largest group of asylum seekers in Israel: national military service is mandatory for every Eritrean between the ages of 18 and 50; since refusal to perform military service amounts to imputed political opinion, for those who fled the country in order to avoid the compulsory service - which is true for most if not all of the Eritrean asylum seekers staying in Israel - the awaiting punishment when returned is one of five years’ imprisonment under inhumane conditions, many times without a trial or the right to appeal. According to the reports of some human rights NGOs, death in captivity is not unusual, nor is the disappearance of prisoners and detainees. For these reasons and others, the UNHCR determines that most Eritreans fleeing their country should be considered as refugees under the Geneva Convention, especially on the grounds of ”political opinion”. The extremely high world-wide recognition rate of Eritrean asylum seekers shows that other liberal democracies apart from Israel do in fact accept and follow the UNHCR’s eligibility guidelines for assessing the international protection needs of Eritrean asylum seekers³⁰.

Israel, for its part, also seems to acknowledge the fact that Eritreans are likely to face persecution if returned to their country of origin, and its ’temporary policy of *non-refoulement*’, at least on the surface, reflects its awareness of the risks imposed on Eritreans asylum seekers if returned, and to its own obligations under international and domestic law.

²⁷ The Population and Immigration Authority in its letter to Mr. A.A. (3.3.2014)

²⁸ Population and Immigration Authority, foreign workers statistics (January 2014) - <http://piba.gov.il/publicationAndTender/foreignWorkersStat/Documents/563343n80.pdf>

²⁹ Population and Immigration Authority (October 2014) -

<http://piba.gov.il/publicationAndTender/foreignWorkersStat/Documents/564899cce.pdf>

³⁰ UNHCR, Eligibility Guidelines for Assessing International Protection Needs of Asylum-Seekers from Eritrea, <https://www.ecoi.net/file-upload/90-1303373613-unhcr-eri20110420-guidelines.pdf>

However, in examining the rights granted to the asylum seekers under that policy, or moreover the rights that are not granted to them, that is - the right to liberty and the right to life with dignity - it is clear that the state's policy does not provide asylum seekers with an adequate subsidiary protection. To put it more concretely, the implementation of this policy was never meant to actually prevent the risks to the lives and freedoms of asylum seekers, and those thousands who were virtually pushed to possibly risking their lives on return to their countries of origin prove that this policy was made contrary to the fundamental doctrine of good faith.

Quite in the same fashion, if we examine the outcomes of almost all RSD procedures, what would seem clear is that the administrative authority is acting in *mala fides* also in relation to the ones who are allowed to file an individual asylum application and to go through the procedure. If thousands of RSD procedures, many of which concern Eritreans and Sudanese nationals' claims, result in a total recognition rate of around 0%, it seems sound to determine that asylum applications lodged in Israel are merely *illusory*. The renouncement of thousands of Eritrean and Sudanese nationals from the permission to stay in Israel, combined with the virtually non-existent recognition rate of asylum seekers as refugees, represent the overall unfair approach of the administrative authorities toward asylum seekers and what appears to be its basic denial of the very existence of contemporary refugee-hood, as this thesis intends to claim.

Although the right to asylum, as such, does not exist, if we look at the Israeli asylum system and at the impassable barriers it stages on the way of asylum seekers resulting in their poor chances of succeeding, it is far from clear whether asylum seekers in Israel are at all able to fulfill even their right to seek asylum.

As the Israeli asylum system is governed by the administrative authority, in order to better understand the reasons for the practical inexistence of recognized refugees in Israel it may seem at first glance that one should focus particularly on the work of the Israeli Ministry of Interior, it being the governing body of the asylum system.

And yet, the total recognition rate of asylum seekers as refugees, and even the ways and manners, broadly speaking, in which the asylum system functions, are enacted not only by the Ministry of Interior but also by the Courts. In Israel, the District Courts have the jurisdiction to adjudicate appeals filed against negative decisions taken by the Ministry of Interior on asylum application³¹. It is also the District Court which performs judicial review over general policies conducted by the Ministry of Interior in relation to asylum seekers and the state's obligations towards them.

³¹ Administrative Matters Court Law – 2000

The extremely low percentage of refugee statuses given to asylum seekers by the administrative authority, and the inequity of the Israeli asylum system were already discussed in different contexts, however not sufficiently. Nevertheless, nothing has yet been written about the most interesting fact, in my opinion: namely that the Israeli Courts have so far made only two rulings overturning a decision of the Ministry of Interior and so recognizing asylum seekers as refugees.

Although asylum adjudication is distinguished by a relatively high rate of challenge by those individuals whose applications for asylum were initially rejected by the administrative authority, most of the unsuccessful applicants in Israel would be incapable of carrying out the legal process of appeal by themselves³². Hence it seems clear that in the asylum context, the administrative authority's role predominates substantially over the role played by the Court, since the latter takes only a small number of decisions when compared with the Minister of Interior. Thus, from the asylum seekers' point of view, my examination should probably give much more attention to the policies and conducts of the administrative authority, which indeed affects their lives more than any other agent of the state.

However, I'm far more interested in shedding light on the role of the Israeli Courts in the asylum context. My high drive to stage the Israeli Courts, or more accurately, the Israeli judge in the Jewish state, does not stem from the fact that so far no attention at all has been paid to the Court's asylum adjudication³³, although that might stand as a sufficient enough reason to conduct my inquiry in this direction. What makes this aspect of the asylum condition in Israel so appealing to me, is the image of the Israeli Courts as highly professional and independent ones, with the Israeli Supreme Court internationally perceived as perhaps the most activist Court in the whole world, and that image I wish to challenge.

The other side of that coin is the Israeli political establishment's attempt to pass for being modern, liberal and democratic by promoting in the international arena some of the Court's most liberal case-law. Quite ironically, the Israeli Diplomats boast of the very same rulings that are harshly contested and almost never complied with by the executive branch as it performs in front of the Israeli domestic audience.

³² In Israel, the major part of asylum seekers are not eligible for free legal aid while going through RSD process or if wish to appeal against the administrative negative decision. Naturally, most of unsuccessful applicant lack the financial possibility to pay a lawyer and their only chance to challenge a negative decision is with the help of only few NGO's which offer legal aid and representation.

³³ From now on I will use the term '*Israeli-judge*', although virtually all the judges who are competent to decide on asylum appeals are Jewish. In Israel, only 52 out of 672 judges are Palestinian citizens of Israel (That number amounts to only 7.7% of the judges in the Israeli judicial system, while the whole Arab population represents 20.7% of the country's population. Only 10 of those Arab-Israeli judges sit in the Districts Court, of which judges only some very few are nominated to serve also as judges for administrative matters and, *inter alia*, to adjudicate asylum appeals. See – G Lurie, '*Appointing Arab Judges to the Courts in Israel*', Mishpat U'Mimshal, the University of Haifa Law Review, 2015, p.307.

In other words, the notion of the Israeli Court as an agent of liberalism in Israeli society, and the legitimacy Israel tries to gain out of that image of its Court, makes it important to examine whether the Court actually acts in such a manner, that is, furthering liberal values in an active fashion, also in relation to disputes between the state and non-Israeli citizens.

Given the disparity existing not only between the percentage of refugees recognized at first instance in Israel and in other liberal democracies, but also between the recognition rates at the appeal level - that is, the overall number of asylum seekers being recognized as refugees by the Israeli Courts in comparison to the National Courts of other liberal democracies - the same exact questions arise regarding the work of both the Ministry of the Interior and the Israeli Court in the asylum context: Why is the recognition rate of asylum seekers as refugees in Israel so low when compared to other liberal democracies?³⁴ Can this fact be explained only by the ways in which legal rules are phrased, interpreted and applied? Or is there something deeper at the root of this phenomenon? In light of the Jewish experience during the Holocaust, would it seem just to perceive Israel as having a special moral obligation towards asylum seekers and refugees? Do the Holocaust and the Israeli-Jewish public's collective memory of it play any role when the Jewish state's agents come to decide about a non-Jewish person's asylum claim?

Even though at first glance both these questions and their answers can be equally applied to the role played by Israel's administrative authorities and Courts in regard to asylum adjudication, I shall focus here, for the reasons mentioned above, on the performance of the Court alone. In that spirit, I might as well leave out of my account the very few asylum seekers who have been recognized as refugees by the administrative authority, and further sharpen one of the abovementioned questions: If we accept the basic assumption that there must be, or have been, more than just two refugees within Israeli borders, and that there are, or have been more than those two asylum seekers who appealed to the Court against the administrative authority's decision to revoke his/her asylum application – then why only two persons have ever been granted refugee status by the Courts?

2.2. The Israeli Courts in the Asylum Context: Introduction

I would like to open the discussion about the Israeli judiciary with a personal story of how I was first introduced to the issue of asylum seekers and refugees in Israel: immediately upon admission to the bar in 2008, I established my own law firm despite having only one client: the International Solidarity Movement (ISM). These human rights activists were doing volunteer work in the west bank, and from time to time some of them were dragged by the Israeli army into Israel's jurisdiction and then detained by the Minister of interior allegedly since they did

³⁴ For more details regarding the refugee recognition rate on appeal in different countries – see chapter 4.

not have permission to stay in the country. While visiting these clients of mine in the immigration detention facilities, I was amazed to realize that together with them, the wards were full of African men, women and children. This was already some time after the beginning of the influx of African asylum seekers into Israel, but somehow this fairly new phenomenon went under the radar of the Israeli media and so I was truly overwhelmed by what I saw; by and large none of these asylum seekers was represented by a lawyer or had been brought before a judge, and most of them did not even speak English. They were all waving the decisions of the administrative tribunal of the prison, which were all written in Hebrew.

And so, when one of them was especially persistent, I agreed to represent her pro-bono. I never had the chance to examine their case files before they gave me the power of attorney, but I eventually represented each and every one of these sporadically chosen potential appellants. In other words, I did not even assess their legal situation before deciding whose chances seemed to justify an appeal against the decision to detain them.

Several months later, I managed to release from detention seven out of eight persons in whose names I appealed to the District Courts. Some of them had been administratively detained for more than two years, while their asylum applications were never examined. Others claimed to be Eritreans or Sudanese, eligible for the temporary group protection given to nationals belonging to these populations, but the Ministry of Interior's conclusion was that they were not who they claimed to be, and that they were instead Ethiopian nationals. Needless to say these conclusions were not based on any - let alone a thorough - examination. In other cases the decision to detain them was taken by an unauthorized employee of the Ministry.

As it turned out, an overwhelming majority of these hundreds of detainees were in fact asylum seekers, and they were detained without legal basis while their asylum claims should have been examined. Having no legal representation and being disconnected from their relatives in their countries of origin, or from anyone in Israel, they were destined to stay in jail for years on end or to give up their request for asylum. In the latter case they would have been deported back to their countries of origin, where they might face persecution.

Each one of these cases exemplified the administrative authority's general lack of fairness toward the African asylum seekers, and it was the culmination of these eight cases that convinced me of the need to provide asylum seeking detainees with pro-bono legal aid and representation.

Given the limited resources at its disposal, in addition to what seemed to be the most acute need of the asylum seeker population, the "We Are Refugees" NGO, which I jointly

established in 2010, was initially designated to provide asylum seekers held in administrative detention with pro-bono legal representation only in regard to their detention. And so, in the course of a few months, we appealed to the District Court in the name of dozens of asylum seeking detainees, and succeeded in releasing the vast majority of them from prison. After a short while we realized that without providing the released asylum seekers with legal aid also within the framework of the RSD procedure or the examination of their entitlement to temporary group protection, they were all destined to be placed back into detention facilities. Consequently, we decided to represent the asylum seekers we had released from detention also in regard to their entitlement to international legal protection.

Since not one of the dozens we had represented in front of the administrative authority was amongst the 0.19% of asylum seekers recognized as refugees at first instance, we had to appeal to the Court for the second time in the name of the same people, but this time against the administrative authority's decision to revoke their asylum application.

It was then that I first noticed the existence of two distinct, almost parallel, approaches of the Court: on the one hand, the judges were willing to conduct a meticulous judicial review regarding the administrative authority's decision to *detain* asylum seekers - its justification at first and its reasonableness as time passed since the decision was initially taken; on the other hand, when the contested decision of the administrative authority was one of revoking a person's request for asylum, then the judges seemed to be almost cynical, if not irritated, as for the need to even listen the case before them.

On various occasions I have found myself standing for the second time before the very same judge who had previously overturned the administrative authority's decision to keep one of my clients in detention. This time, however, after an interval of no more than a few months between the two hearings, I had to argue against a later decision regarding the exact same client - this time to revoke her request for asylum. A clear pattern emerged: while hearings regarding detention decisions tended to be long and were carefully conducted, resulting in verdicts which were always thoroughly reasoned, the procedures regarding a negative decision concerning an asylum request were rather hastily concluded, presenting time and again short verdicts, often lacking even sufficient references to the sheer facts of the case, and always ending by upholding the Ministry's decision.

I believe that these occurrences demonstrate that Israeli judges do not have prejudice against foreign nationals appearing before them. It is fair to say that the Courts in Israel have always offered, by and large, protection to the individual against arbitrary or unlawful decisions taken by the state's authorities which caused the infringing of his or her rights. If my previous story tells us anything at all, it is that Israeli Judges are most likely to attribute decisive weight to

some fundamental rights of the individual, whether he/she is a citizen of the state or not. Such is the right to liberty, anchored in Basic Law: Human Dignity and Liberty, and guaranteed to *any* person within the state of Israel. To the extent that the Court limits itself to considering the asylum seeker's right to liberty and its fulfillment only within and while staying in Israel, we can expect the Court to show no reluctance on its way to set aside an administrative decision to detain a person, and so to set him free, although such a decision is most likely to diminish the Court's popularity amongst the Israeli Jewish public. An impressive, and in a way even unprecedented, example of the Court's activist approach in regard the infringement of asylum seekers' right to liberty was given recently when the High Court of Justice set aside, for the second time in two years, a piece of legislation, amendments no. 3 and 4 of the Prevention of Infiltrators Law, which allowed "infiltrators" to be held in detention for three years in the first case, and one year that can be prolonged for an undefined time, in an 'open' detention center in the later. As a result of the first decision, given by the court in 2013, 2,000 African asylum seekers were to be released within a short period of time. The first of the two decisions of the Court was so widely contested among the Israeli Jewish society that the Israeli parliament hastily passed another amendment to the law, which in turn was once again set aside in another highly unpopular ruling of the Court (the Court's intervention in the third arrangement that was set forth in amendment no. 5 was more subtle – see chapter 4).

I have already mentioned, these two decisions of the Israeli High Court of Justice are, in a way, unprecedented, not because of the annulment of the law³⁵ - though this is undoubtedly a rare outcome – but because it concerned a piece of legislation that was situated at the center of the current political debate, and that was supported by the vast majority of the political parties, whereas previous decisions of the Court to revoke some Knesset laws concerned mostly 'low profile' and to a certain extent even 'a-political' acts of legislation. That is to say, that when the basic right at stake is the right to liberty and its fulfillment within Israel, and even when the issue concerns asylum seekers' right to liberty, then the Court's approach seems to perfectly fit with its image as an agent of liberal and democratic body of jurisprudence and its general 'judicial daring'.

At the same time, however, the High Court of Justice overlooks or at least refrains from deciding whether the administrative authority's policies' real aim is to push asylum seekers to 'voluntarily return' to their countries of origin, consequently putting at risk asylum seekers' right to liberty in their countries of origin, as well as their right to life and right to dignity in case they returned there.

³⁵ Since the enactment of the Basic Laws in 1992 and the consequently "Constitutional revolution" declared by the Supreme Court itself, enabling the Court to set aside Knesset laws which violate the rights asserted in the Basic Laws, the Court has already annulled several pieces of legislation, though only in some very rare occasions.

I will get back to these decisions of the High Court of Justice for further elaboration of the disparity between the Court's regular jurisprudence – which applies to just a limited aspect of its asylum adjudication, that is, the asylum seekers' right to liberty within and while they stay in Israel – and its jurisprudence relating to the most common asylum cases, where the risks posed on the asylum seekers' fundamental rights stem from the state's unwillingness to recognize any of them as refugees and thus to grant them adequate international protection.

Having that said, one may already ponder regarding the apparent incompatibility between this approach of the Court on the one hand, and the nonexistent rate of success at second instance on the other, that is, the virtually 0% recognition rate on appeal, which seems to clearly illustrate the Court's 'particular' jurisprudence regarding asylum cases. And if we are to exclude a general prejudice of the Israeli Courts against foreigner nationals at large, then the question arises again: why is it that out of almost all other fields of law and types of cases³⁶, it is only in respect to appeals against a negative decision on core asylum claims that the Courts radically abandon their regular body of jurisprudence, characterized by a strong activist and daring approach?

At this point it is noteworthy to say a few words about the Israeli Court's 'regular' jurisprudence, which has brought one prominent, and essentially critical, Israeli scholar to define the Israeli Courts as "rights-minded"³⁷. Another influential Israeli scholar regards the Israeli Supreme Court as an "agent of liberal values" within Israeli society³⁸.

The notion of the Israeli judiciary as highly pro-active is tremendously widespread also on the international level; Richard Posner wrote that "what Barak (Israel Supreme Court's Chief Justice between the years 1995-2006) created out of whole cloth was a degree of judicial power undreamed of even by our most aggressive Supreme Court justices... In Barak's conception of the separation of powers, the judicial power is unlimited"³⁹.

That perception of the Israeli Supreme Court was strongly affirmed in a survey amongst comparative law scholars, who were asked to rank "the degree of judicial daring" of 14 different national courts; the Israeli Court was found to be the "most daring" of all⁴⁰.

³⁶ There is yet another type of cases to which the Courts apply a different judicial approach, characterized by a tendency toward omission to interfere in the administrative authority's decisions; these are the cases relating to the occupied territories, and I will get back to them and to the complex connection between them and cases relating to asylum claims.

³⁷ D Kretzmer, *The Occupation of Justice*, State University of New York Press, 2002; kretzmer's work on the Israeli Supreme Court's decisions relating to the occupied territories is a source of inspiration for my own work. His essential claim is that the Israeli Supreme Court has always offered a fair degree of protection to the individual against arbitrary decisions of the state, performing a "rights-minded" approach, but only when it comes to "domestic-dispute", that is, disputes between the individual-citizen and the government agency.

