

מוקד סיוע לעובדים זרים (ע"ר)

"וגר לא תונה ולא תלחצנו כי גרים הייתם
בארץ מצרים", שמות כ"ב, פסוק כ'

March 9, 2009

Israel's non-compliance with Article 3 of the Convention - the prohibition on non-refoulement

1. General

During the last 2 years Israel deported at least 145 African asylum seekers to Egypt, soon after they have crossed the Egypt-Israel border. The deportees were deported with little or no procedures to ascertain whether the deportation will expose them to the risk of persecution, torture or subsequent refoulement to places of danger. Some of the deportees were subsequently deported by Egypt to their country of origin (mostly - Eritrea and Sudan), where they face the risk of torture and indefinite detention in cruel and in-humane conditions.

Israel maintains it has reached "diplomatic understandings" with Egypt, which permits it to deport the asylum seekers. Egypt denied it had ever agreed to readmit the deportees. Despite this fact, and ignoring the information regarding subsequent deportations by Egypt, Israel continues with the deportations. Following a petition served by 5 Israeli NGOs to the High Court (HCT 7302/07 *The Hotline for Migrant Workers and others v. The Minister of Defense and others*, pending)¹ the State initiated a new procedure entitled: "Coordinated Immediate Return" (Permanent Operational Order 1/3.000, November 2007). However, this procedure does not meet basic international standards, is not geared to identify potential torture victims and is implemented in the field by IDF soldiers who have not received adequate training.

¹ This petition was served on August 2007, soon after the summary deportation of 48 asylum seekers to Egypt. Although 18 months passed, the Court has not yet rendered its decision and refused the petitioner's repeated attempts to issue an injunction which will bar further deportations to Egypt. Four hearings were held so far (on 24.9.07, 27.2.2008, 7.10.2008 and 2.3.2009), however, there is no indication the Court will accept the petition as an "order to answer" which is a pre-condition for accepting a petition was never issued.

Israel's procedure of "Coordinated Immediate Return" is part of a current governmental proposal for legislation (Prevention of Infiltration Law, 2008).

In addition there is a credible testimony of the deportation of 2 Sudanese asylum seekers to Gaza strip during 2003. The asylum seekers were transferred to the hands of the Palestinian Authority and as a result suffered torture and prolonged detention in cruel and inhumane conditions.

This brief is presented by the 2 Israeli NGOs (hereinafter: "the authors"): The Hotline for Migrant Workers, a non-Governmental organization dedicated to protecting the rights of migrant workers and refugees and eliminating human trafficking in Israel. The Refugee Rights Clinic at the Buchmann Faculty of Law, a legal aid and advocacy program devoted solely to the rights of refugees.

2. The lack of legislation, procedure or regulations which would ensure the implementation of the principle of non-refoulement

Israel is signatory both to the Convention against Torture and the 1951 Refugee Convention. However, Israel implemented neither of the Conventions in enabling legislation. The failure to incorporate the Convention into domestic law was criticized by the Committee in the past.²

Although the principle of non-refoulement was recognized by the Israeli High Court as a binding principle,³ there is currently no legislation, regulations or procedures in place to ensure that the principle is adequately implemented by the various authorities. Moreover, article 11 to the Governmental law proposal: Proposal for a Law for the Prevention of Infiltration, 2008 reads as follows:

"(a) Where an authorized officer learned that the infiltrator had recently entered Israel, he may order his immediate return to the country or region from which he had infiltrated to Israel, provided that such return would be preformed within 72 hours from the time the policeman or the soldier had a reasonable basis to suspect that the person had infiltrated to Israel.

² CAT A/57/44 (2002), para. 53 (a).

³ HCt 4702/94 *El Tai and others v. The Minister of the Interior*, PD 49 (3) 843, 848

(b) There is nothing in this article which derogates from article 13j to the Entry to Israel Law."⁴

Although the explanatory note to the Proposal declares that the return would be preformed "in a manner which is compatible with Israel's obligations under international conventions, including the principle of non refoulement enshrined in the 1951 Convention Relating to the Status of Refugees",⁵ this important restriction is not included as part of the proposed legislation and is therefore not part of the law.