³⁸ M Mautner, *Law and the Culture of Israel*, Oxford University Press, 2011

³⁹ R Posner, 'Enlightened Despot', The New Republic, April 23, 2007

⁴⁰ R Cooter and T Ginsburg, 'Comparative Judicial Discretion: An Empirical Test of Economic Models', 16 int'l Rev L&Econ 295, 300, 1996

If this is indeed the Court's 'regular' jurisprudence, then why does the Israeli judiciary abandon its activist approach and completely refrain from interfering in administrative decisions on asylum requests? – I believe that the explanation for this phenomenon – within the 'regular' jurisprudence of Israeli Courts and then also when compared to national Courts of other liberal democracies – exceeds the judicial dimension of administrative and international law, and may be found in the historical, psychological, cultural and political dimensions as they manifest themselves in the conductance of the Israeli judge. It seems to rely, above all, on the Israeli-Jewish public's collective memory of the Holocaust, and the way this memory is constantly being shaped and instrumentalized by the Israeli political establishment in order to justify some otherwise morally indefensible policies. More specifically, the notion of the Holocaust as a categorically *unique* atrocity, one that does not bear any comparison at all, and the rejection of any possible universal meaning of that catastrophe, is perceived to be a sort of explanation or legitimization for the *unique* behavior of Israel: a state which insists on being defined as a liberal democracy ('the only democracy in the middle east'⁴¹) while exerting some very undemocratic and illiberal policies.

Because the Israeli Jewish public denies the capacity of 'others' to authentically perceive its traumatic experience of the Holocaust - for only someone who has experienced the same or similar event can fully understand it– insisting on the categorical unique nature of the Holocaust leaves no room for the existence of any similar events, and renders any critical voice coming from the non-Jewish world illegitimate.

In the following sections of this thesis, I would trace and define what seems to be a peculiar lacuna within the Israeli judge's famous daring approach, a lacuna which may seem especially peculiar to the outsider viewer due to the historical trajectory drawn between the Jewish Holocaust, the establishment of the state of Israel as safe-haven for Jewish refugees, and the creation of the Refugee Convention in light of the Holocaust's atrocities – a trajectory that should have suggested perhaps special affinity and sensitivity of Israeli judges towards contemporary asylum seekers. And so it does, but it yields exactly the opposite outcome one would expect when looking at the issue at hand through a "rational" (or merely a legal) prism. I would like to show that when it comes to the core question of recognizing contemporary asylum seekers as refugees, the Israeli judge suddenly breaks with that trajectory of humanism and compassion, with "history's lesson learned", and by refraining from recognizing any contemporary asylum seeker as refugee, she continues to indirectly constitute and maintain the hermetic distinction between any other atrocity and the Holocaust, "the genocide of

⁴¹ Israel's ambassador to the UN: Israel is the Only Democracy in the Middle East', israelnationalnews.com, 19.3.2015

genocides”, and to reinforce the notion that only the victims of the Holocaust and nobody but them can ever be recognized as genuine refugee.

3. Uniquely Unique and Un-comparable: the Holocaust Framework

3.1. The Case of Yafa Yarkoni, ‘the Singer of Wars’

During the 2002 Israeli military operation in the West Bank, which lasted for six weeks and was the largest one conducted in the occupied territories since the 1967 Six-Day War, a photograph appearing in the newspapers had captured the imagination of the 76 years old Yafa Yarkoni: it showed Israeli soldiers marking numbers with pencils on the arms of some handcuffed Palestinian men. It was published only a few days before Israel's Memorial Day and the following Independence-Day celebrations - probably the busiest time of the year for Yarkoni. Like every year, she was scheduled to open the Memorial Day sermon at her granddaughter's high school with one of her canonical songs, and she was also booked for a Memorial Day concert taking place in the Kfar Yona community center. Yarkoni, the winner of the 1998 Israel - Prize for Hebrew Song, known as "the singer of wars" due to her war-time performances for Israeli soldiers on the front lines, was asked also this year, for what has become to be an almost tradition for her, to give a short interview to Israel's Army Radio on the eve of Memorial Day. Until that point, despite the general circumstances being those of an actual ongoing bloody-military operation, the coming together of the nation on the one hand, and of its '*gloria-nazionale*' singer on the other, on that specific time of year, was almost normal. But it all changed at once when Yarkoni got on the air, and instead of just saying the much expected things, such as 'today my heart goes for the soldiers' and so on, she claimed to have no mood for "festivities" and after delivering an expansive critique of the Israeli-politics state of affairs, she added –

"When I saw the Palestinians with their hands tied behind their backs, young men, I said 'it is like what they did to us in the Holocaust...we are people who have been through the Holocaust, how can we be capable of doing such a things?"⁴²

During the first few hours after that interview Yarkoni had already received dozens of threat calls. The Military Radio station was of course bombarded with countless complaints from furious listeners. Subsequently, her scheduled performances for the next day – even the one at her granddaughter's high school - were both canceled. But soon it was not only a high school principal and a Mayor of a small town to determine the harsh exclusion of Yarkoni – at one time the artistic figure most identified with Israeli military and commemorative rituals - from the public sphere; they were soon joined by the Israeli Union for Performing Artists, which was not hesitant to call off the homage concert dedicated to Yarkoni herself on her 75th anniversary which was scheduled to take place only two weeks later.

⁴² Y Klien, 'the Singer of Wars' Against the War', Haaretz, 2.5.2002

Noteworthy is the fact that Yarkoni had never before hesitated to publicly express her political stance against the ongoing occupation of the Palestinian Territories. If only she had restrained herself from denouncing solely the Israeli occupation of the Palestinian also now, probably no special reactions would have followed that interview.

But what Yarkoni had said was absolutely unacceptable and simply had to be censored; Yarkoni disobeyed the social paradigm according to which “it’s forbidden to compare” the Holocaust to any other historical atrocity. It is true, Yarkoni did not only compare the Holocaust to just any historical event, but specifically to a much debated Israeli-operation in the territories it occupies for decades by now. And yet, given the Israeli hyper sensitivity for the subject matter, it seems fair to speculate that even had she compared the Holocaust to any other genocidal occurrence which is completely foreign to Israel’s current affairs, not even that and not even Yarkoni’s personal biography could have shielded her against the attacks that were aiming to silence her.

Despite the fact that meanings at large are always comprehended through comparison, in the eyes of the Israeli-Jewish public the Holocaust seems to stand out as a unique historical event that does not endure any comparison whatsoever. This social ban on comparison regarding the Holocaust stems from, and at the same time, constitutes and reinforces the Israeli-Jewish public’s perception that the Holocaust is a *categorically* unique event. It seems to be an extreme expression of the perhaps *faith* (rather than just belief) in the Holocaust’s uniqueness, and a radical form of defending that ethos: By a-priori discarding the very comparability between the Holocaust and any possible historic event.

Although the notion of the Holocaust’s uniqueness is still very much prevalent also outside of Israel and the Jewish-world, it was and still is being shaped and reshaped mainly by Israeli and Jewish political, educational and commemorative institutions, and first and foremost by Israeli and Jewish historians and holocaust scholars.

Nowadays, scholars in these fields of studies who advance the Holocaust’s uniqueness argument anchor their premise mainly in the *intent* of Nazi-Germany to murder each and every single Jewish person, to fulfill the *total* annihilation of the *whole* Jewish people. The full claim is that such intention cannot be found in the doings or aspirations of any other genocidal perpetrator in modern-history, and that in the Nazi case the intent to do so was motivated solely by ideology, in a way that all the more proves the predominance of anti-Semitism within the broader Nazi ideology. According to the Intentionalist approach, this unprecedented intention cannot be attributed to the European settlers in relations the indigenous people of

America⁴³, nor to the Turks vis-à-vis the Armenians⁴⁴ - if to mention only the two most prominent, although unsuccessful, other candidates in the genocide recognition struggle.

Following this claim comes a conclusion, that this distinctive feature alone, the allegedly unparalleled intention that stood behind the Nazi extermination of European Jewry, is sufficient enough to depict the Holocaust as ‘unique’ altogether.

3.2. The Intellectual Struggle over the Holocaust’s Uniqueness

However, the claim that the Holocaust’s uniqueness stems from the Nazis’ intent to bring about a *complete* extermination upon the Jewish People, was not the first move of the uniqueness-thesis proponents; previous to some research developments and significant disclosures and revelations in respect to other claimed examples of genocide, they have first resorted to different criteria in order to establish the distinctiveness of the Holocaust and then to roughly mistake it for a sign of uniqueness⁴⁵.

With a new data available on the proportion of population extermination amongst the Gypsies⁴⁶ or the Armenians⁴⁷, it was already manifestly inaccurate to continue and claim that apart from European Jewry “*no other people anywhere lost the main body of its population*”, as one prominent defender of the uniqueness-concept had done before⁴⁸. And with new facts revealed in the 1980s about the scope of destruction of indigenous Peoples in America, it was no longer “self-evident” that the total number of Jewish-Holocaust victims can be still used in order to support that claim about the unique nature of the Holocaust.

David Stannard, perhaps the most eminent critic of the uniqueness-thesis and its devastating political consequences, examines how, when the quantitative criterion has already failed to prove the premise about the unique nature of the Holocaust, defendants of that very claim went further on to exhaust different sorts of criteria before they had to approach, as a last resort, the issue of the intent behind the Nazi genocidal machinery⁴⁹. The speed with which death reached the Holocaust Jewish victims; the distinction between the means of destruction employed by the Nazi and by other genocidal perpetrators - these and other fairly-arbitrary criteria upon which they had first claimed to establish the unique nature of the Holocaust were

⁴³ S T Katz, ‘*The “Unique” Intentionality of the Holocaust*’, Oxford University Press, 1981

⁴⁴ M R Marrus, ‘*The Holocaust in History*’, Brandeis University Press and University Press of New England, 1987; Y Bauer, ‘*Whose Holocaust?*’, Midstream 26(9), November 1980

⁴⁵ D E Stannard, ‘*Uniqueness as Denial: The Politics of Genocide Scholarship*’, in Is the Holocaust Unique?, ed. A S Rosenbaum, Westview Press, 1996, p. 183

⁴⁶ I Hancock, ‘*Uniqueness of the Victims: Gypsies, Jews, and the Holocaust*’, Without Prejudice: The EAFTD International Review of Racial Discrimination 1(2), 1988, p. 45-67

⁴⁷ R G Hovannisian, ‘*Etiology and Sequence of the Armenian Genocide*’, in *Genocide: Conceptual and Historical Dimension*, ed. G J Andreopoulos, Philadelphia, University of Pennsylvania Press, 1994

⁴⁸ L Dawidowicz, *The Holocaust and the Historians*, Harvard University Press, 1983, p. 12

⁴⁹ Stannard, p. 171

all more or less abandoned by the uniqueness advocates as they too failed to prove their essential premise.

Of course, there is nothing wrong in pursuing a strong intuition in research, but the persistence with which the proponents of the uniqueness argument have skipped from one stance to another, and their overwhelming antagonism towards anyone who wishes to challenge them⁵⁰, may altogether depict their essential claim as nothing more than a presupposition that lays at the center of an organized crusade rather than an honest intellectual attempt to genuinely prove a research-hypothesis.

While most advocates of the Holocaust's uniqueness have shifted their attention to the issue of the intent behind the Nazi extermination of European –Jewry, their opponents did not always restrict themselves to dispute only the accuracy of that ever more central argument, but also increasingly engaged in an attempt to contest the validity of the very concept of uniqueness itself within the field of history studies.

As for the claim itself about the unparalleled intent of the Nazis to kill all the Jews – not just within Europe but *everywhere* - some historians had pointed out the lack of sufficient documentary evidence to establish that specific claim⁵¹, or the fact that such documentary evidence indeed does exist, but in regard to the Europeans settlers' intent to exterminate some whole groups of Native Americans⁵². According to Stannard, Jewish advocates of the uniqueness thesis simply ignore the culmination of such documentary evidence in respect to the English settlers' intent in a way that corresponds to the consistent Euro-American indifference or denial of the Native American Peoples' Holocaust.

Even if we accept the premise that of all genocidal victim-groups only the Jews alone were singled out for total extermination, the actual outcomes of at least two comparable genocidal projects should raise the “question of whether a *failed* intent to kill all the members of a given group – as in the case of the Nazis and the Jews – is truly more notable than the *successful* extermination of an entire people”⁵³.

Although intentionalists often do seem to acknowledge the “tragedy” of the Indigenous peoples, that is, the radical destruction that European settlers have brought upon them⁵⁴, they refuse to attribute it to any premeditated, intentional-genocidal act by the European settlers,

⁵⁰Attribution of anti-Semitic motives to the critics of the uniqueness thesis, and various attempts to delegitimize them are wide spread : D E Lipstadt, *Denying the Holocaust: The Growing Assault on Truth and memory*, Plume, 1994, chapter 11; G D Rosenfeld, ‘The Politics of Uniqueness: Reflections on the Recent Polemical Turn in Holocaust and Genocide Scholarship’, pp. 42

⁵¹Rosenfeld, p.43

⁵²Stannard, p. 184

⁵³Ibid., p.185

⁵⁴Katz, p.168

for the extermination of the Native-peoples of America was allegedly only the consequence of ‘natural phenomena’ such as disease and hunger. While Stannard points out the fact that also many Jews have perished, *inter alia*, due to diseases or starvation, and so not only by direct agent violence, and yet, of course, they are still considered to be “holocaust victims”, others suggested that by employing a completely different conception of intention – one which includes reckless conduct or indifference towards the foreseeable consequence of an action - the intention to bring about destruction upon the native people of America can surely be attributed then to the European settlers of America, just as much as to the Nazis in relation to their Jewish victims⁵⁵.

What I was trying to outline through these exemplas, is that the Holocaust’s uniqueness advocates were always ready to employ some new criterion in order to establish some distinctive trait of the Holocaust that would supposedly render it “unique”, as their opponents become more and more aware and keen to expose the arbitrariness of those criteria or their possible applicability not only in regard to the Holocaust alone but also when you care to think of all the overshadowed and usually-unconsidered claimed exemplas of genocide and mass murder⁵⁶. Moreover, some critics of the uniqueness concept point out the arbitrariness of this very concept when it is being implemented in historical studies, its futility in this theoretical context and its inevitable devastating political consequences of inflicted indifference or absolute denial in regard to other examples of genocide.

According to Stannard, the Holocaust, the Armenian genocide or the genocide against the Gypsies do not differ from each other in terms of any of them being somewhat more unique than the others. Each of them is inevitably unique by its historical nature, “*for no two events, even though they commonly may be acknowledged to fall within a single large classification, are ever precisely alike*⁵⁷”. The manner in which scholars who promote the uniqueness argument diverge from the regular treatment given by historians to any major historical event, is exemplified by the general category of the definition of “Revolution”. The French, Russian or Chinese revolutions all retain different characteristics, which may or may not attract different degree of attention from different scholars, but nonetheless no one particular aspect of these major historical events would potentially mark any of them as more particular than the others nor would any historian be tempted to define one of them as the truly “unique” revolution. It seems solid to say that any historian, whether those or other examples of

⁵⁵ W Churchill, ‘*Genocide: toward a functional definition*’, Alternatives, vol.11, 1986, p. 413; A D Moses, ‘*Conceptual blockages and definitional dilemmas in the ‘racial century’: genocides of indigenous people and the Holocaust*’, Pattern of Prejudice, Institution for Jewish Policy Research, vol. 36, no. 4, 2002, pp. 29

⁵⁶ Stannard elaborates this point time and again: “In fact, the entire process of seeking grounds for Jewish victim uniqueness is one of smoke and mirrors... If, however, critics point out after a time that those experiences are not in fact unique, *other* allegedly unique experiences are invented and proclaimed” - p.190; And so goes Moses: “... it is to note in this field of inquiry that group trauma is acted out in truculently held intellectual positions whose articulators are prepared to climb out on very thin limbs to make their cases” - p.16

⁵⁷ Stannard, p.191

revolution are of more interest for his or her work, would agree that all of the abovementioned major historical events “have *been* revolutions”.

Daniel Blatman also points out what is so apparent, that is that every historical event is as unique as the next one, and so that by upholding one event categorically unique, to the extent that it would not bare a comparison to any other, we are being led “to a metaphysical notion of history and turns it into a collection of narrative anecdotes, a series of events devoid of context and universal meaning”⁵⁸.

Similarly, Moses stresses out the metaphysical quality of the inquiry into the meanings of differences and similarities between historical events, proclaiming that it is rather a political and philosophical task, not a historical one. He states that –

“Uniqueness is not a useful category for historical research; it is a religious or metaphysical category...”⁵⁹

According to Dan Stone, the “uniqueness policy” expresses an ideological stance, with the aim of advancing the perception of the Holocaust as containing *sacred* historical significance. He also locates the intellectual struggle over the uniqueness of the Holocaust within the ethical or commemorative sphere rather than in the field of history studies⁶⁰.

Even Gavriel Rosenfeld, who seems to understand, and to a certain extent to even justify the appeal being made for the uniqueness concept, questions the utility of that concept given not only its linguistic ambiguity, but also the different analytical approaches in which it is rooted, especially because of its ever increasing connotation to moral judgment. He concludes –

“Given the drawbacks of uniqueness, might the concept not be replaced by a less attention-grabbing but more precise term...?”⁶¹

Up to now, none of those highly energetic defenders of the uniqueness concept have ever made any attempt to confront the essential claim that that concept itself - even before we go deeper into critical examination of its political and moral consequences in the context of genocide studies - is above all *foreign* to their field of research. Why is it, then, that notwithstanding those serious concerns regarding its possible applicability to historical - research, the concept of uniqueness remains right at the center of Holocaust scholarship ,and, *inter alia*, of genocide – studies altogether? Some critics of the uniqueness concept suggest that

⁵⁸ D Blatman, ‘*Holocaust Scholarship: Towards a Post-Uniqueness Era*’, Journal of Genocide Research, 2015, p. 22

⁵⁹ Moses, p.18

⁶⁰ D Stone, ‘*The historiography of Genocide: Beyond “Uniqueness” and Ethnic Competition*’, Rethinking History, Vol. 8, No. 1, 2004, p. 129

⁶¹ G D Rosenfeld, ‘*The Politics of Uniqueness: Reflections on the Recent Polemical Turn in Holocaust and Genocide Scholarship*’, Holocaust and Genocide studies, V13, 1999, p.48

the answer lies in the political concerns of the concept's defenders or in the empowerment of the victim-group to which they belong.

According to Stannard, the two major beneficiaries from the advancement of the uniqueness concept in genocide studies are Euro-American nations on the one hand⁶², and the state of Israel on the other. Bearing in mind various examples of overshadowed unconsidered - genocides, and above all- as he seems to see it- that of the native people of the Americas, he says:

“... The notion of the uniqueness and the incomparability of the Jew’s genocidal suffering is the concomitant trivialization or even outright denial of the genocidal suffering of others....”⁶³

If indeed the inevitable consequence of the uniqueness-concept in the context of genocide – studies is the denial of the “American Holocaust”, for example, then to accept and promote the uniqueness claim seems to perfectly suit the Americans’ wish not to confront their own past as genocidal perpetrators.

Regarding world-Jewry and the state of Israel, their effort to establish a unique type of historical persecution and suffering, which is shared by the Jews alone, seems to strongly resonate the Jewish people’s self-perception as the ‘The Chosen People’, both augmenting to its fullest the ‘*moral capital*’ that a genocidal victim- group may ever gain. And so, in order to justify its territorial expansionism and the occupation regime it has brought upon the Palestinian people, Israel is advancing the self - perception of being home to the ‘chosen people’ and at the same time tries to maximize the inflicted moral-capital by applying the exact same idea, the one of Jews being ‘elected people’, only now in the morbid context of the exclusive persecution and unparalleled suffering experienced by that ‘chosen people’ alone. As Zygmunt Bauman puts it, Israel uses the Holocaust *“as the certificate of its political legitimacy, a safe-conduct pass for its past and future policies, and above all as the advance payment for the injustices it might itself commit.”*⁶⁴

Moses explains the devotion of some Jewish-scholars to the idea of the Holocaust’s uniqueness, by pointing out the centrality of that traumatic event within their own personal identity. The Holocaust serves as a key pillar both of personal and collective Jewish - identity, and by many Jews it is perceived to be *sacred*; that shared sense of sacredness, according to Moses, is fundamental for the creation and maintenance of a group identity. Since the attribution of sacredness to the Holocaust is vastly based on its alleged uniqueness, any

⁶² Moses also points out that “...for most American public leaders and intellectuals are happy to pontificate about genocide in every country but their own” - Moses, p.16

⁶³ Stannard, p. 194

⁶⁴ Z Bauman, *Modernity and the Holocaust*, Cornell University Press, 2001, p.ix.

attempt to undermine that premise of uniqueness is also a threat to the group's identity at large. And so, scholars like Kats and Bauer, who place the Holocaust at the heart of Jewish experience, would be essentially betraying their own personal identity if they were not insisting as vehemently as they do on the unique nature of the Holocaust⁶⁵ (In the forth chapter, where I examine the figurative language of the Israeli judges, we'll see how they habitually tend to make allusions to the Holocaust as being a sacred event).

In my view, it is indeed quite notable that within the framework of the academic struggle over the question of the Holocaust's uniqueness, most of that perception's defenders come either from Jewish-diaspora or the Israeli academy, who then at least for the reasons given by Moses should be suspected of having a personal motivation to advance and support that perception⁶⁶. It is all the more true when their apparent agenda to establish by hook or by crook the unique nature of the Holocaust – and so to de-facto disqualify all the ‘un-unique’ claimed genocides who dare apply for that desired title - is perfectly in line with the Israeli political establishment's consistent stance against recognition of any other claimed genocide, well established as it may be in terms of recognized historical research⁶⁷.

What we see here, then, is mainly Jewish and Israeli scholars who persistently advance and ferociously defend the contentious Holocaust's uniqueness thesis; their agenda seems to be dubiously compatible with the political expressions of that very thesis as it is enacted by the state of Israel. The state's active role in the international attempt to deny the Armenian Genocide, is only one amongst many ways in which the State tries, and in my view succeeds, to exploit the Holocaust to its fullest. To complete the picture come museums and commemorative bodies in Israel and around the world, alongside Jewish communities and

⁶⁵ Moses, p.13

⁶⁶ Stannard claims that the uniqueness argument was always advanced by a handful of Jewish scholars, whom due to their research methods he defines as “something of a cult within that scholarly community”. He does note, though, that these scholars do not represent the whole of Jewish scholarship on the subject matter – Stannard, p. 167, 192; See also, D Gutwein, *'The Privatization of The Holocaust: Memory, Historiography, and Politics'*, Indiana University Press, 2009, p.45

⁶⁷ Twenty Three countries have already formally recognized the Armenian genocide; Israel and the United states are not among them. The most notable political attempt to bring about a sort of official Israeli recognition of the Armenian genocide was carried out by Yossi Sarid, who served as the Israeli education minister; his call for an official Israeli recognition of the Armenian genocide, and for its inclusion in the education system's texts-books, was rejected by the prime minister at the time, Ehud Barak – see : Y Sarid, *'you finally remember now?'*, Ha'aretz, 21.01.2010; Israel has also tried, in collaboration with the Turkish government, to prevent the united states from establishing an official memorial day for the Armenian genocide – in Stannard, p.196 ; see also: Y Klein Halevi, *'The Forgotten Genocide'*, Jerusalem Report 6(2), 1995, p. 20-21 . The Americans' constant position not to acknowledge the Armenian genocide seems to prove the claim that the American political establishment benefits from the denial of other examples of genocide alongside the ‘American Holocaust’, and that the contribution of the uniqueness argument to the denial process of any genocides other than the Jewish one, is the reason why the American academy and its political establishment ally with Jewish scholars and Israeli officials in order to preserve the notion of the Holocaust's uniqueness. The shifts in the position of president Barack Obama, who as a presidential candidate has described the Armenian tragedy as a ‘genocide’ and proclaimed that the United States has the moral responsibility to recognize it as such, is all the more revealing; Since he took office Obama stopped calling the Armenian massacre a genocide, and he has abandoned his promise to officially recognize it as such if elected – *'Barack Obama Will Not Label 1915 Massacre of Armenians a Genocide'*, The Guardian, 22.4.2015. It is all the more disturbing when you read President Obama's cryptic statement on Armenian Remembrance Day, with its implicit message that the president still believes the Armenian tragedy was indeed genocide, but he simply cannot say so – see: <https://www.whitehouse.gov/the-press-offi>.

other stake-holders, who join their efforts for the construction and the maintenance of a hermetic distinction between the Holocaust and any other genocidal historical event⁶⁸.

For the unfortunate candidates - competitors in the monopolized field of genocide-recognition, putting it all together means the denial of their tragedy, and *inter alia* their deprivation of the international community's interest and sensitivity regarding their special needs and demands.

For Israel, however, regardless of its apparent indifference towards the additional pain being caused to any other victim-group but her, the hegemonic- Eurocentric perception of the Holocaust's uniqueness means exactly the opposite: it signifies the monopolistic ownership over the entire 'moral capital' driving the industry of genocides-recognition.

Throughout the writings of both proponents and opponents of the uniqueness thesis, one might get the impression that everybody who is involved in that contentious - debate perceives the potential 'moral capital' as somewhat undividable, as if it could not be conferred upon more than only one genocidal victim - group⁶⁹. It is hard to determine whether at first it was Israel, alongside Jewish and Euro-American interested actors, who regulated and structured, for the abovementioned reasons, the academic and political recognition- practices to result in what appears to be a zero-sum game. On the one hand, we do see some solid evident to prove such an attempt by the actors who are closely associated with the Jewish and Euro-American world. But on the other hand, there are also similar attempts being made now by their rivals, who in their turn claim for the exact same thing – the uniqueness, or the 'special' or 'real' quality – but this time regarding the genocides that were conducted against the competing victim-groups to whom this scholars relate⁷⁰. This unfortunate move of some critics to the uniqueness-thesis raises the question whether they are merely pushed to accept the codes and regulations of the 'game' as they were previously determined by the predominant players in that field, or whether possessiveness is an inherent driving factor with equal hold on each and

⁶⁸ Blatman writes about the contribution of Yad Vashem, Israel's official memorial institution to the Holocaust's victims, to the maintenance of the uniqueness thesis: "The decades in which Holocaust studies were deeply rooted in the uniqueness paradigm, and the centrality of Yad Vashem in maintaining and perpetuating this message, make it difficult for new approaches to emerge" – Blatman, 'Holocaust Scholarship: Toward a Post Uniqueness Era', pp. 38; See also, A Goldberg, 'The "Jewish narrative" in the Yad Vashem global Holocaust museum', Journal of Genocide Research, Vol. 14, No.2, 2012, pp. 187-213; and Moses presents the struggle between Jewish communities and other exiled victim-groups living in Canada over the commemorative expression of uniqueness-agenda – D Moses, 'The Canadian Museum For Human Rights: the 'uniqueness of the Holocaust' and the question of genocide', Journal of Genocide Research, 14(2), 2012, p.215-238.

⁶⁹ We have, on the one hand, the advocates of the Holocaust's uniqueness thesis, such as Bauer, who claims that other victim groups are "stealing the Holocaust from us... we need to regain our sense of sacredness", quoted in R G L Waite, 'The Holocaust and Historical explanation', in I Wallimann and M N Dobkowski (eds), *Genocide and the Modern Age*, Greenwood Press, 1987, p. 169; on the other hand, there are critics of the uniqueness thesis, who according to their political concerns wish to redistribute the moral capital and to invest it in different victim group. Ward Churchill, for example, aims to confer upon the American Indians "every ounce of moral authority we can get", Churcill, *A Little Matter of Genocide*, p. 11. The struggle over the attribution of the 'moral capital' is best encapsulated in Irving Louis Horowitz's expression – "moral bookkeeping" – see: 'Genocide and the Reconstruction of Social Theory: Observations on the Exclusivity of Collective Death', in Wallimann and Dobkowski, *Genocide and the Modern Age*, p. 62.

⁷⁰ "The American holocaust was and remains unparalleled, both in terms of its magnitude and the degree to which its goals were met..." Churchill, *A Little Matter of Genocide*, p.4

every victim-group, irrespective of the positions and actions taken before by others. Either way, it is hard to deny that at least in practice the struggle for recognition between different victim-groups is still indisputably governed by those propagating the uniqueness of the Jewish genocide.

This expansive survey of the opposing views and arguments regarding the uniqueness of the Holocaust was meant to form an analogy between the driving forces - the political, sociological and psychological ones – motivating the creation and maintenance of the uniqueness thesis, first on the international level and then within the Israeli-Jewish society. What seems to be missing within the Israeli domestic sphere is a challenging position to the hegemonic perception about the Holocaust's uniqueness, and the absence of such a confrontation generates an even more rigid presupposition about the Holocaust's uniqueness - which does not entail possibility to conduct any comparison at all between the Holocaust and other claimed genocidal occurrences. The story of Yafa Yarkony was meant to exemplify the extreme intolerance within the Israeli-Jewish public towards any attempt of comparing the Holocaust - or even of using it as an open analogy - to past or contemporary historical events.

It is rather obvious, then, that the uniqueness thesis is at least as prevalent within the Israeli-Jewish society as it is in the international arena, but in my view the political aim and consequences of that paradigm are quite different in the narrow Israeli context; I wish to argue that while the advancement of the uniqueness thesis at the international level intends to gain the entire ‘moral capital’ for only one victim-group - that of the Jews - and for the state of that people, Israel, the creation and maintenance of the uniqueness - thesis within the Israeli-society has a different political aim: to constitute and to preserve the conviction of Israeli-Jews about the inability of ‘others’ to judge their actions in an accurate and fair manner.

In the Israeli context, depicting the Holocaust as a categorically- unique historical event is tantamount to the exclusion from the debate over its conducts of any critical voice coming from outside of the Jewish-world. Richard I. Cohen’s observation regarding the response of Jews from Germany to the controversial claims of Hanna Arendt – who was Jewish but lacked the personal experience of the Holocaust as she was fortunate enough to flee Europe in time – is many times more telling if examined vis-à-vis the attitude of the Israeli-Jewish society towards *goyim* (a somewhat derogatory word for Gentiles used in Israel). According to Cohen, the de-legitimization of Arendt by Jews from Germany –

“... Sheds light on a characteristic attitude of individuals who have undergone a major trauma and whose identity has become deeply intertwined with that experience. They deny the

*outsider's ability to penetrate authentically into their experience, perceiving that only someone who has experienced a similar event can reach the depths of true understanding*⁷¹.

Following Cohen, I suggest that for the Israeli-Jewish society, anyone who has not experienced The Holocaust⁷² cannot authentically understand and, *inter alia*, judge, the alleged acute needs and motives which stand behind Israel's conducts - its expansionistic politics and its ever growing appetite for militaristic power. Many different versions of self-justification on the one hand, and de-legitimization of Israel's critics on the other, are drawing upon the presumption that only Jewish people and the Jewish-state can truly understand the extraordinary - eternal threats upon them, and consequently that only they alone can determine for themselves what measures are to be taken in confronting such threats.

And so, if indeed a personal or collective experience similar to the Holocaust is a precondition for a critical view of Israel to be considered as legitimate, then the hegemonic social rule according to which it is forbidden to even compare the Holocaust to other historical events serves as an obstacle for such similar events to be found at all. Consequently, obeying this rule means also shielding Israel from 'outsiders' critique, since such a stance stages an impassable barrier on anyone's attempt to be admitted into the imaginary-community of Holocaust and possible 'Holocaust-like' victims, and so renders the outsiders' critique inherently illegitimate.

When it comes to asylum adjudication, the Israeli judges' performance - which is best described as a bias in favor of omission rather than their regular juridical tendency toward intervention in administrative decisions - seems to encapsulate the very motives that stand beyond the advancement of the uniqueness thesis by scholars, commemorative-bodies, communities and state-organs which directly belong or are intimately associated with the Jewish-world and the state of Israel.

⁷¹ R I Cohen, '*A Generation's Response to Eichmann in Jerusalem*', in S E Aschheim (ed), *Hannah Arendt in Jerusalem*, University of California Press, 2001, p.261

⁷² Jewish Israelis don't tend to make any distinction between themselves and their ancestries, who have indeed personally experienced the horrors of the Holocaust. The memory of the Holocaust in Israel is ever more present, and it is being constructed and shaped in a way that indulge Israelis in the imagining of themselves as the direct heirs of the Holocaust' victims. Representations of the Holocaust in Israel tend to blur the distinction between the reality of the events themselves and their commemorative expressions. Pilgrimage of High School children to the death camps contributes immensely to this confusion: "*This confusion is most striking in the case of memorials located at the sites of destruction, where a sense of authentic place tends to invite visitors not only to mistake their reality for the actual death-camps' reality but also to confuse and implicit, monumentalized vision for unmediated history... Nothing but airy time seems to mediate between the visitor and past realities, which are not merely re-presented by these artifacts but present in them. For as literal fragments of events, these ruins tend to collapse the distinction between themselves and the memory of events they would evoke.*" – see: J E Young, '*The Texture of Memory: Holocaust Memories and Meaning*', Holocaust and Genocide Studies, Vol. 4, No.1, 1989, p.64. On Israeli-politicians' allusions for the continuum between Holocaust-victims and Jewish Israelis on the one hand, and the Nazi-perpetrators and the Palestinians on the other, see I Zertal, *Israel's Holocaust and the Politics of Nationhood*, Cambridge University Press, 2005, p. 109, 112, 114, 120, 195, 197. See also – D Gavriely – Nuri, '*Collective Memory as a Metaphor: The Case of Speeches by Israeli Prime Ministers 2001-2009*', Memory Studies, vol.7(1), 2014.

Judges in a democracy are supposed to act independently of other branches of the government; their decisions shouldn't be dictated by other organs of the State. And yet, Courts “*are part of the machinery of authority within the State and as such cannot avoid the making of political decisions. Judges may be independent, but they are not neutral*”⁷³.

Israeli - judges’ reluctance to recognize contemporary asylum-seeker as refugees stems from the same sociological, psychological and political motives that I have mentioned before in relation to the defenders of the uniqueness thesis and their refusal to recognize the members of any other trauma-group as genocidal victims. But the Israeli judges’ target audience is different than that of other Israeli and Jewish institutions which are invested in the furtherance of the uniqueness thesis; while the other actors stage constraints on various victim-groups seeking international - recognition of their trauma, in order to confer the entire moral-capital upon Jews and the Jewish-state, the aim of the Israeli- judges’ bias - conscious or not - against the recognition of contemporary asylum seeker as refugees, is meant to influence the Israeli-Jewish society rather than the international community. Their bias against the recognition of contemporary asylum seekers as refugees reinforce the fundamental perception within the Israeli-Jewish society, that no other people but the Jewish People has ever experienced anything similar to the Holocaust, and, *inter alia*, can ever make a judgment about Israel’s considerations and conducts.

My essential claim is that when Israeli-judges apply the 1951 Refugee Convention, the implications of their discretion transcend dramatically beyond the narrow scope of the individual asylum seekers’ faith; their bias against the recognition as refugees of contemporary asylum seekers aims at and results in the reinforcement of the Israeli world-view that nobody is in the position of judging the Jewish – state. To put it differently - if, for example, Eritreans were to be recognized as refugees, then those Eritreans would also be in a position to make a judgment over Israel’s policies, for they too have experienced a trauma similar to that of the Jewish - Holocaust. It is quite obvious that a hypothetical critical position, if taken by Eritrean or Sudanese communities, would not be a major concern for Israel. But it is almost a matter of principle: in a somewhat similar fashion to the overall prohibition of all comparison, rather than only dealing with some possible undesirable findings that may or may not come out of such comparison, no one should be ever empowered to ‘have a say’ on Israeli matters under the implicit recognition that they too belong to the imaginary community of people who has suffered a Holocaust-like event.

Now, I’m perfectly aware of the fact that an entitlement to refugee status under the convention has nothing to do with one’s being on the run specifically from a genocidal perpetrator; but the convention does evoke the memory of the Holocaust, and its application by the Israeli-judges

⁷³ Kretzmer, p.191

connotes a preliminary appeal to the Holocaust and a consequent comparison with it. The Refugee Convention, according to the conventional wisdom, was enacted as a result of the international community's failure in protecting (mainly) Jewish-refugees from the Nazi-genocidal machinery. It was meant to prevent similar episodes from happening. Due to the historical context of its enactment (on which I elaborate in the next chapter), the convention seems to invite the Israeli judge to render the signifier 'refugee' as having the specific Jewish-refugee as its 'signified'⁷⁴, rather than any other faceless person who may face 'only' a ('un-unique') persecution on one of the grounds proclaimed in the convention.

Taken all that's been said so far regarding the massive propagation of that unique identity – preserved, reenacted and propagated by the state and its organs – and in light of the statistical and verbal facts that are and will be presented in this thesis, it wouldn't be too far-fetched in my opinion to assume that when the Israeli judge adjudicates asylum-appeals, and she closes her eyes, what immediately pops up in her mind is the prototypical-Jewish refugee, and only him. The appearance of that prototypical- refugee is so compelling to her for reasons that go beyond the sheer connotation between the convention and the Holocaust .The convention, however, can alone evoke the Israeli judge's self-perception of being a direct heir to the proto-refugees, not to mention to victimhood itself – a self-perception which is the stone and marble cement for the creation of her personal identity, as much as for the construction of a group identity for the Jews and the Israeli Jews. The uniqueness of that exclusive victimhood renders it altogether sacred, and so entails its function as an effective delineating tool between Jews and gentiles. But there is something else that goes even further beyond the judge's obvious interest in the preservation of the Holocaust' sacredness; Our judge is so colonized by that personal identity of the categorically unique victim that she is simply incapable of opening herself to the unfamiliar, to the visits of others - to imagining their expectations and fears, which are being dictated by different life experiences and standpoints than hers⁷⁵.