The Proposal for a Law for the Prevention of Infiltration, 2008 was approved in the first reading by the Knesset on 19.5.2008 and is currently being prepared for second and third readings.⁶

3. Background: The arrival of growing numbers of migrants, asylum seekers and refugees during 2007, 2008

During the last two years there was a substantial increase in the number of migrants, asylum seekers and refugees who arrive to Israel from Egypt via the Sinai border. In November 2008 The Government reported that 6,900 people "infiltrated"⁷ to Israel during 2008 and that 75% of them are from Eritrea and Sudan. According to the Government there has been a 30% increase in comparison to the number of arrivals during 2007 (5,208 people).⁸ For comparison, the number of asylum seekers arriving during 2006 was 1,348 and in 2005 was 909.⁹

⁴ Official Gazette of Government Law Proposals 318, published on April 1, 2008, p. 548 (Hebrew, we provide a free translation). Article 13j to the Entry to Israel Law, mentioned at sub-section (b) allows a police officer to order the immediate deportation of a Palestinian who stays illegally in Israel.

⁵ Id. P. 555.

⁶ A law is legislated after it had received a majority of votes in three readings.

⁷ The term "infiltrator" is used by the Government indiscriminately to describe any person entering Israel illegally. The authors object the use of this term, since it incriminates and stigmatizes migrants, refugees and asylum seekers as felons. The term "infiltrator" is derived from the 1954 Prevention of Infiltration law (felonies and jurisdiction), a security-related law, which prescribes a 5 year penalty for this felony. The 1952 Entry to Israel law, which is Israel's regular immigration law, uses the term "persons who stay illegally in the country" and prescribes a penalty of 1 year imprisonment.

⁸ Complementary Announcement by the Respondents in HCt 7302/07 Hotline for Migrant Workers and others v. the Minister of Defense and Others, submitted on November 18th, 2008, article 20. In a recent interview to "yediot Ahronot" Mr. Yaakov Ganot, head of the Immigration, Population and Border Crossing Authority reported that the number of people arriving illegally to Israel is currently 600 per month (Nir Gontaz, "The Gate Keeper", Yediot Ahronot, February 15, 2009 (Hebrew)).

⁹ State Comptroller, Annual Report 58B for the year 2007 and the fiscal year 2006, published May 20, 2008, available at:

<http://www.mevaker.gov.il/serve/contentTree.asp?bookid=514&id=57&contentid=&parentcid=undefined&sw=1024&hw=698> (Hebrew). It should be acknowledged that since the information regarding 2005 and 2006 is

Most of the arrivals during 2007 and 2008 were Sudanese and Eritrean nationals. According to UNHCR – Israel, at the end of 2008 there were 16,403 asylum seekers in Israel, the two largest nationalities are Eritreans (4,963) and Sudanese (4,418). Israel recognized that deportation of Sudanese and Eritrean nationals may expose them to various risks and therefore defers their deportation proceedings (if they are inland, they may however be deported if they are captured on the border). Unlike asylum seekers of other nationalities, they do not undergo RSD procedures.¹⁰

The growing numbers of migrants, asylum seekers and refugees who cross the Egypt-Israel border clandestinely has led to serious human rights violations along the border by both Egyptian and Israeli authorities. A recent comprehensive report, published by Human Rights Watch, recorded 33 fatalities by Egyptian border guards from June 2007 to November 2008, dozens more were wounded.¹¹ Other violations on the Egyptian side include: Use of military tribunals to try civilians who attempted to enter Israel; separation of family members, denial of access to asylum procedures and harsh and inhumane detention conditions.¹²

This brief, however, focuses on the actions of the Israeli authorities in response to the arrival of thousands of migrants, asylum seekers and refugees in the context of article 3 to the Convention against torture. Although we focus on the situation along Israel's southern border, it is useful to begin the discussion with an over-view of the risk of non-refoulement in three different situations:

- (a) Aliens detained inland for illegal stay
- (b) Aliens who arrive at a formal port of entry
- (c) Aliens who cross the border clandestinely

derived from a different source than the information regarding 2007 and 2008, there may be some discrepancy in the criteria used for documenting the phenomenon.