Now, let's keep the (ethical) encounter between the Israeli judge and the contemporary asylum seeker present in our mind while we read the follow passage from Judith Butler - her take on the Levinasian term - 'the demand of the Other':

"If the ethical demand arrives from the past, precisely as a "resource" for me in the present – a message from an ancient text, a traditional practice that illuminates the present in some way, or might dispose me toward certain modes of conduct in the present – it can only be "taken up" or "received" by being "translated" into present terms. Receptivity is always a matter of

⁷⁴F D Saussure, *Writing in General Linguistics*, Oxford University Press, 2008

⁷⁵J Han, Conference Re-cap: Truth & Identity – www.hannaharendtcenter.org/p=2501; See also – H Arendt, *Lectures on Kant's Political Philosophy*, University of Chicago Press, 1989, p.43; I Zertal, *Israel's Holocaust and the Politics of Nationhood*, Cambridge University Press, 2010, p.135

translation... the “message” changes in the course of the transfer from one spatiotemporal horizon to another.

If we understand the way we gain access to an original set of demands or injunction as a translation, then this access does not take place through a historical return to the time and place of the original, which is, in any case, impossible. On the contrary, we can only turn to what translation makes available to us, brings forth, illuminates within the present. In this way the loss of the original is the condition of the survival of a certain “demand” relayed through language and across time”⁷⁶.

The resonance of abovementioned historical, sociological, psychological and political ethics projecting on the Israeli-judge’s mind; the continuum of the past into present life in Israeli society - these make it impossible for the Israeli judge to simply ‘lose the original’ in order to enable an ‘opening to the unfamiliar’; the original demand of the proto-refugee (‘protect me from *Auschwitz*’) does not disappear when the contemporary asylum-seeker makes her demand (‘protect me from persecution on the grounds stated in the convention’); It clashes with the present demand and renders its receptivity practically impossible. The contemporary asylum seeker appearing before the judge - never quite the same like the proto-refugee who fled *Auschwitz* – cannot pass for a ‘real’, ‘true’, refugee; her demand cannot be properly received by the Israeli-judge, who is looking to see in her the proto-refugee from a past time and place. Thus, the Eritrean or Sudanese asylum-seeker is destined to be discarded by the Israeli-judge. Her demand will never correspond with the original demand of the proto-refugee, whose translation will inevitably result in the labeling of the asylum-seeker as a migrant worker, never a *genuine* refugee.

⁷⁶ J Butler, *Parting Ways, Jewishness and the Critique of Zionism*, Columbia University Press, 2014, p. 10-13

4. The Jewish Context of the Refugee Convention – a Nexus Between the Holocaust and Contemporary Asylum Issues?

Israel had signed the 1951 Convention relating to the Status of Refugees already on the 1st of August 1951, immediately upon the closure of the UN Conference of Plenipotentiaries. Despite the pleas that were later made – both by its own representative to the conference and by the High Commissioner for refugees - for Israel to be among the first six countries to ratify the convention⁷⁷, it actually took the Israeli government three more years to conclude the ratification process, eventually making Israel only the tenth state to deposit its instrument of ratification. The state of Israel never actually transposed the convention into its domestic legislation, which nevertheless doesn't mean that Israel is not bound by the convention's provisions.

On the international level, Israel is bound by the Convention according to article 26 of the Vienna Convention on the Law of Treaties, 1969⁷⁸ ("*Pacta sunt servanda*"). The Convention also binds Israel by its domestic law: According to the presumption of conformity between international –law (contractual and customary) and Israeli-national law, the latter should be interpreted in light of Israel's obligations to international law⁷⁹.

Although Israel's compliance with the Convention's provisions may be seriously doubted, no one claims that it is not legally bound by it, not even the Ministry of Interior. Israeli judges routinely make recourse to the Convention when they adjudicate asylum-appeals. Now, given the legal outcomes of their interpretation and implementation of the convention - that is, that no present day asylum-seeker is ever to be found eligible for the refugee status under it - I would suggest that an inquiry into the Convention's Jewish context may shed some light on the subtle reasons for which Israeli judges apparently delineate the legal subject '*refugee*' under the Convention, in a rather exclusionary manner.

In other words, the fact that the Minister of Interior and the Israeli judges - both the executive branch and the Courts - consistently find that the Refugee Convention applies to virtually no present day asylum-seeker, can be explained in respect to the strong connotation between the Refugee Convention and the Holocaust, a connotation which generates the ghostly appearance of the "proto-refugee" (the Jewish-Holocaust victim/ survivor) right in front of the Israeli judge's eyes; in her eye's mind, the phantom of this proto-refugee accompanies every contemporary appellant-asylum seeker, undermining her claim of being a "refugee in her own

⁷⁷ According to article 43(1), the convention was to enter into force ninety days after six states deposited their instruments of ratification.

⁷⁸ Although Israel has never acceded to the Vienna Convention, its provisions are considered to be a customary international law – see A Aust, *Modern Treaty Law and Practices*, Cambridge, N.Y, Cambridge University Press, 2000, p.11

⁷⁹ It means that only when the wording of the law or its specific purpose don't fit with the international norm, then and only then the Israeli law would be interpreted as if it contradicts the provisions of an international treaty to which Israel is a signature party – see: HCJ 2599/00 *Yated v. The Ministry of Education* (14.8.2002)

right” with its particular refugee-hood and the extreme intensity of that ‘unique’ form of persecution that only that Jewish proto-refugee has ever had to endure. The culmination of the suffering and fears of that proto-refugee is de facto the one and only real standard for being recognized as a ‘genuine’ refugee, notwithstanding the legal fact that the Convention itself does not contain such a standard, but rather much more general and broad ones.

So in what way does the Refugee Convention connote the Jewish Holocaust and Jewish-refugees, at least in the eyes of the Israeli judge? According to one commentator on the Convention’s definition of Refugee, its formulation was undoubtedly influenced by the “*particular forms of persecution that had been witnessed during the Nazi regime in Germany*.⁸⁰ K Walker argues that already during some early attempts⁸¹ to constitute and further a refugee protection regime, what was basically created is “*a definition of refugee that expressly referred to threats to life or liberty on the basis of race, religion or political opinion... these three grounds, particularly race and religion, in the context of the attempted genocide of the Jews – were those that had been fundamental to the Nazi regime’s horrific human rights abuses perpetrated in the concentration camps*”.⁸² Notwithstanding Walker’s apparent confusion along the way regarding the common meaning and usage of the term ‘Holocaust’ (she seems to refer by it not only to the genocide against the Jews but also to other persecuted groups under the Nazi regime), she claims that the Holocaust “*remains a yardstick against which persecution today is often assessed*”, and what she seems to alert from is exactly what I believe eventually indeed happens – “*though it ought not to be seen as exhausting the possibilities of persecution*”.

The original temporal and geographical limitations imposed on the Convention’s scope, as they were drafted and adopted in 1951⁸³, indicate that the drafters – in accordance with certain political interests of those states involved - were only preoccupied with some refugee populations situated in Europe at that time, who were displaced as a result of events occurring prior to the Convention’s entry into force. Of course, the Holocaust was not the *only* event resulting in flows of refugees and displaced people, occurring prior to January 1st 1951, and

⁸⁰ K Walker, ‘*Defending the 1951 Convention Definition of Refugee*’, Georgetown Immigration Law Journal, 2003 p.3-4

⁸¹ The Inter Governmental Committee on Refugees (IGCR) was established in 1938 in order to resolve the problem of refugees from Germany; its definition of Refugee was later picked up into the Refugee Convention. – See: *Ibid.*, p.3-4

⁸² I do not dispute this basic assumption about the memory and the influence of the “particular forms of persecution” enacted by the Nazi regime on the minds of the drafters who had to determine the outlines of the refugee-definition under the Convention; I’m rather not sure whether the drafters have really had in their minds only the “attempted genocide of the Jews”, and not, for example, also the attempted genocide of the Gypsies. But for this Australian scholar, who writes many years after the drafters’ mission was completed and from within a political and intellectual environment that cherish the ‘uniqueness thesis’ regarding the Holocaust, it seems to be very compelling to think of the Jews alone as the one and only genocidal-group victim of the Nazi regime.

⁸³ The scope of application of the Convention was originally limited to events that occurred prior to January 1, 1951, in Europe or elsewhere, according to the states’ discretion. However, when the Protocol relating to the Status of Refugees entered into force, on October 4, 1967, this limitations were finally removed – United Nations Treaty Series, Vol. 606, p. 267

Jews were furthermore not the *only* refugees within Europe at the time⁸⁴. But just as much as the Holocaust and its Jewish victims and survivors seem to completely occupy the imagination of a gentile Australian commentator whom I have cited above, Israeli-judges tend to stage the Holocaust and the Jewish refugees problem right at the center of all the various European tragedies that occurred prior to that date.

The question whether or not Israel had actually had an historical commitment to the Refugee Convention, is irrelevant to the understanding of the strong connotation between the Convention and the Holocaust in the thoughts and minds of the Israeli judges. What really counts is the common belief regarding such an historical commitment, the particular reasons upon which this belief is drawn, and its wide acceptance within Israeli society, and, for our subject matter, by the Israeli-judges.

To put under scrutiny this conventional wisdom may be somewhat telling in the context of this paper, insofar as it once again reveals the general indifference of Israel to the refugee problem at large, and to some extent, even regarding the fate of some Jewish refugees. The first reason to doubt its historical commitment to the Convention is that Israel has not transposed the Convention's provisions into its domestic law. One could rightfully argue that an omission to do so does not at all express such an historical commitment.

The government's reluctance to ratify the Convention also raises serious questions regarding Israel's commitment to the Convention. Despite the reiterated pleas by different actors about Israel being one of the first six states to ratify the convention, it eventually declined to do so. Israel's representative to the ad hoc committee, Dr. Jacob Robinson, seems to have anchored his position in favor of such a quick ratification in an obligation stemming directly from Jewish morals: "*Morality demands* that we be among the first six to ratify..."⁸⁵. According to a report by Shabtai Rosenne, the Minister of Foreign Affairs' legal advisor, Paul Wies, who was then the UNHCR Jewish legal advisor, also urged him to have Israel among the first six states, and even otherwise "...not to see ourselves exempt from the *moral duty* of ratifying the convention only because it will have entered into force with the sixth ratification"⁸⁶.

Moral arguments such as these were responded to by Rosenne in a strict and practical manner: "I explained the difficulties and the obstacles obstructing our path and hinted that we are not very interested in ratifying this Convention as *we have no need for it*"⁸⁷. The

⁸⁴ The concern raised by the Mexican representative to the ad hoc Committee on Statelessness and Related Problems, whether the case of Spanish refugees would be also covered under the suggested temporal limitation, is only one example for the many different 'events' that attracted the attention of the drafters – see: "The Refugee Convention, 1951, The *Travaux Préparatoires Analysed with a Commentary by Paul Weis*" – UNHCR.

⁸⁵ Robinson's letter to the MFA, in R Giladi, "A 'Historical Commitment'? Identity and Ideology in Israel's Attitude to the Refugee Convention 1951", The International History Review, 2014, p.8

⁸⁶ Ibid., p.9

⁸⁷ Ibid., p.9

government bureaucrats and Robinson continued to debate the ratification for some time after six other states had already done so. It eventually took Israel another three years to ratify the Convention, on August 22, 1954. During this time the reasons given by Robinson in favor of ratification were shifted from the moral and ethical realm to the political one, but by now his political concern differed substantially from the considerations of the Zionist political establishment and State.

According to Rotem Giladi, while at least some of Robinson's considerations regarded also the interests of Jewish refugees not wishing to come to *Eretz-Israel*, his colleagues with their narrow perspective could only think about "...Jewish issues as an instrument for promoting Israel's cause"⁸⁸. Robinson expressed his concern about Diaspora Jews already upon signing the convention: "we will acquire a legal title to help those Jewish refugees in Europe *who have not yet made their final decision*"⁸⁹. His colleagues, however, perceived any effort to advance Jews' rights in the Diaspora as undermining the Zionist objective of gathering all Holocaust survivors in the Jewish state. For the government bureaucrats, so Giladi, the Convention was superfluous and suspicious: "superfluous because the Jewish state was, by ideological definition, the state of refuge for Jewish refugees; suspicious because it posed an ideological challenge to this very *raison d'être*. They were uninterested in offering Jewish refugees an international legal protection alternative to that offered by the Jewish state"⁹⁰.

This kind of instrumentalization of Jewish refugees for Zionist causes was not new to the leadership of the newly born Jewish State; already in the days of the post-war *Yishuv* the Zionist leadership has often seemed to consider Holocaust survivors as nothing more than means to its end⁹¹. Such an instrumental attitude towards Jewish refugees - Holocaust survivors, is quite telling; if indeed the Jewish state had the inclination to sacrifice the rights of Jewish refugees, about whose entitlement to such rights it had no doubt, we should not be

⁸⁸ Ibid., p. 14

⁸⁹ Ibid., p.13 note 98

⁹⁰ Ibid., p.17

⁹¹ In her seminal book '*Israel's Holocaust and the Politics of Nationhood*', Idith Zertal provides many examples for Israel's instrumentalization of Jewish Holocaust refugees, those who have immigrated to Israel and became Israeli citizens and others who remained displaced in Europe. Notable among them is Ben Gurion's reaction when one of his aids reminded him of the Jewish Holocaust survivors refugees who were still on board the ship Exodus, already after it was sent back to Germany and while the Zionist movement's attention was completely shifting to the upcoming vote in the UN. Ben Gurion was irritated by a simple remark about the passengers' bravery, and so he snapped: "*It's over, finished. This is the past. Now there is a future*". Another remarkable anecdote is related to the reprisal operation of Israeli troops under Ariel Sharon in the village of Qibya in the West Bank in October 1953, in which several dozens of Palestinian peasants were murdered. Ben Gurion denied Israeli involvement in the attack and attributed the massacre to Holocaust survivors who were allegedly driven by avenge. Zertal claims that Ben Gurion exposed the Jewish refugees to a serious and real risk, and that he could have done so only due to the fact that Holocaust survivors had had no voice or even real presence within Israeli society: "This darkness also symbolize the blindness of this encounter, the absence of a gaze, a Zionist lack of *recognition* and acknowledgment of the Holocaust Survivors as individual human being, which made their political use, both then and later, not just possible but also highly effective" – see: Zertal , p. 48, 177. The State's current treatment of the not so many Holocaust survivors who are still alive reveals the same pattern: Although Germany has paid heavy reparations to Israel, some fifty thousands of the living Israeli Holocaust survivors live in conditions of poverty and their struggle to augment their State pensions keeps making headlines on every general election. See: '*they have treated Holocaust survivors like they were a bank account*', H'aaretz, 16.4.2015.

surprised then by its willingness to violate the rights of present day refugees, whose suffering and fears do not convince the State about their entitlement for international protection. Or to put it somewhat differently, for the sake of its political interest, Israel is now ready to be *a priori* unconvinced when it is visited by asylum seekers - even regarding the requests for asylum of *all* those who flee some infamously well known producers of refugees such as Eritrea.

At any rate, even if Israel's attitude to the Convention can be perceived through the wider context of the State's readiness to mobilize even its own people and their suffering for the benefit of its political ends, the contradicting belief, namely that for moral and historic reasons Israel has a strong commitment to the Convention, remains very much prevalent within Israeli-Jewish society. Even Giladi, who concludes that "*there had never been a historical commitment*"⁹², departs from the opposing presupposition: "...*public discourse often turns to moral and historical arguments. Central among these is the assertion that Israel owes a special duty to asylum seekers – and to the treaty... it is made by civil society bodies and newspaper editorials, politicians and activists, academics, attorneys, and judges... none challenges Israel's historical commitment... this conventional wisdom – accepted both by critics and government spokespersons – represents a curious area of consensus in the midst of fierce political debate about Israel's treatment of refugees*"⁹³.

This 'conventional wisdom' seems to draw on the persecution and suffering experienced by the Jewish people during the Holocaust, as well as on the central role that was conferred upon Israel in the Convention's drafting. Those two sources are deeply intertwined: if not for the Jewish history of persecution and suffering, it seems rather implausible that Israel would have been invited to play such an active role in the Convention's making. In the same vein, one can assume that the High commissioner's plea for Israel to become one of the first six states to ratify the Convention was made only due to the special moral capital that only Israel could have conferred upon the newly born refugee regime by doing so. Irrespective of Israel's actual performance throughout the years that came after its signing the Convention, the prevalent public opinion, assigning Israel with fundamental involvement in the making the Convention, as well as with its acceptance and promotion, is not at all wrong at least regarding the first part.

As a matter of fact, Israel was one among only 13 states elected to be represented in the ad hoc Committee on Statelessness and Related Problems, which was assigned to draft a Convention on this subject⁹⁴. When the Committee established a working group whose aim was the

⁹² Giladi, p.17

⁹³Ibid., p. 2-3

⁹⁴ Alongside Israel, the following countries were represented on the committee: Belgium, Brazil, Canada, China, Denmark, France, Poland, Turkey, Union of Soviet Socialist Republics, the United Kingdom, the United States and Venezuela. The Committee was later on called the ad hoc committee on Refugees and Stateless persons – see '*The Travaux Préparatoires Analysed with a Commentary by Dr Paul Weis*' – note 20.

drafting and polishing of the convention, Israel was once again amongst only very few states, six in total, whose representatives were chosen to compose that group.⁹⁵

It is also worthwhile to mention, that Apart from the Israeli governmental representation, some Jewish NGOs were also represented at that conference by The Israeli representative's brother, Nehemiah Robinson⁹⁶. The extraordinary participation of these organizations exemplifies the symbolic importance that the international community attributed to the Jewish people regarding the creation of the refugee protection regime which emerged in the aftermath of World War 2.

Regarding the personal contribution of the Israeli representative to the Committee's work, testimonies of other members of the Committee depict Dr. Robinson as a meticulous jurist who “*expressed his opinion on every single question*”⁹⁷.

Moreover, despite the disinterest in ratification displayed by Israel for several years after it signed the Convention, it did, after all, ratify it and was yet only the tenth state to do so.

These facts and their historic context are of course well known to the Israeli judges. They habitually refer, in one way or another, to the ‘Jewish context’ of the Convention when dealing with its interpretation. Here, for example, Justice Amit:

“The state of Israel and a number of Jewish organizations played an active role in articulating the international Convention relating to the Status of Refugees, on the backdrop of the Second World War and *atrocities of the holocaust*, and the state of Israel was one of the first ones to sign and ratify the treaty - *and not by coincidence*. The story of the ship Saint-Louis is still an open wound in our memories, a historical lesson and synonym of asylum-seekers who can’t find refuge anywhere (the ship Saint-Louis with a thousand Jewish refugees on board, departed Germany after the Cristal Night in 1939 and was refused entry to Cuba and the U.S. The ship eventually returned to Europe where several countries agreed to grant access to the Jews on board, whose majority – except for those who reached England, eventually perished during the Second World War).”⁹⁸

References such as this expose us to the secret path that leads the Israeli judges from the starting point of Auschwitz to the final rejection of virtually every asylum application that

⁹⁵ibid., p.5 note 24

⁹⁶ G Ben Nun, ‘*The Israeli Roots of Article 3 and Article 6 of the 1951 Refugee Convention*’, Journal of Refugee Studies Vol.27, No.1, Oxford University Press, 2013, p.102

⁹⁷ Giladi, p. 6 note 37

⁹⁸ HCJ 7146/13 *Adam v. the Knesset*, (September 2013), p.100; all of the following quotation from verdicts in this thesis were translated from Hebrew.

draws on any other form of persecution but the one witnessed by the judges' own people in the concentration camps.

Because of the 'Jewish context' of the Convention, and due to the self centered attitude of Jews to the immense culmination of atrocities during the 'racial century'⁹⁹, what Israeli judges actually see before their eyes when they apply the Refugee Convention is specifically and solely the Holocaust and the Jewish refugees who survived it. Consequently, what we might call a 'political reflex' is then activated in them, as the collective sacred belief regarding the Holocaust's uniqueness, and moreover - its desirable political implication, push them to deny the refugee-hood of contemporary asylum seekers. It is as if recognition of that quality of present day asylum seekers would inevitably imply a common experience of persecution and suffering, shared both by them and the Jews. Recognition of such an intimate acquaintance with the sort of suffering experienced by the Jews would undermine the exclusive entitlement of the Jewish people to the moral-capital invested in genocide victimhood and at the same time empower the newly recognized gentile refugees to evoke *valid* criticism on the contentious Israeli policies. In their reluctance to recognize present day asylum seekers as refugees under the Convention, the Israeli judges reinforce the Jewish hegemony in the field of genocidal victimhood and exclude from the debate around the morality and legality of some otherwise indefensible Israeli conducts any voice emerging from outside of the Jewish world.

⁹⁹ Moses, '*Conceptual blockages and definitional dilemmas in the 'racial century': genocides of indigenous people and the Holocaust*', p.33

5. What Do They Talk About When They Talk About Asylum: Analysis of the Figurative Language Used by Israeli Judges

Since 1954, when Israel ratified the Refugee Convention, its judiciary has recognized only two individual petitioners as refugees under the convention – by overturning the negative administrative decisions on their requests for asylum, and ordering the Government to grant them the Refugee status¹⁰⁰. Due to the fact that the Israeli court system does not publish statistics regarding specific appeals against negative decisions on asylum requests, the total number of such legal procedures is unknown. And yet, as seems to be the case in other liberal democracies, asylum adjudication in Israel is also characterized by relatively high rate of challenge posed by the asylum seekers whose application for asylum has been rejected by the administrative authority¹⁰¹. References to the heavy burden posed by the many asylum seekers on all relevant state's organs - amongst them the Courts - can be easily found in one of the Supreme Court's decisions on such an appeal against a negative decision at first instance: "the fact that many take advantage of the possibility to appeal for asylum – which indeed amounts to a *heavy* strain for all the relevant authorities dealing with those requests – *including the courts*, cannot inflict on the comprehensiveness and profoundness of the judicial review that must be activated in each and every case..."¹⁰².

The two court decisions which have recognized asylum seekers as refugees, in comparison with even just the number of appeals personally filed by the writer of this text on behalf of asylum seekers, requesting the Court to overturn the first instance's negative decisions and to grant them the Refugee status (which were all dismissed) - the two extraordinary approvals of refugee status by the Courts do not even amount to 1% of the total. With only two cases in which the Court itself recognized a petitioner as refugee, out of the few hundreds or thousands of appeals brought before the court, a grim picture is revealed: recognition rate at the Court level is even lower than the illusionary one at first instance.

¹⁰⁰ See: The District Court of Jerusalem - sitting as a Court for administrative matters, case 729-09-11 *Barhana v. The Minister of Interior* (December 2011) ; The District Court of Lod - sitting as a Court for administrative matters, case 3415-05-10 *John Faber v. The Ministry of Interior* (August 2011). While only the first of these two extraordinary decisions became final and indeed resulted in the granting of a Refugee status to the petitioner, the latter was subject to appeal brought by the State before the Supreme Court, and was subsequently annulled –SC 7126/11 *The Ministry of Interior v. Faber* (June 2012). I will get back to these decisions for deeper discussion.

¹⁰¹ R. Thomas, *Administrative Justice and Asylum Appeals*, Hart Publishing, 2011, p.12

¹⁰² ISC 1440/13 *Chima v. The State of Israel* (August 2013). Of course, the essential claim that most if not all of the asylum seekers in Israel are merely migrant workers who exploit the Israeli asylum system, is being disputed time and again before the Court –“ *Who are those “infiltrators”? Why did they come to Israel? In the appeal before us the principle dispute between the state and the petitioners is revealed once more – the question regarding the infiltrators' identity and their motive to come to Israel, which according to the state is merely finding work and improving their standards of living, or rather saving their lives by escaping an immediate threat to their lives and health in their countries of origin, as claim the petitioners*” – see: HCJ 7385/13 *Eytan et al. vs. the Knesset et al* (September 2014); and although the Court does not determine whether the extremely low recognition rate of asylum seekers as refugees is due to the applicants' profiles as depicted by the state, or to the lack of fairness displayed by the MOI, as suggested by petitioners and NGOs, it is sure to still echo the government's dubious claim in different contexts, always in passage.

At this point, it is important to tackle two possible preliminary objections to my claim, namely:

1. that those two exceptional decisions of the Court do not reveal any special reluctance of the judges from recognizing asylum seekers as refugees, since in numerous other cases, where the dispute between the asylum seeker and the state is narrowed to the issue of the applicability of the temporary protection regime to the situation of the petitioner, the Court shows no hesitation to pro-actively determine that the petitioner is in fact a national affiliated to a certain group to which this policy applies. And since for a long time - and to a large extent up till today - nationals who constitute the largest populations of asylum seekers in Israel were not allowed to go through the RSD procedure, overturning such administrative decisions which deprive temporary protection from the petitioner, is actually the most pro-active judicial intervention possible.
2. that according to a principle of judicial review on administrative decisions, the Court should not substitute the administrative authority's discretion with its own¹⁰³. If the Court does find serious deficiencies in the administrative *procedure*, only then it may cast the case back to the administrative authority for reexamination and consequent enactment of a new decision. In accordance with that principle of the Israeli Supreme Court's jurisprudence, so goes the claim, the court in fact habitually annuls negative-decisions on asylum requests which were taken by the MOI, but rather than enacting a new decision by themselves, such as affirming the petitioner's entitlement for the Refugee Status, the judges leave that task, as it should be, to the competent administrative authority's discretion.

I do not wish to challenge the claim that in the narrow context of disputes between an individual asylum seeker and the state over the identification of the former as a national of any country other than Eritrea or Sudan, the Court is frequently willing to intervene in the administrative-decisions. In fact, I know it is so from my professional experience; convincing the Court that an administrative decision regarding someone's nationality is wrong, and consequently that a temporary protection policy should apply to that person, is a fairly possible task. However, doing the same when what's at stake, instead, is a person's entitlement for the Refugee Status - is practically impossible. Even the most superficial research would quickly elicit dozens of court decisions which assertively overturn administrative-decisions regarding a person's identification and the consequent inapplicability of temporary protection policy to her situation. What I do like to suggest is, that such a pro-active approach in cases regarding the administration of *any other* right or entitlement to foreign nationals *except for*

¹⁰³ See: AAA 7126/11 *The State of Israel vs. Kintro Hernandez*

their possible eligibility for the Refugee Status, is very much in line with my essential claim regarding the nature of the relationship between Israeli judges and asylum seekers, namely that the Israeli judge stays in line with his reputation as a significantly pro-active ruler – even in sensitive matters regarding the handling of asylum seekers, just up to the point of granting a refugee status to one of these contemporary asylum seeker.

The alleged apprehension that Israel passes for a decent observer of its commitments under international law (without ever recognizing present-day asylum seekers as refugees) allows the judges to keep on adhering to their regular- daring jurisprudence in and around this type of cases. But the judges' pro-active approach here only comes to underline the anomaly of their tendency for omission when they scrutinize administrative- decisions on the individual's entitlement specifically to the Refugee Status.

This type of cases shows also that when it comes to temporary protection policy the judges do not always restrict themselves to only examining the appropriateness of the administrative procedure, but sometimes also enact a new decision under the one they annul. In a majority of these cases, when the Court finds that the contested administrative- decision is stemming from an inappropriate procedure, instead of returning the case to the competent administrative authority, the Court itself fully engages in the process of decision making, i.e. independently taking a new decision on the possible applicability of the temporary protection policy to the case at hand.

However, when it comes to the 'hard-core' asylum cases, meaning those directly dealing with a person's entitlement to the Refugee Status, those cases often reveal the Courts' double standard in relation to the abovementioned principle of judicial review on administrative matters.

While the Supreme Court's decision to annul one of the two only decisions ever given by the judiciary to recognize a petitioner as refugee, was reasoned by the fact that the lower Court wrongly appropriated the administrative authority's discretion, in other cases, when the Court equally finds that some serious fault was made in the administrative procedure from which stems a contested administrative-decision, it rather refrains from casting the case back to the administrative authority and indeed considers itself rightfully authorized to conduct anew an overall examination of the case, which always results in upholding the exact same conclusion reached before by the MOI, as if it was essentially right all along - irrespective of the apparent deficiencies which brought that decision to be reviewed by the court in the first place ¹⁰⁴.

¹⁰⁴ Compare: AAA 7126/11 *The State of Israel vs. Kitro Hernandez* and AAA 7945/12 *Igbokwe Francis Chidi vs. The State of Israel*

It is also important to put the abovementioned principle of judicial review in the right context: it refers to situations in which the Court finds that serious faults underpin the administrative *procedure*. Then, the Court is restricted to return the case for reexamination and enactment of a new decision by the competent administrative authority. Conversely, when the Court finds that the administrative *decision* itself is extremely unreasonable, then there are grounds for the Court to interfere in the very decision, i.e. to reach a new one to replace the extremely unreasonable one. Given the asylum condition in Israel, the question arises: out of the many thousands of negative administrative decisions on virtually *all* asylum applications, logged mainly by Eritreans and Sudanese - were there no more than just two extremely unreasonable ones?

Boosting the Court's image as being pro-active also in cases concerning entitlement to the Refugee status would be somewhat dubious, even while taking into account its decisions to cast cases back to the administrative authority. It is so not only due to the fact that the only possible outcome of such reexamination by the MOI is destined to be yet another rejection of the asylum request, but mainly because the judges seem to take this path in order to avoid taking the otherwise compelling legal decision of recognizing the petitioner before them as a refugee. In my view, when the contested negative administrative decision is manifestly extremely unreasonable, and is such irrespective of some minor faults that may or may not have influenced the administrative procedure, then the judges prefer to simply attribute more weight to the deficiencies in the *procedure* in order to have the hot potato go for yet another futile tour at the administrative level, rather than declaring the *decision* itself extremely unreasonable and consequently recognizing the petitioner as refugee all by themselves¹⁰⁵.

Now, if the Israeli judiciary has a bias in favor of omission in respect to disputes over the individual's entitlement to the Refugee Status - how can one prove this bias stems from the judges commitment to the 'Holocaust framework'¹⁰⁶? If the judges are indeed distracted in their work by phantoms of Jewish-refugees, and with all this commotion in their Courtroom they somehow mistake the allegedly unique form of persecution witnessed by these phantoms for the yard stick with which to measure the *actual* petitioner's eligibility for the Refugee Status – would they ever mention in their verdicts the surreal appearance before them of those misery-stricken visitors? Would they say that through their magnifying glasses what they are actually looking for are signs for well founded fear of persecution *like* the one that was witnessed in *Auschwitz*?

¹⁰⁵ Compare: The District Court of Tel-Aviv – sitting as a Court for administrative matters, Case 47226-09-11 *Kamara v. The Minister of Interior* (26.12.2012)

¹⁰⁶ N. G. Finkelstein, *The Holocaust Industry*, p. 41. For Finkelstein, “the Holocaust” is an ideological representation of the Nazi Holocaust”. Of the two central dogmas underpinning the ‘Holocaust framework’ a-la Finkelstein, I’m particularly interested in the first one: “*The Holocaust marks a categorically unique historical event*”.

Given that this kind of tendencies are deeply rooted in indoctrination, let alone the psychological aspects of such a behavioral phenomenon, and that an accomplished indoctrination is never to leave a trace of its occurrence on its subjects, it would be appropriate to ask whether the judges are at all aware of the personal and ideological motivations lurking behind their rejectionists decisions. If they are aware of that, they must also comprehend the tension between their biased professional performance and their expected impartial and highly professional one, and thus it shouldn't come as a surprise if they intentionally blur their corruptive personal disposition in order to resolve that possible tension.

What kind of methodology, then, could be deployed in order to prove that when adjudicating asylum cases, Israeli judges restrict themselves by the premises and imperatives of the ‘Holocaust framework’, rather than considering the international refugee law framework as their only valid point of reference?

I was advised by some eminent jurists to renounce methodology altogether; Exposing judges’ bias, they say, albeit being a hazardous subject for an academic study, may be nevertheless possible by employing an empirical method¹⁰⁷. Conversely, there is no methodology for establishing the motives lying behind the bias of a judge. Judges would simply not tell us about that and we cannot just read their minds. Sometimes, a plausible explanation for such a phenomenon is simply the best you can offer. If your explanatory framework is compelling enough so as to make any alternative explanation grow pale, then it may be valuable enough even if not scientifically proven.

As for me, I believe that from everything we have seen so far, from the culmination of activities and common political concerns displayed by various Israeli agencies and Jewish associations in different fields – history, politics, diplomacy, education and commemoration – emerges a pattern that should not be ignored, to say the least, when we investigate the Israeli asylum state of affairs, which is best defined as the ‘Denial of (contemporary) refugee-hood’. In my view that denial of contemporary refugee-hood is being enacted with as much unlimited devotion and passion, both by the Government and the Courts, as is the commemoration of the Jewish holocaust and the subsequent promotion of the Uniqueness thesis mentioned earlier in this assignment. We may see it in the Israeli historian’s refusal to participate in academic conferences on genocide which suggest other examples of genocides as legitimate cases in point; in the Israeli diplomat’s sabotage of efforts made by other genocidal victim-groups to gain international recognition also in their personal trauma; the Holocaust museum’s board which will assail any initiative to include exhibitions on the genocidal experiences of other victim groups.

¹⁰⁷ Compare: HCJ 11163/03 *High Follow-Up Committee for Arab Citizens of Israel v. the Prime Minister* (27.2.2006), preamble 18-20 to Chief Justice Barak’s opinion

In that sense we may also mention the Israeli Minister of the Interior, as he is followed by the Court. When these two deal with the issue of asylum seekers, deciding on their entitlement to the Refugee Status, they are dealing with motifs borrowed directly from *the story* of their lives, with materials that are overwhelmingly famous for their distinct appearance in Jewish history. The history of the alleged eternal hatred and persecution of the Jews, with the Holocaust at its center, is sacred for them as for the whole of Israeli institutions and society. No other possible persecution of other groups and individuals can qualify as sacred, since the tools with which the Israeli judges are supposed to assess that suspected persecution's magnitude are derived directly from the 'Holocaust framework' as they know or promote it. Hence those tools and signifiers have a conceived monopoly on sacredness, whatever they are juxtaposed against, and hence they apply to the Refugee Convention itself whose reenactment need be executed as if in reverence to God itself. [That should be. and from now on they do not lose their sacredness wherever they are being placed. The Refugee Convention itself, or more accurately, its application in order to recognize refugees, is somewhat sacred and as such it should be threatened with god-fearingness.]

Are Israeli judges acting any differently from the Israeli historian or politician when they deal with these sacred elements, deeply rooted in and proclaimed by Jewish mythology? I believe they do not. When the Supreme Court was recently asked to order the state to register a ninety year old petitioner as a citizen by residence rather than a citizen under The Law of Return, justice Rubinstein's deliberation contained more than just the sheer legalistic argumentation:

"The Law of Return (...) comes to prevent the second coming of the tragedy of Jewish refugees knocking on the gates of one yet another state, and finding them locked for them, including the White Book that prevented their entry to our own country, as happened in the days before and during the Second World War – the days of the Holocaust.

The state of Israel as a Jewish Democratic state, is the most precious deposit bestowed on us, it is the fulfillment of the Zionist dream, it is the only Jewish state in the world, while it also has to try to achieve appropriate equality for minorities; and this court is not a means for eroding its essence and nature".¹⁰⁸

That comment of Justice Rubinstein came already after the conclusive legal findings of the Court, that "*we have nothing but the law, and the law is not with him, and that is indeed obvious*" Ironically, from this superfluous reflection of the Court we reveal that in regard to issues intimately associated with the underpinning of Zionist ideology, the Court's toolkit contains more than just the law and its appropriate application; it has also its own pressing

¹⁰⁸ HCJ 8140/13 *Ornan vs. the State of Israel* (December 2013); Professor Ornan claimed that article 4 of The Law of Return in conjunction with article 2 of Israeli Nationality Law should have not applied to him since he has not registered himself as Jewish in a civil registration conducted decades ago (Ornan considers himself to be a Canaanite).

convictions, its ideological stance in favor of the Zionist project, whatever the costs or compromises may be.