¹⁰ Since the Entry to Israel Law prescribes that immigration-related detention may be used only when the deportation is imminent, Sudanese and Eritreans are typically released from detention once their nationality is ascertained. They are given a "conditional release visa" which formally does not allow them to work. They are subjected to geographical limitations prohibiting them from entering the center of Israel (except for meetings at the UNHCR's office in Tel-Aviv) and they have no access to health services.

¹¹ Human Rights Watch, Sinai Perils – Risks for Migrants, Refugees and Asylum Seekers in Egypt and Israel, November 12, 2008, found at: <http://www.hrw.org/en/reports/2008/11/12/sinai-perils-0> p. 1, see annex at page 89 for a list of fatalities.

¹² Id. Chapter VI, p.61-71

4. The risk of article 3 violations regarding aliens who are in Israel or arrive to Israel

(a) Aliens detained inland for illegal stay

Aliens detained inland in Israel would normally be able to raise any fears of torture or persecution as a result of their deportation prior to being deported. The 1952 Entry to Israel Law prescribes that a deportation of a person will only be carried out three days after the deportation order was issued and delivered.¹³ The Law does not include any orders requiring the Ministry of the Interior to verify prior to the deportation that the deportation will not violate article 3 obligations. The burden to raise any such concerns is left for the individual, who might be too traumatized, scared or confused to voice her fears. Normally the deportation procedures are lengthy. The detainee would be brought before the Tribunal for the Review on the Detention of Undocumented Migrants.¹⁴ The adjudicators of this tribunal are only authorized to review the necessity of the detention, however, if they learn that the person fears being returned to her country of origin, they would advise her to seek asylum with the local UNHCR office.¹⁵ UNHCR may ask the Ministry of the Interior to stay the deportation for the duration of the examination of the asylum application. This understanding between UNHCR and the Ministry of the Interior was subject to increasing pressure recently. The Hotline for Migrant Workers is aware of at least dozen cases in which asylum seekers were deported despite the fact that their asylum applications were still pending. In other cases, UNHCR had to make last-minute emergency interventions to prevent the deportation of asylum seekers whose applications were still pending.

Palestinian nationals who are detained in Israel for illegal stay do not enjoy even the minimal form of protection in the form of a three days waiting period before their deportation is executed. The Law allows a police officer to order their summary deportation immediately.¹⁶

¹³ Article 13(d), the 1952 Entry to Israel Law

¹⁴ This administrative tribunal was established in a 2001 amendment to the Entry to Israel Law (Entry to Israel Law, Amendment no. 9), 2001 and was incorporated in the law. A recent Amendment enacted in July 2008 orders that all detainees would be brought before the Tribunal for the Review on the Detention of Undocumented Migrants within 96 hours from their arrest (article 13(n)(a)).

¹⁵ According to Israel's 2002 "Regulations for the Treatment of Asylum Seekers in Israel" applications for asylum are filled with UNHCR which interviews the applicant and provide a recommendation to a governmental committee. This committee ("The Refugee Advisory Committee") makes a recommendation to the Minister of the Interior who makes the final decision whether to grant the applicant refugee status.

¹⁶ Article 13(j) to the Law.

On several recorded occasions, the police deported gay Palestinian men, despite their claims that the deportation would risk their lives.¹⁷

(b) Aliens who arrive at a formal port of entry

Israel maintains a wide discretion to refuse entry to any person arriving at a formal port of entry. Applying for protection at an entry port is precarious. A recently updated procedure issued by the Ministry of the Interior prescribes that when a person arrives to a port of entry and claims she is seeking asylum, her entry would be delayed until the issue is examined by the UNHCR and other governmental authorities.¹⁸ The procedure does not include any specific orders regarding the examination which should be performed; the detention of the asylum seeker; access to legal aid; legal remedies when the application is refused, etc.