The Law of Return¹⁰⁹, which establishes an exclusive path for naturalization, designated for Jews and their spouses, seems to touch upon the Israeli-Jewish public's collective memory of the Holocaust, and as such it provokes the judges to display their ideological commitment to the Zionist project rather than to perform a 'chirurgical', impartial judicial review. What the Court had implicitly said about The Law of Return in another case, encapsulates its treatment as *sacred* of any legal norm or administrative policy that is said to relay on Holocaust's imperatives -

"...in the Law of Return, which is a symbol of the state being Jewish, I believe there reside motifs of *sacredness*, not in the religious sense but rather in the national and historical sense. That is our answer to our persecutors, as well as to the closure of the country's gates for Jews, to the White Book, to those indifferent to the suffering who had closed every harbor in the face of the Jewish passengers of the MS Saint-Louis in 1939, on the evening of the holocaust; those who had sent refugees in the first days of the holocaust to desolate exile in Mauritius in the Indian ocean (my mother rest in peace took part in the medical force who had brought them here in 1945). That nature of the Law of Return, with its motifs of "*national sacredness*", demands the state and its agents, on the one hand- to open the country's gates to any truly eligible person, and on the other hand to stand guard against its violators and those who wish for themselves a false right of return."¹¹⁰

There is much to say about Justice Rubinstein's stream of consciousness when he reflects upon a piece of legislation, which, albeit fundamental for the "Jewish-settlers regime"¹¹¹, simply constitutes yet another element of the state's nationality law. If considering the applicability of that law to the situation of one single petitioner also means paying a preliminary visit to the Holocaust's martyrs, to their perpetrators, to those who silently stood by, and - to Justice Rubinstein's late mother and her refugees-protégés, it is not surprising then that the possibility of mere immigration fraud transcends the criminal dimension and implies the dishonoring of 'national sacredness'.

I believe that for the Israeli judges, the same psychological burden and ideological imperatives are being generated vis-à-vis each and every claim for asylum lodged in Israel. Such extra judicial considerations render the possibility of an individual being recognized as refugee even though she is not a genuine one, a 'truly outrageous' scheme, to the point of dishonoring the

¹⁰⁹ The Law of Return, 1950

¹¹⁰ HCJ 10226/08 *Zavidovski v. The Minister of Interior* (2.8.2010)

¹¹¹ H. Shamir, G. Mundlak, '*Spheres of Migration: Political, Economic and Universal Imperatives in Israel's Migration Regime*', Middle East Law and Governance 5, 2013, p. 113

memory of the Holocaust and its victims. In the same vein, recognizing present day asylum seekers as refugees would be tantamount to stealing the ‘moral capital’ belonging to the Jews, as well as undermining the presupposition that no one but the Jews – who were the only ones to ever witness that certain unique kind of persecution which exclusively produces ‘genuine’ refugees - can truly understand Israel, its motives and conducts, and so to also be able to criticize it at all.

The virtual 100% rejection rate of asylum appeals at the Court level - just as that same rejection rate of the administrative authorities - suits perfectly the pattern that seems to emerge from the varied activities of Israeli agencies and Jewish associations in other fields, in relation to issues that might somehow affect the perception of the Holocaust as unique, unparalleled and incomparable, or undermine the current distribution of moral capital and immunity from critique that stems out of that perception.

Considering the abovementioned reservations regarding the very possibility to prove what is in the judges’ heart, the question may well be whether the identification of such a pattern is sufficient to support the hypothesis that the judges’ jurisprudence regarding asylum cases is also shaped, just as much as the work of the committed historian or diplomat, by the underpinnings of the ‘Holocaust framework’.

In my opinion, the behavioral pattern that emerges from the corpus of activities of different Israeli and Jewish actors, and its suitableness also to the issue of the judges’ rejectionist approach toward asylum seekers, do attribute great plausibility to my hypothesis about the judges’ motives. And yet, as we could clearly see from the abovementioned examples of the Supreme Court’s decisions, albeit on cases related to The Law of Return and not directly concerning asylum claims, an analysis of the figurative language of the judges may furnish a further valuable support to my claims (moreover since those two legislative guidelines – the Law of Return and the Refugee Convention - can be seen as a ‘mirror image’ of one another, both revolving around the issue of granting access and rights to a foreign national, while the legal subjects in each of those pieces of legislation are found on two opposing poles of favorability, as far as it is demonstrated by the Israeli establishment and court).

Not all of the most relevant and telling references of the Courts to the Holocaust are to be found in its decisions on asylum issues; of the ones that do, some seem to be given in support to the state’s rejectionist policies and individual decisions, while others do quite the contrary. All in all, I am not sure whether the limited - number of cases which permit such an analysis constitute a sufficient empirical basis to prove my claims. If taken alone, they may not even have a sufficient suggestive strength to fully convince the reader about the complex explanation I wish to offer for the ‘denial of refugees-hood’ by the Court. Alongside the

theoretical explanatory framework and the pattern that emerges from the activities of analogous Israeli and Jewish actors, I hope that the following illustrative analysis of the actual language used in some relevant cases will provide the reader with supplemental, though decisive, support to my essential claims.

The ruling of the Court in *Balca*¹¹² provides us with an outstanding illustration of the judge's flow of Holocaust-related associations when he examines, *inter alia*, whether the 72 petitioners, Ethiopian nationals, are likely to face threats to life or freedom if expelled to Ethiopia. In this case the Court also reveals its interest in protecting the states' public image in relation to its treatment of asylum seekers and refugees. Although the Court generally agrees with the state's reservations regarding the inadmissibility of the petition, it nonetheless decides to hear the case for ..."focusing the public attention on that discussion actually enhances the criticism towards the respondent (the state of Israel in this case) generated on the background if its handling of refugee issues in general and Ethiopian citizens found in Israel in particular. That is also why I believe that the appeal should exceed the judicial debate in order for it to be resolved and for the resolution to be visible for the public eye".

That been said by the judge, the Court's examination of the merits, and its final conclusion that the principle of *non-refoulement* does not apply to the situation of the petitioners, could be seen now as transcending the scope of the case at hand and aiming at absolving the state altogether for its alleged maltreatment of refugees.

But more revealing than the Court's preoccupation with the state's good reputation is the connotation made by the judge between the issue at stake and the history of the eternal hatred and persecution of Jews. Already when setting forth the relevant legal framework to the case, justice Mudrick, who is also the former Chief Military Advocate General, states that Israel's obligation to protect foreign nationals from persecution stems not only from its legal commitment under international law but also from moral considerations: "That commitment is also morally grounded, in a state on whose tradition's flag engraved for eternity is the sentence "for you lived as an alien in the land of Egypt", and whose being's essence has been crystalized by the atrocities of Jew's persecution throughout all generations".

If the history of Jews hatred serves here as the source for Israel's moral obligations towards people in need of international protection, immediately afterwards, in a footnote, it is being utilized to somewhat negate the petitioners' complaints about their maltreatment by the Israeli authorities:

¹¹² The District Court of Tel-Aviv – sitting as a Court for administrative matters, case 2028/05 *Zanbek Balca et al. vs. the Minister of Interior* (February 2006)

"Each of the appeals opens with Alterman's "The Swedish Tongue" venerating Sweden, which unlike other nations, had opened its gates for Danish Jews escaping the Nazi horrors. That intro is an agitation, as if preaching to the state of Israel. I shall not polemicize with these things, and shall limit myself to examining the legal rights of the appellants. Nevertheless I shall note that the Jewish holocaust refugees were refugees of a genocide according to every human scale, and their fate – as well as the fate of millions of other displaced people in that war – were the basis for the articulation of the UN's Refugee Treaty. I am not the one to review Israel's history regarding refugee's status since 1951 (there were some who heavily criticized that history but still took acknowledged the impressive list of humanitarian gestures towards different refugee groups) (...) at least since 2002 the state bases its decisions regarding refugee protection on the recommendations of the UN commissionership. I believe that this fact projects heavily on any possible justification for "waving" Alterman's rhymes, as beautiful and firm as they may be."

Since Jewish-refugees, or the Holocaust altogether, have absolutely nothing to do with the questions before the Court – what is the law? What is the law's appropriate interpretation and how to apply it to the case at hand? – Any reference to the Holocaust, irrespective of its actual content, is superfluous; I would not expect the judges to mention any of that when they uphold a decision to revoke someone's asylum request, and indeed they mostly do not. It might have been appropriate to mention the persecution and suffering in the Jewish context when they recognize someone as refugee and offer her an international protection, so as to say "we've learned history's lesson". But then again, they hardly-ever recognize anyone as refugee.

What we have here instead is truly remarkable: not only that Justice Mudrick resorts to the Holocaust within the framework of a rejectionist decision, but also the content of his comments is highly contentious; it implies a sort of competition between Jewish refugees and present day asylum seekers, a hierarchy of suffering and vulnerability. If it is said that Jewish refugees were genuine ones under some human standard, then, who is not? And why does it seem that to launch an ethical critique against Israel is per-se inappropriate? Do these two notions somehow relate to each other?

The judgment of the Supreme Court in *Chima*¹¹³ illustrates well the discrepancy between the situations in which the judges adhere to the principle of not substituting the administrative authority's discretion on the one hand, and the situations implying a *de facto* new decision enacted by Court itself on the other. In my view, when the administrative procedure is deemed defective, the decision whether to cast the case back for reexamination to the administrative authorities, or rather to independently enact a new decision under it – depends to a large extent on the judges' impression of the petitioner's entitlement to the Refugee Status; if they believe

¹¹³ ISC 14430/13 *Chima v. The State of Israel* (August 2013)

the petitioner does meet the Convention's requirement, they would most likely cast the case right back to the MOI. If they are convinced of the opposite, it is more likely they will validate the same conclusion of the MOI (that was derived from the defective administrative procedure) and decide to spare another round of examination at the administrative level.

In this case, both justice Meltzer, who wrote the majority opinion, and the dissenting judge, Amit, engage in full examination of the merits. From justice Meltzer's deliberation it seems like he believes the petitioner has in fact proved to be having a well-founded fear of being persecuted, on one of the grounds stipulated in the Convention. But the MOI rejected the petitioner's request for asylum already at a preliminary stage of its examination, a fact that depicts the administrative procedure altogether substantially defected. Given that, and according to the principle of judicial review on administrative matters, Justice Meltzer restricts himself to ordering the state to examine the petitioner's application anew.

Conversely, justice Amit does not seem to share the view that the Minister of Interior has done wrong by dismissing the application at such a preliminary stage. And he tries to prove this (in essence - that the petitioner is *not* a refugee, and so the hasty administrative rejection of his request for asylum could not have been so wrong after all) by referring to facts and reasons that were never before taken in account by the MOI. He might have been aware of this anachronism and so from his dissenting opinion it remains somehow unclear whether the MOI should have after all rejected the petitioner's request for asylum already at that preliminary stage. But knowing what he seems to know by now about the petitioner, he states – "...*at any rate, I see no reason to cast the petitioner's case back to the asylum seekers' unit...*"

For justice Amit, casting the case back for reexamination by the MOI is futile because he has already personally reached a negative decision on the petitioner's request for asylum, and there is zero probability the MOI will reach a different one if obliged to reexamine the case for the second time. What justice Amit had actually done is to reach a *de facto* new decision under the one, identical in substance, which was previously taken by the MOI, but could not stand due to the serious deficiencies in the administrative procedure from which it has resulted. Justice Meltzer is aware of justice Amit's infringement of the Court's jurisprudence: "*If it was found that there was no reason to begin with, for inexorably renouncing an asylum request – it would be inappropriate in my opinion for a reviewing court to step into the shoes of the administrative authority and take it upon itself to examine the case as a whole, as suggested in paragraph 5 dissenting on my colleague's opinion, judge Amit. The proper solution, in my opinion, for this kind of cases: casting the case back to be re-examined by the administrative authority.*"

But despite judge Meltzer's firm stance, we may very well ask why is it that for him recasting the case back to the MOI would ever be considered as having any remedial effect altogether? Seemingly never be judged as ineffectual by justice Meltzer? After all, throughout his examination of the merits, the impression one gets is that he takes the opposite view of justice Amit, that is, that the petitioner *is* a refugee. And considering the virtually nonexistent recognition rate at first instance, it is rather obvious that the MOI would never reach, even if obliged to conduct a new examination, a different decision other than its original, negative, one.

We may conclude then, that in cases like these it is the judge's view of the petitioner's entitlement for the Refugee Status which determines also whether one of two possible courses of action, in case the administrative procedure is deemed to have been seriously defected, either that the Court would recast the case back to the MOI, or rather ignores its own jurisprudence by reaching a *de facto* new decision, corresponding to the one previously taken by the MOI but resulted from a manifestly-defected administrative procedure. If the judge believes the petitioner is *not* a refugee, then irrespective of the Court's declared jurisprudence he is likely to spare such a new examination at the administrative level by independently reaching the exact same decision as the contested one. And if, conversely, the judge seems to believe the petitioner *is* a refugee, then he would probably never be led by the assumption that new examination by the MOI is futile. Otherwise, he would have to recognize the petitioner as a refugee all by himself, which is ideologically undesirable. Needless to say that for the petitioner, both of these outcomes equally implies the rejection of his asylum request – already at the appeal level or yet again, a bit farther down the road, again by the administrative authorities.

Interestingly enough, within the framework of Justice Meltzer's majority opinion - which in his eyes must have been seen as providing the greatest possible relief for the petitioner – also the following argument is included:

"In conclusion, we – who belong to a people who knew exile, and whose ancestors needed refuge time and again – are obliged to profoundly inspect any request for political asylum."

Not surprisingly, you will not find allusions of that kind in Justice Amit's rejectionist opinion. These remarks are reserved solely to situations in which the judge orders the government to reexamine a case anew or when it provides asylum seekers with protection of their peripheral-rights. Notwithstanding that the relief offered to the petitioners in this type of decisions falls short of their hope to be recognized as refugees, their relatively favorable treatment by the judge permits then its attribution to an alleged Jewish historical commitment towards asylum seekers and refugees. Conversely, it is rather obvious why the judges would almost never set

forth any references to the Holocaust while upholding an administrative decision to revoke someone's request for asylum.

Another example for the principles and function of this economy of holocaust allusions can be found in *Martinez*¹¹⁴. In this case, the Court finds that the basic assumption of the MOI regarding the petitioner's unreliability is extremely unreasonable. The fact that the petitioner's version is allegedly unreliable has underpinned both the MOI's first negative decision and then the second one, which was taken in the framework of the petitioner's consequent application for reconsideration of his case. On the face of it, it seems like the reasonableness of the very administrative *decision* is what's being refuted by the Court. If this is the case, then why does the Court fail to interfere in the decision, dictating on its turn a new, proper one? In principle, the idea is that administrative matters such as these should be left to the discretion of the competent administrative authority. Here, the administrative authority has already established that the petitioner's version is unreliable and thus rejected his request for asylum. It used its discretionary power – twice already – and what it produced is the contested decision at hand, a decision most accurately reflecting the MOI's autonomous-discretion. But the judge here refrained from annulling the administrative decision for it is substantially unreasonable; under such circumstances, an annulment would serve *de facto* as declaring the petitioner is a refugee – a turn she preferred to avoid. What the judge did instead - a juridical maneuver more suitable to the field of political strategy perhaps - is annulling the decision on the ground that the administrative *procedure* from which it resulted was somehow defected. According to the Court, it is so because the MOI had based its final decision on an unreasonable assumption about the petitioner's unreliability, and from there on the rest of the examination procedure was supposedly defected. Determining the annulment of the administrative decision through the prism of the administrative procedure's properness is how the judge restricted herself with the principle of judicial review on administrative matters that was lengthily discussed before. She ordered the MOI to reexamine anew the petitioner's request for asylum, under the assumption that his version is reliable. For the petitioner it meant nothing but another waiting period before the MOI will reach, not surprisingly, another negative decision on his application.

Here, again, justice Agmon-Gonnen probably frames her decision as most favorable for the petitioner, and thus she found it fit to make allusions to the Holocaust –

"The treaty, anchoring refugee rights, was created as a remedy for millions of people turning refugees as a result of the atrocities of the holocaust and the Second World War. The state of Israel was fifth in order of signing the convention, and immediately upon its establishment it

¹¹⁴ The District Court of Tel-Aviv – sitting as a Court of administrative matters, case 46427-07/11 *Sanday Martinez vs. the State of Israel*

strove, alongside Jewish organizations, to articulate the treaty and achieve broad rights for refugees and asylum seekers. In the treaty's accompanying statements it was noted that its aim is to prevent the reoccurrence of a situation in which refugees who were persecuted and managed to reach another state, will be deported back to the country from whence they came."

Another telling reference to the Jewish context of the Convention comes on the backdrop of the judges' peculiar comment about the actual difficulties which Israel is now facing as a result of the massive influx of migrants into its territory:

"as a side note to my decision I would like to add that one cannot ignore the real difficulty facing the country in the shape of the waves of immigration flowing into it, bringing about many difficult problems...but at the same time one shall not ignore the stipulations of the Refugee Treaty which the state of Israel strove to create and took upon itself, with all due consequences, including the juridical review of those stipulations".

If Israel is legally bound by the Convention – what difference does it make that it had also promoted its enactment and acceptance? Why mentioning it at - all, and already for the second time in a rather short - two and half pages verdict? The fact that Israel - irrespective of the invitation it had surely and not-coincidentally received, and the active role it eventually played in the drafting of the convention – has actually shown no interest at all in promoting the convention's acceptance, does not change the meaning behind the judges' urge to mention this conventional wisdom about the alleged historical commitment of Israel to the Convention.

Moreover, the tension between the actual historical record and the fallacy of that conventional wisdom highlights the fact that these half-truths, not to say inventions, must have then some political function. This conventional wisdom suits perfectly to the notion that Jewish suffering, for its unique magnitude, stands alone at the center of the entire history of world's cruelty and pain. Every instrument - legal, political or educational - with which the international community deals now with the destruction of human values and its affect on human beings - be it refugees or victims of genocide- is being measured first, in our minds, by the scale of the long gone Jewish Holocaust victims. And so is the Refugee Convention perceived, as essentially rooted exclusively in the specific history of Jewish persecution.

Making recourse to this conventional wisdom within decisions that are "relatively favorable" for asylum seekers (favorable, yet without challenging the central paradigm of the 'Holocaust framework' – by actually recognizing any one as refugee) seems to be the most advantageous one in filling at least something in the lacking compliance of Israel with the natural expectation from it to treat asylum seekers in a fair and decent manner. Mentioning it in such cases and hindering from doing so where the Court upholds negative administrative decisions

on asylum requests, do not mean the Judge is not just as preoccupied with Holocaust's memories and their vivid images also when she dismisses an asylum-seeker's appeal. There is no possible reason for the judge to think about the Holocaust while protecting *some* rights of the asylum seeker and not thinking about it when depriving the asylum seeker from Refugee Status.

In my view, the judges are always far more keen to comply with the paradigms of the 'Holocaust framework' than to reinforce the state's compliance with international law, and indeed they virtually never display the opposite disposition in the form of recognizing someone as refugee. In order to stay in line with the 'Holocaust framework', they must first observe its fundamental underpinnings, keep them in mind of ; however, I would not expect them to mention any of that when they uphold the rejection of someone's asylum request, and indeed they hardly ever do. Their mentioning of it in the context of relatively favorable decisions to the asylum seekers suffices for us to assume they are possessed by the exact same reflections when dealing with all asylum cases at large.

Justice Agmon-Gonen's latter remark about the high number of asylum seekers staying in Israel and the many difficulties resulting from their presence, exemplifies an ever growing shift from the universal humanitarian imperative - upon which the admittance of asylum seekers and the consideration of their requests for asylum are typically based - to the political and the economic imperatives which are usually attached to different spheres of migration¹¹⁵ . If there is any place at all for this kind of utilitarian consideration in relation to asylum issues, it should be only in the framework of constitutional petitions on these matters, where they may be relevant for the purpose of proportionality test¹¹⁶. Taking in account such considerations, so foreign to the question of the individual asylum seeker's need and right for international protection, is not only legally wrong, but is also quite ironical, given that no such or other considerations would ever be accepted as justification for the denial of Jewish refugees by the world's nations during WW2.

From the inflammatory words of Justice Rubinstein in *Ornan* comes out the resentment and the un-forgiveness towards the nations which were indifferent enough to close their gates for Jewish refugees fleeing the Nazi perpetrators. Notwithstanding forgiveness, and also the faculty to forget, have an indispensable role in the restoration of any relationship, whether between individuals or nations¹¹⁷, the yet resisting hard- feelings in this case are not too

¹¹⁵ See: H Shamir & G Mundlak, p. 116

¹¹⁶ According to Article 9 to the Convention, exceptional circumstances may entail a Contracting State to take provisional measures which it considers to be essential to national security. In light of that provision, circumstances regarding the number of asylum seekers or the reception capacity of the hosting state may be relevant. But when it comes to the asylum-situation in Israel, nothing amounts to such "grave and exceptional circumstances": "...the burden on the State of Israel in handling asylum seekers is not higher than the one experienced by other western countries..." – see: Eitan, preamble 3 to justice Arbel's opinion.

¹¹⁷ A Ophir, 'Between Eichmann and Kant: Thinking on Evil after Arendt', Indiana University Press, 2011, p. 95

surprising given the terrible fate of all those Jewish refugees who were refuted on the boarders. It seems to be exactly that which still fuels the rancor – the extreme magnitude of suffering should have not permitted the bystander to prevent protection from the ones in need. When matters of life and death, or threat to fundamental human liberties are at stake, then economical consideration cannot stand as a legitimate reason for not offering shelter to those at risk.

After all, the denial of entry from Jewish refugees fleeing Nazism, which was common among almost all nations of the world - from the United States to Switzerland - stemmed not only from anti-Semitism or sheer xenophobia, but also, and most importantly, from economic considerations¹¹⁸. And yet, it is not being perceived as a legitimate reason for the much deplored decision not to offer asylum to those vulnerable Jewish refugees. As Finkelstein puts it, “...’The world’s silence’, ‘the world’s indifference’, ‘the abandonment of the Jews’: these themes became a staple of ‘Holocaust discourse’”¹¹⁹. Justice Amit’s remark about the denial of the Jewish-refugees aboard the MS *St. Louis*, resonates these themes, and so do various statements of Elie Wiesel, maybe the most prominent representative of the ‘Holocaust framework’ (“there were the killers – the murderers – and there were those who remained silent”¹²⁰); As always, detecting the different sources proliferating these identical ideas in different fields, appears to be very helpful in connecting the players and establishing their common political interest. And so the Minister of Interior and the judge, who express and fuel the long lasting rancor towards those indifferent nations who stood by in silence, leverage their resentment and indisputable monopoly over victimhood in order to block and castrate any possible criticism which is trying to point out that what they are doing, the decisions they are taking in regards to present day asylum seekers, are a complete replica of the actions they resent and reproach so deeply.

But the Minister of Interior and the judge simply do not believe them to be refugees; otherwise, they would not deny entry from a group of Eritreans, pending on the Sinai desert boarder fence for over a week¹²¹ nor would they revoke virtually all asylum requests lodged in Israel, not because of the sheer economic burden caused by their admittance. In this state of ‘denial of refugee-hood’, which in my view stems from the ‘Holocaust framework’, even nationals of states which are officially acknowledged by the UN as major producers of

¹¹⁸ Finkelstein, *The Holocaust Industry*, p. 103-104

¹¹⁹ Ibid., p.49

¹²⁰ E Wiesel, *And the Sea Is Never Full: Memoirs*, Shocben, 2000, p.68.

¹²¹ In 2012, a group of 21 Eritrean asylum seekers stumbled upon the fence along the Israeli-Egyptian border and were denied entry. They were sitting in the desert for more than a week pressed against the fence when a petition was submitted to the Supreme Court; the Court, for its part, was not in a rush to reach a decision. A few hours after the Court hearing, while the case was still pending, Israeli soldiers violently expelled 18 men and admitted two women and a child into the country for “exceptional humanitarian considerations” – see: HCJ 6582/12 *Anu Plitim v. Ehud Barak – Minister of Defense et al.* (2012); Isabel Kershner, ‘*Israel to Admit 3 of 21 African Waiting in Desert*’, New York Times (sep. 6, 2012) – <http://www.nytimes.com/2012/09/07/world/middleeast/israel-to-admit-3-of-21-african-waiting-in-desert.html?r=0>

refugees are, a-priori and regardless of any serious examination, mere *infiltrators* who only seek to improve their economic situation.

The three separate decisions of the High Court of Justice regarding the constitutionality of the three reincarnations of the Amendments to the Prevention of Infiltration Law are central to this part of my analysis. They are so telling not only due to the many allusions to the Holocaust that can be found there, especially in the majority judges' opinions; it is that these decisions encapsulate the disparity between the Court's regular pro-active approach (displayed also here in relation to the infringement of asylum seekers' constitutional right to liberty and dignity while they stay in Israel), and its governmental-minded approach when it comes to the protection of the same rights, and above all the asylum seekers' right to life, if returned to their countries of origin contrary to the fundamental principle of *non-refoulement*.

Amendment no. 3 of the Prevention of Infiltration Law allowed holding asylum seekers in administrative detention for three years and was challenged in *Adam*¹²². Shortly after the Court had struck down the arrangement for being unconstitutional, Amendment no.4 to the law was enacted, allowing now to hold asylum seekers in administrative detention for a year, which will be followed by indefinite detention at the *Holot* 'open' detention facility. This arrangement was challenged in *Eitan*¹²³ and was also set aside by the Court due to the unproportionate limitations on the "infiltrators'" constitutional rights. Following this second ruling of the Court, the Knesset was once again prompt in passing Amendment no.5 to the law, according to which only migrants who enter Israel after the entry to force of the amendment may be detained for a period of 3 months; preamble D of the amendment regards a potential 'infiltrator' whose expulsion back to his country of origin results in difficulty "of any kind". In this case, the 'infiltrator' may be held in an 'open' detention facility for 20 months. Both parts of this arrangement were challenged in *Desta*¹²⁴, and while this time the shorter duration and the allegedly legitimate purpose of the detention rendered it constitutional and it was upheld unanimously, chapter D of the law was struck down for the un-proportionate restrictions it puts on the 'infiltrator's' constitutional right to liberty and human dignity.

All three judgments were opened with a sort of introductory statements regarding the challenges and difficulties with which Israel has to confront due to the influx of 'infiltrators' crossing into its territory:

¹²² HCJ 7146/12 *Adam V. the Knesset* (September 2013)

¹²³ HCJ 7385/13 *Eitan – Israeli Immigration Policy Center, et al. V. the Israeli Government* (September 2014)

¹²⁴ HCJ 8665/14 *Desta et al. V. the Minister of Interior* (August 2015)

"The infiltrators phenomenon, which has been expanding in Israel, influences different sectors of the state. It also has significant influence on the interior and public security. A profound change has occurred in the life fabric of urban areas, as well as in the economy and market".¹²⁵

"Tens of thousands of infiltrators from Eritrea and Sudan have entered the state of Israel in recent years. The executive and legislative authorities have tried to handle the ramifications of this phenomenon in several ways..."¹²⁶

"In recent years tens of thousands of people have entered Israel not through border check-points... in the face of the infiltration phenomenon Israel is facing complex challenges"¹²⁷.

Notwithstanding the potential relevance of factors such as these to the proportionality tests conducted in the framework of constitutional judicial review, open statements have a special rhetoric power and the decision to dedicate them to this aspect of the issue frames the economic and political imperatives as most central also to the reviewed spheres of migration in this cases. This starting point fits the state's presupposition, according to which *"the majority of the infiltrators population – coming from North Sudan and Eritrea – are immigrants coming to Israel due to economical motives, in order to work and earn money to improve their standard of living and support their relatives left behind in their countries of origin"*¹²⁸.

Although the Court considered also the petitioner's counterargument, namely that the vast majority of this population is composed in fact of asylum seekers and refugees, and acknowledges that at least in relation to some of them – *"one cannot easily renounce the claims about the dangers they experience in their country of origin"*, it adheres to the terminology configured by the legislator – which does not distinguish between asylum-seekers and other irregular migrants – and refers to all the affected subjects of the law with the degrading term 'infiltrators'¹²⁹

Yet, these terminological and contextual biases did not prevent the Court from displaying its most pro-active performance when it struck down, totally or partly, three different reincarnations of the same legislative piece, due to their un-proportional infringement of the so-called infiltrators' constitutional rights. The first ruling of the Court in *Adam* was already

¹²⁵ See: *Adam*, p.4

¹²⁶ See: *Eitan* preface to the Central opinion

¹²⁷ See: *Desta*, preamble 1-2 to Chief Justice Naor's central opinion

¹²⁸ *Eitan*, preamble 6 to justice Vogelman's central opinion

¹²⁹ The Court is using this term notwithstanding justice Fogelman's preliminary remark in *Eitan*: *"The Term 'Infiltrator' is originally used to describe those who enter Israel in order to perform crimes and acts of terror...the legislator's rhetoric choices are not at our judgment, but we must not let them dim the essence. We must remember that those new 'infiltrators' did not come to our borders in order to perform hostile actions, and that many of them see themselves as asylum seekers. However despite this remark, I shall use in my opinion the term as it is legally articulated"* – see: *Eitan*, preamble 5 to Justice V's opinion

highly unpopular, and the Court's following judgments have only further augmented the general public's disapproval. Justice Arbel, who wrote the central opinion in Adam, was fully aware of that: *"In conclusion, I must assume that this ruling will not be easy for the Israeli public, and especially to the residents of South Tel Aviv, whose distress reflected in their outcry seems to be coming from the heart and evokes empathy and understanding as for the need to help them in their situation."*¹³⁰

The Court's impressive persistence in protecting the asylum-seekers' right to liberty and human dignity while in Israel highlights even more its deplored overlooking of their deprivation from effective international protection, and I will soon further elaborate on this point. For now, I would like to frame those decisions as relatively favorable for asylum seekers, and compile together some of the Holocaust's allusions made by the judges in support of their ruling, mostly in the concluding parts of their opinions –

In *Adam*:

*"The state of Israel along with Jewish organizations have taken an active part in the drafting of the international treaty concerning the status of refugees, on the backdrop of the Second World War and the atrocities of the holocaust, and the state of Israel was furthermore one of the first states to sign and ratify that treaty. And not in vain. The story of the MS Saint Louis is still engraved in our consciousness as an open wound, as an historical lesson and a synonym for asylum seeking refugees who are not welcome anywhere... the Saint Louis eventually returned to Europe where a few countries agreed to let its passengers in, many of whom – except for those who entered Britain – were killed during the War"*¹³¹.

*"The state of Israel is signed on the international treaty of refugee rights since 1951. The year the treaty was signed, as well as its title, tells something about the special sensitivity of the state of Israel regarding that issue, also on the backdrop of the special history – the far and the near ones – of our people and country"*¹³².

In *Eitan*:

*"The state of Israel, which was one of the 26 states whose delegates took part in drafting the refugee convention, has signed it in 1951 and was one of the first states to ratify it in 1954 (also since the population the treaty was dealing with was that of the Second World War's refugees, including the Jewish ones)"*¹³³.

¹³⁰ *Adam*, preamble 120 to justice Arbel's central opinion

¹³¹ *Adam*, preamble 3 to justice Amit's opinion

¹³² *Adam*, preamble 2 to justice Hendel's opinion

¹³³ *Eitan*, preamble 33 to justice Vogelman's central opinion

*"Even though in the media depicts it differently, up to date data tells us that the burden on the state of Israel in handling asylum seekers is not higher than the one experienced by other western countries... this burden should be taken with understanding, especially on the backdrop of Jewish history..."*¹³⁴.

*"As the Supreme Court of the state of Israel comes to deliberate the infiltrators issue, it cannot ignore that Israel is a Jewish and democratic state according as defined by its basic law. The state's Jewishness is not expressed only in the principles of the Hebrew Law, in my opinion, but also in its people's history. With this perspective, and on the backdrop of the deportations we've experienced in different eras, one has to be sensitive to the other who is looking for a new home, even temporarily. That obligation is part of the whole picture. We must aid as much as possible, and acknowledge that that is a hard situation. Life is unbearable in Sudan and Eritrea, where most of the infiltrators come from. That given situation only enhances the recognition of our well-being, of enjoying the fruits of democracy and prosperity. It is not a mere practical consideration, but in my view it is also a part of the people's definition"*¹³⁵.

And in Desta:

*"...Hebrew Law and Jewish history – are highly sensitive to the two polarities and to the tension between them: on the one hand – the commandment to love the foreigner, the care for her and to be sensitive to the refugee, on the backdrop of our people's upheavals throughout history, and on the other hand- the rule saying "the poor in your own land are first"*¹³⁶.

*"...as someone whose ancestors used to be, in the far past, foreign labourers in another land, and in the nearer future have knocked in vain on the gates of different countries while fleeing from the Nazi regime, and were renounced – we are demanded to utilize the relevant juristic tools with compassion and sensitivity towards all involved. That is necessary because we are a Jewish democratic state."*¹³⁷.

As we have seen before, also in these rulings the judges habitually make recourse to the Holocaust as if to find further support, from outside the legal dimension, to their relatively favorable decisions regarding asylum seekers. If they do not make allusions to the Holocaust when upholding the first instance's negative decisions on asylum claims – it does not mean they do not visit these foreign realms also then. If the consideration of asylum seekers' right to liberty provokes in the judges connotations to the Holocaust, then, the same must be

¹³⁴ *Eitan*, preamble 3 to justice Arbel's opinion

¹³⁵ *Eitan*, preamble 14 to justice Hendel's opinion

¹³⁶ *Desta*, preamble 9 to justice Hendel's opinion

¹³⁷ *Desta*, Preamble 17 to justice Meltzer's opinion

happening also when they deal with the core of all asylum issues – entitlement to the Refugee Stats and to international protection.

The three verdicts regarding the Amendments to the Prevention of Infiltration Law exemplify also the discrepancy between the Court's regular highly-daring jurisprudence – displayed also in cases relating to asylum seekers' 'peripheral' rights, and their governmental-minded approach when at stake is the asylum seeker's entitlement for the refugee status and to international protection. A display of the second, anomalous approach, can be found in the Court's way of dealing with one of the petitioners' central claims, the one regarding the hidden - actual purpose behind the legal authorization to hold 'infiltrators' in the '*Holot*' "open" detention center.

The claim is, that in contrast to the proclaimed purposes of chapter D of the law, the actual, hidden, purpose is to break the detainees' spirit in order to promote their 'voluntary return' to their countries of origin or to some third country. Chapter D of the law was added to it after the Court's first ruling in *Adam*, and was contested both in *Eitan* and *Desta*. In the framework of the constitutional examination of the amendment, the question regarding the purpose is a central pillar. If the law limits rights enshrined in the Basic Law: Human Dignity and Liberty, - as it was established in the case at hand - it would deem to be constitutional only if notwithstanding the conditions of the limitation clause in the basic law. The limitation clause conditions that the limitation of the protected rights is made by a statute and befits the values of the state of Israel. The more complex condition regards the proper-purpose of the law.

In both the second and the third cases, the state proclaimed that the amendment has some few legitimate purposes, among them also to deter 'infiltrators' from reaching Israel. The Court has found that purpose, if stands on its own, to be improper, but since it was only secondary and incidental to the main purpose of the law – to prevent the settling down of 'infiltrators' in the centers of the cities – the Court had examined mainly the properness of that proclaimed central purpose of the statute.

That the suggested alternative purpose of the amendment – breaking the spirits of the detainees – is manifestly improper, seems all too obvious. Chief justice Naor, who wrote the central opinion in *Desta*, has stated that –

*"That purpose would be improper, given that it allegedly compromises the principle of non-refoulement, forbidding the deportation of a person to a state where his life or freedoms are in danger"*¹³⁸.

¹³⁸ *Desta*, preamble 81 to Chief Justice Naor's central opinion

If the judges had accepted the petitioners' claim regarding the hidden- purpose of the amendment, the constitutional examination would have had to stop here, since a statute which limits constitutional rights for no proper - purpose is void¹³⁹.

In *Eitan*, justice Vogelman, who wrote the central opinion, was very receptive to that explosive claim of the petitioners, but given that chapter D was destined to be annulled altogether for it do not withstand the proportionality condition, he preferred not to decide on that matter –

*"...the question of whether one of the purposes of the Law which we are currently examining its constitutionality, is "breaking the spirits" of the infiltrators - so that they would choose to leave the country, is not clear of doubts... even though I am not convinced that the appellant's claims in that issue can be utterly revoked, I shall not reach any conclusion on that issue, since I believe that chapter D of the law will anyway be revoked since it doesn't withstand the demand of proportionality"*¹⁴⁰.

While justice Vogelman had at least thoroughly examined the petitioner's claim regarding the secret purpose of the amendment, Chief Justice Grunis, who dissented from the majority regarding the annulment of chapter D of the law, didn't even consider the claim that the actual purpose of the law is to break the detainees' spirit:

*"my colleague also notes the appellants' claim according to which the true purpose of the arrangement outlined in chapter D is to "break the infiltrators spirit" so they would agree to voluntarily leave Israel (regarding which the answerers have firmly claimed otherwise). Like my colleague, I shall not deliberate whether that is indeed one of the law's purposes"*¹⁴¹.