In a recent case the authors had to petition the Tel Aviv Administrative Court after the Ministry of the Interior refused to allow UNHCR to complete its examination in the application of an asylum-seeker from Sri-Lanka and were about to deport her.¹⁹

(c) Aliens clandestinely crossing the borders

As mentioned above, during the last two years, Israel summarily deported to Egypt at least 145 African migrants, asylum seekers and refugees. This action was officially sanctioned by the Legal Advisor to the Government, attorney Menahem Mazoz, who at an internal inter-governmental agencies meeting on the "handling of infiltrators via the Egyptian border" dated March 1, 2006, summarized the following:²⁰

...3. The "Hot Return" procedure – without going into the details of the practical and security challenges involved, there is no legal impediment to return to Egypt an infiltrator who was captured soon after the infiltration. Such return does not require a deportation order or any other procedure. Legally this is a

¹⁷ Nowhere to Run – Gay Palestinian Asylum Seekers in Israel, Kagan M. and Ben-Dor A. The Public Interest Law Resource Center, Tel Aviv University, 2008, found at: <http://www.law.tau.ac.il/Heb/Uploads/dbsAttachedFiles/NowheretoRun.pdf> at page: 21-22.

¹⁸ Procedure for treatment of Asylum Seekers in Israel and those who were recognized by the Minister of the Interior as entitled to asylum in Israel, procedure 5.2.0012 (Hebrew), found at: [http://www.pnim.gov.il/Apps/PubWebSite/publications.nsf/All/A5C1B2D4AD341823422570AD004311F4/\\$FILE/Publications.2.0012.pdf?OpenElement](http://www.pnim.gov.il/Apps/PubWebSite/publications.nsf/All/A5C1B2D4AD341823422570AD004311F4/$FILE/Publications.2.0012.pdf?OpenElement), para. C(6).

¹⁹ AD (Tel Aviv) 2595/08 *Araziga v. The Minister of the Interior*, on October 3, 2008 the Court issued an interim order delaying the petitioner's deportation and enabling the examination of the asylum application.

²⁰ The Legal Advisor for the Government office, protocol dated March 16, 2006 re: "Handling of infiltrators via the Egyptian border" (Hebrew, copy with the authors).

process of prevention of entry and not deportation from Israel. It is emphasized that using this procedure is conditioned upon certain proximity of time and capturing place.

4. In addition, actions should be taken vis-à-vis the Egyptian authorities, including via diplomatic channels, to reach coordination regarding the return to Egypt of Sudanese and other infiltrators who infiltrated to Israel via Egypt. A systematic return would create an effective deterrence from infiltrating due to the high cost of the infiltration for the infiltrator (the payment to the border smugglers).

When the authors learned about this new directive, which was quoted by the former Minister of the Interior, Mr. Bar-On during a Knesset hearing,²¹ they immediately wrote to the Legal Advisor to the Government and warned that the Non-Refoulement principle applies as soon as a person presents himself at the border, and that summary rejection at the border might lead to violation of Israel's international obligations.²² Only on February 15, 2007 the State Attorney office replied that since no "Hot Returns" are currently carried out, the office will not answer the principled objection at this time. The letter added that in the past a procedure was instated requiring coordination vis-à-vis the Egyptian authorities for the return of an infiltrator, soon after the infiltration and under the condition that Egypt will assume responsibility for the safety of the returnees. The letter concluded that when Israel operates to prevent entry or to deport an infiltrator who had entered its territory, in coordination with the country from which he arrived, and in accordance with the rules of the international laws, this action is permitted.²³

First recorded summary deportation - 6 Eritrean nationals, April 26, 2007

According to information provided to the Hotline for Migrant Workers by reserve soldiers, at the night of 25.4.2007-26.4.2007 six Eritrean nationals were detained in Israeli territory by IDF soldiers. Despite the fact that the Eritrean nationals claimed they have come to seek

²¹ 14th. Meeting of the 17th. Knesset, Proposal for the agenda: The incarceration of refugees from Darfur in Israeli prisons, May 24, 2006, found at (Hebrew): <http://www.knesset.gov.il/Tql/mark01/h0028469.html#TQL>

²² Authors letter to the Legal Advisor to the Government re: "Disputing the legality of the "Hot Return procedure" dated June 1, 2006 and subsequent reminders dated July 24, 2006, January 11, 2007.