Three months after the Court has issued its judgment in *Eitan*, the Knesset once again passed a new amendment to the law. Now, the added chapter D of the law allowed holding 'infiltrators' in an "open" detention center for 20 months. The constitutionality of the amendment was now challenged, for the third time, in *Desta*. By now, the petitioners have already accumulated substantial experience with the way this chapter of the law was implemented, in its present and old versions, and with its actual results on the ground, and so they could now support their claim about the hidden purpose of the law with conclusive evidence. Most telling of these evidence, was not the decisive number of detainees in the '*Holot*' "open" detention center who have 'voluntarily' returned to their countries of origin, but the actual composition of the "open" center's population; it appeared to be that in contrast to their relative number in the

¹³⁹ See: R Ziegler, 'In the Land of Hidden Legislative Aims: HCJ 8665/14 (detention of asylum-seekers in Israel – round 3)', Versa, 4 Sep. 2015 – <http://versa.cardozo.yu.edu/viewpoints/land-hidden-legislative-aims-hcj-866514-detention-asylum-seekers-israel-round-3>

¹⁴⁰ *Eitan*, preamble 113 to justice Vogelman's central opinion

¹⁴¹ *Eitan*, preamble 27 to Chief Justice Grunis' opinion

general population of migrants in Israel, 76% of the detained ‘infiltrators’ in ‘*Holot*’ center were Sudanese, and the rest were Eritrean. Even though the State refrains from expelling both, Eritrean nationals are covered by a temporary protection regime while Sudanese are allegedly not being expelled only due to the lack of diplomatic relationship between Israel and Sudan. In that way and others, they have seemed to be targeted by the MOI, who may assume that they are the less resistant of the two groups – an assumption corresponding with the fact that many more Sudanese nationals have in fact ‘voluntarily’ returned to their country of origin.

Not only these circumstantial evidence were added in support of the petitioner’s consistent claim, but also the minister of Interior’s public statement on the day the Court issued its ruling in *Eitan*, saying that the annulled law had given a substantial contribution to the furthering of ‘voluntarily return’ of the ‘infiltrators’ being held in ‘*Holot*’. On top of it, the petitioners have handed the Court affidavits of several detainees in ‘*Holot*’, claiming that the staff in the detention center is applying constant and unfair pressure on them to give up their asylum requests and to ‘voluntarily’ return to their countries of origin.

Apart from chief justice Naor, who assertively concluded that “*I have not reached the conclusion that the current law is meant to break the spirits of the infiltrators*”, other judges seemed to be taken, not to say convinced, by the petitioners’ claim about the hidden purpose of the law¹⁴². From their conclusive argumentation it is hard to understand though, why have not a single one of them affirmatively accepted the validity of that claim and so proclaimed the chapter is void altogether for notwithstanding the condition regarding a proper purpose. So goes, for example, justice Vogelam:

“...despite the state attorney’s statement in the procedure at hand, according to which “of course of course of course” that no action is or will be taken to break a person’s spirit...the state did not relate to the appellants” concrete claims – which were backed by affidavits- according to which heavy pressure to leave the country was indeed put on them...the question regarding the identities of the people being sent to ‘*Holot*’ and the criteria determined in that regard by the administrative authority, is still with us since *Eitan*...once again I do not seek to replace that question mark with an exclamation mark and rule about the existence or absence of that claimed purpose... however, I believe that even if we’re unable to determine that the purpose of chapter D of the law is “applying pressure” on the infiltrators to agree to leave Israel, enough was said so that we may hinder from any positivistic ruling in this matter.”¹⁴³

What seems odd is that from the culmination of the supporting figures and the many doubts arisen, justice Vogelman failed to reach the positive conclusion that the law’s actual purpose is

¹⁴² *Desta*, preamble 81 to Chief justice Naor’s central opinion

¹⁴³ *Desta*, preamble 26, 27 to justice Vogelman’s opinion

to further ‘voluntarily’ return of the detained ‘infiltrators’. What is even harder to understand is how justice Vogelman permits himself to leave a question mark where he is supposed to consider and reach a concrete conclusion on a matter so inherent to the constitutional examination that the Court is supposedly doing.

Justice Amit’s rhetoric is even more decisive, and yet, he too refrains from giving a conclusive answer in regard to the claim about the hidden purpose of the law –

“The current law uses a method of ‘centrifugal circulation’ by way of extracting the infiltrators from the cities’ centers, centrifugally waving them to the end of the desert for 20 months, and from there back to the cities’ centres, while extracting others from the cities’ centres to ‘fill in the gaps’ in the incarceration facility. This winding path... arouses the suspicion that perhaps behind the stated purpose of preventing infiltrators from settling down, hides a purpose of ‘kicking them around’ and breaking their spirit, as was claimed by the appellants. Therefore I join the question mark brought up by judge Vogelman in his deliberation in the purpose of encouraging voluntary departure, in regard to the gap between the stated and the actual purposes of the law.”¹⁴⁴

The negligence of the administrative authority in reaching decisions regarding the detainees’ asylum requests, and the virtually nonexistent refugee recognition rate in relation to the extremely low number of decisions that are being taken, are augmented in justice Meltzer’s doubts regarding the real purpose of the law, but he, like his colleagues, is yet again somewhat reluctant in reaching positive findings about the subject matter –

“The non-treatment, in our context, may imply that the proper purpose that was stated (prevention of settling down in cities’ centers) – is in fact not the main purpose, and that there are other hidden purposes, no lesser in importance than the stated one, in pursuit of which the state acts, as it seems, in contradiction to its authorities’ commitments as are derived from Basic Law: Human Dignity and Liberty (paragraph 11), and in alleged contradiction to its international commitments, which it has taken upon itself in joining the Refugee Convention (and which Israel and different other Jewish organizations took part in its initiation and articulation”)¹⁴⁵.

What might explain this anomalous failure of the judges to coherently follow their reasoning and positively determine that the purpose of the law is to generate a constructive-expulsion of the detainees? – In my view, the sudden reluctance of the judges from refuting the formal position of the state on this contentious matter stems from the intimate relevance of that issue

¹⁴⁴ Desta, preamble 5 to justice Amit’s opinion

¹⁴⁵ Desta, preamble 13 to justice Metlzer’s opinion

to Israel's compliance with the provisions of the Refugee Convention, and more specifically, with the fundamental principle of *non-refoulement*. While annulling the law or some parts of it due to its un-proportionate limitation on the constitutional rights of the detainees didn't require the judges to determine whether those detainees are asylum seekers and refugees or merely migrant workers, doing the same but for the fact the law has the illegitimate purpose of furthering a constructive expulsion would inherently imply that those detainees are in fact asylum seekers and refugees whose expulsion is then unacceptable. In other words, bypassing this argument suits perfectly the judges' governmental-minded approach on issues that relate to the core of international refugee law – recognition and *non-refoulement*¹⁴⁶. For them, acknowledging the state's hidden purpose in this case, is equally acknowledging also its illegality *directly due* the *non-refoulement* principle and its applicability to the so called '*infiltrator*', but here I would assume that by keeping this issue 'under the rug' by "staying doubtful" about the state's intention to practically commit an act of *non-refoulement*, they also hinder from igniting that cascade of syllogisms which will eventually lead to the inevitable conclusion, that those detainees at stake are in fact Refugees.

Somewhat surprisingly, justice Meltzer was not the only judge to attribute his suspicion also to the virtual zero recognition rate of asylum seekers as refugees by the administrative authority. Justice Haiut was just as much preoccupied with those figures –

*"In the face of the state's conductance regarding Eritrean and Sudanese nationals, it seems that these nationals are trapped in an ongoing and impossible state of normative mist regarding their status...on the one hand they are not directly deported to their country of origin due to practical obstacles (North Sudan) or due to the conditions in their country of origin and the non-refoulement principle (Eritrea), but on the other hand the state doesn't rule within a reasonable time-frame regarding the asylum requests they have filed, and when it finally does, it validates only a negligible percentage of them which is something that arises questions in light of the recognition rates of asylum requests filed by people of those same nationalities elsewhere in the world"*¹⁴⁷.

In response to that harsh critique of the judges, Avi Himi, chairman of the advisory committee on refugees reporting to the Minister of Interior, seems to have no interest at all in downplaying the judges' complicity in the 'denial of refugee-hood', and so he states the obvious –

¹⁴⁶ That this matter is of primary importance for the asylum seekers detainees – seems fairly obvious. Haaretz's investigation on the fate of Eritrean and Sudanese detainees who 'voluntarily' left Israel to a third country shows that their departure, facilitated by the state, was to Ethiopia or Ruanda, where no formal status was granted to them, thus risking them with expulsion back to their countries of origin – see: I lior, '*Israel is sending asylum seekers to Rwanda without status*', Haaretz, 4.4.2014

¹⁴⁷ Desta, preamble 3-4 to justice Haiuth's opinion

*"The committee's decisions are subdued to legal review from the courts, who have generally, if not completely, accepted the advisory committee's stances, since those stances are written based on international law and rules of morals and justice, without any agenda or anything else."*¹⁴⁸

The judges' sudden eruption of interest in the illusionary recognition rate at first instance is not only ironical due to the mere illusionary recognition rate at the Court level – which should have also raised questions about the Court, given the much higher recognition rate on appeals in other countries¹⁴⁹ – but also and especially because in different cases the Courts have established their own revocations of asylum requests *based* on this virtually nonexistent recognition rate of the administrative authority whose decisions they reviewed –

*"The presumption embedded in the appellant's claims, as if asylum seekers should be treated as refugees, is not anchored neither in the refugee convention nor in Israeli law. Noteworthy in this context is the fact that out of all of the asylum requests inspected, a very minor, almost non-existent number, was approved. And there are indications that most of the infiltrators have come to Israel for the purpose of working and improving their standard of living."*¹⁵⁰

In comparison to the many judgments which routinely upheld the administrative standard-negative decisions, or simply recast the case back for reexamination at first instance – what was, if anything, so different about the two single judgments of the Court ordering the government to grant someone the refugee status?

¹⁴⁸ I Lior, *'one month after the chairman of the advisory committee's resignation, no successor was appointed'*, Haaretz, 20.8.2015

¹⁴⁹ Eurostat provides date on the recognition rate at the appeal level in Member States of the EU. Since the Asylum Procedure Directive does not contain harmonized standards for the arrangement of the appeal procedures , and due to the consequent discrepancy between the appeal mechanism in different Member States, as well as for lack of sufficient data regarding several MS – "Eurostate data regarding second instance decisions is therefore difficult to analyze". Bearing that in mind, recognition rates for the Geneva Status granted by the appeal bodies in 2012 are as follow : France – 12%; Germany – 7%; Sweden – 5%; UK – 25%; Belgium – 2%; Austria – 16%; Romania – 7%; Greece – 11%; Denmark – 15%; Italy – 4%; Poland – 2%; Luxembourg – 1%; Ireland – 7%; Hungary – 5%; Finland – 27%; Slovakia – 7%; Latvia – 10%. Recognition rate on appeals in the following MS is around 0%: Cyprus, Czech Republic, Lithuania, Portugal, Slovenia, Bulgaria and Estonia. Notwithstanding the significant differences within the first group of MS, it is nevertheless clear that the recognition rate on appeal in all of these countries is substantial and of course many times higher than the Israeli one. Regarding the second group of MS which dubious recognition rate on appeal resembles the Israeli one: first, in most of the abovementioned countries the total number of appeals examined by the competent appeal bodies amounts to only some few dozen. Second, the extremely low recognition rate may reflect the profiles of the applicants whose appeals are reviewed. At the same time, Eritreans and Sudanese, whose recognition as refugees is extremely high all over the world, constitute 90% of the asylum seekers' population in Israel. Third, my essential claim about the anomaly in relation the reluctance of the Israeli Court to intervene in administrative asylum decisions is based on the Image and the actual record of the Israeli Court as for being one of the most daring, pro-active, in the world. It is hard to establish whether such a claim is valid also in relation to the Bulgarian or the Slovenian Courts, for example. See: Data Source – Eurostate, in EASO Annual Report on the Situation of Asylum in the European Union 2012, Publication office of the European Union, 2013, p.25, 101

¹⁵⁰ The District Court of Beersheba – sitting as Court of administrative matters – Case 34577-01-14, *Haron Ali v. the ministry of Interior*(19.8.2014)

Neither in the framework of *Hernandez*¹⁵¹ nor in *Barhana*¹⁵² are there any direct allusions to the Holocaust. But such references, as we have seen, are not to be found also in the vast majority of the court's rejectionist decisions. Conversely, what seems to be a corner stone of virtually all of the court's decisions on asylum cases - a short exposition of the Jewish context of the Refugee Convention – is missing in those two extraordinary decisions. Here, justices Marzel and Amir restricted themselves to the question – what is the law? And they answered – the Refugee Convention. Nothing more on the history of the convention. And what they did next was striving to apply it to the case at hand, without making recourse to any extra-judicial sources. Moreover, it seems that these two judges are relatively more-keen to conduct a comparative examination of international refugee law and its customary interpretation.

Generally speaking, the judges in these cases did nothing more than to apply the conventional, widely accepted standard of burden of the proof regarding the petitioners' seemingly well-founded fear of being persecuted, and giving them the benefit of the doubt where they were entitled to enjoy it. But the fact is that apart from one single verdict which wrongly sets forth a requirement of objective documentary evidence to support the applicant's claims¹⁵³, no other judge has ever spoken out about derogating from the customary principles in this field of law and the wide accepted standards stemming from them. But it does not mean the judges do not do exactly that; I could not find but one single judgment in which the judge had seemed to mistake fear for one's life with the much larger bundle of rights whose infringement also constitutes persecution, and in that case, since justice Ohad "...do not get the impression that her life will be in danger in her country of origin", she said to be convinced "...that this is a false appeal"¹⁵⁴. But, again, under their magnitude-scaling glasses, it seems from the record that justice Ohad simply cannot be the only judge to look solely for signs of threat to life while overlooking fear of being persecuted in a less than a fatal way.

In other words, the Israeli judges are real *Feinschmeckers*, they talk the talk of international refugee law, but they are not truly committed to its framework. They are secretly attached to

¹⁵¹ The District Court of Lod – sitting as a Court of administrative matters – Case 3415-05-10, *Hernandez v. the Minister of Interior* (August 2011)

¹⁵² The District Court of Jerusalem – sitting as a Court of administrative matters, Case 729-09-11, *Barhana v. the Minister of Interior* (December 2011)

¹⁵³ - "It is expected from someone raising such claims to support them with documents which prove at least the actual approach to the police, if not the way in which the police had handled the matter. In reality the appellant has not provided any documentation, neither of his going to the police nor of the way he was assisted by the police in leaving Nigeria... the simple fear of the appellant for his peace if he stays in the capital region of Nigeria, not supported by any objective evidence, does not comply with the treaty's demands even if there's truth in the claim that the appellant is in danger in his area of residence, even if we could have said (which we namely can't) that the reason for persecution is found within the treaty's definition. The outcome of those is that the appellant has failed to prove that his life is in danger if he is deported to Nigeria..." - The District Court of Jerusalem – sitting as a Court of administrative matters, Case 31600-03-11 *Okphor v. the Minister of interior* (September 2011). Compare: Note on Burden and Standard of Proof in Refugee Claims, HNHCR, Geneva (16 December 1998)

¹⁵⁴ The District Court of Lod – sitting as Court of administrative matters, Case 47890-03-11 *Slada v. the Ministry of Interior* (March 2011). This short verdict lacks even the most trivial factual background – which is the appellant's country of origins?

another framework, to the ‘Holocaust framework’. The only difference between the two extraordinary decisions of the Court that recognized asylum seekers as refugees, and all of the many other rejectionist decisions issued by the Courts, is that justices Marzel and Amir had applied the respective norms of international refugee law also *de facto*. Since the Israeli judges usually display a pro-active, very daring approach in almost all other cases, we cannot attribute their reluctance to interfere in administrative asylum decisions to some sort of general incompetence or lack of independence. According to the Supreme Court’s case law, which was quite ironically mentioned by justice Haiut in relation to the doubts arisen by the nonexistent refugee recognition rate at first instance, in comparison to other countries – “*The end indicates the beginning*”¹⁵⁵. Now it seems appropriate to ask - what does the nonexistent refugee recognition rate at the Court level may tell us about the Israeli- judges? I believe that the outcome of virtually all asylum appeals, that is, the somewhat inevitable final negative decision on practically all asylum application considered by the Courts, indicates the commitment of the Israeli judges to the Holocaust framework with its ideological pressing imperatives rather than to the international refugee law and its appropriate implementation.

¹⁵⁵ HCJ 11163/03 *High Follow-Up Committee for Arab Citizen of Israel v. the Prime Minister* (27.2.2006), in Desta – Preamble 3 to justice Haiut’s opinion

6. Conclusion

The Illusory asylum appeals brought before the Courts lead us to the judges' commitment to the 'Holocaust Framework', and to their deep ideological conviction about the Holocaust's uniqueness. The Activities of other Israeli and Jewish actors who further this sacred perception of the Holocaust in different fields constitute together a paradigm of rejection and reluctance to acknowledge and recognize the suffering of others for what they really are, a paradigm that seems to correspond perfectly with the Israeli judges' exclusionary approach vis-à-vis asylum seekers. The centrality of past persecution and refugee-hood in the collective memory of the Israeli-Jewish public, the ideology and the political aim of the notion of its uniqueness, and the historical Jewish context of the Convention - serving as a nexus between past and contemporary refugee matters, all explain why not recognizing present-day asylum seekers as refugees is tantamount to preserving the uniqueness of the Holocaust, which in turn is an invaluable and indispensable political tool, or rather a cynical yet extremely efficient political leverage, being used time and again by those Jewish and Israeli actors in their different fields and realms. This L.LM thesis has put forward an examination of several telling allusions to the Holocaust found only in a number of cases, where judges seemed to believe that their ruling is favorable for the asylum seeker in regard to her pressing needs, and thus permitting themselves to reveal the subtle connotations triggered in them when they think of present day asylum seekers.

But these allusions may be peculiar and strident enough in the given context - that of the apparent inexorable refusal of Israeli institutions to actually implement a treaty which is said to be a direct derivative of the Jewish holocaust, so that we may inspect them with due seriousness and come to the conclusion, that as ironic as it may be, there is a profound bias found in the Israeli judges' considerations when they finally get the chance to make a change and show the benevolence their ancestors once craved for. And sadly enough, these just might be their ancestors' phantoms in the old photographs, with their striped prisoner uniforms, the yellow badge on their chest, and the sign saying *Arbeit Macht Frei* behind them, unwantedly preventing them from doing so. Them, and the quiet machinery of indoctrination built around them.

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