²³ The State Attorney's Office, re: "Disputing the legality of the "Hot Return" procedure", letter dated February 15, 2007 (Hebrew, copy on file with the authors).

asylum, an order was given to deport them back to Egypt. Since the reserve soldiers refused to carry out the order, regular service soldiers were brought in and after examining the passports and papers of the asylum seekers, they forced them back to Egypt. A complaint about this incident was filed by the authors on April 29, 2007 to the Legal Advisor to the Government. A reminder was sent on May 15, 2007 but to this day, the Legal Advisor to the Government or the Chief Military Counselor did not reply.

Second recorded summary deportation - 48 African nationals, August 18, 2007

At the night of August 18, 2007 Israel summarily deported to Egypt 48 African nationals (according to later information 44 of them were Sudanese nationals, 23 of the group were previously registered by UNHCR-Cairo as asylum seekers).²⁴ In response to the author's urgent inquires, the State Attorney's office replied on August 26, 2007 that on the night of 17.8.2007-18.8.2007 IDF forces captured 51 infiltrators: 44 Sudanese nationals, 3 Ivory-Coast nationals, 3 Eritrean nationals and 1 Somali national. All were questioned soon after they were captured in English or Arabic and their personal details were recorded (country of birth, number of ID or passport). The IDF reported that at this stage none of the infiltrators raised a claim regarding any risks he would face in Egypt. The infiltrators were then taken to an army camp to provide for humanitarian needs (rest, food, drink, etc). On August 18th at 23:30 after diplomatic negotiations, 48 of the infiltrators were returned to Egypt. The 3 Eritrean nationals were not returned since they objected to the return (apparently - physically) and claimed their lives would be in danger. The letter concluded that the State Attorney believes all actions to be legal.²⁵

Soon after receiving this reply, a petition was served to the High Court of Justice by 5 Israeli NGOs in an attempt to declare the procedure of "Hot Return" illegal (HCt 7302/07 mentioned above).

Third recorded summary deportation - 91 African nationals deported at 4 incidents (August 23, 26, 27, 29, 2008)

These deportations were reported to the High Court after the petitioners learned about them from soldiers in the field. In response to an urgent request for an injunction barring the hot returns the State submitted an affidavit made by Brigadier General Yoel Strick (a copy of the

²⁴ Human Rights Watch, Sinai Perils report, ft. note. 11.

State's submission is attached and is marked as **annex "a"**). It should be clarified that at this time, the State had instate the "Coordinated Immediate Return Procedure" (detailed below, this procedure was prepared following a High-Court decision requiring the State to prepare a procedure which will differentiate, at the border, between asylum seekers who need protection and others). In his affidavit, Brigadier General Strick admitted that the returns were not carried out according to the "Coordinated Immediate Return Procedure" however he claimed that none of the deportees raised an asylum claim. Finally Brigadier General Strick declared that the orders and procedures were reiterated to the field forces.²⁶

After receiving this affidavit, the authors filed a complaint with the Chief Military Counselor and demanded that legal action will be taken to investigate and punish the officers who violated the army procedure re "Coordinated Immediate Return Procedure".²⁷ This complaint was never answered.

Additional deportations may have taken place

It should be emphasized that many additional deportations may have taken place unbeknownst to the Israeli public or to the authors. The State maintains the returns to be legal and the High Court had so far refused the petitioner's repeated requests for an injunction barring such deportations. The "Coordinated Immediate Return Procedure" which will be described below does not involve any external authority (such as UNHCR or ICRC or any Israeli non-military entity) in the process. Therefore it is reasonable to deduce that other returns may have taken place unbeknownst to the authors.

5. The fate of migrants, asylum seekers and refugees who were returned by Israel to Egypt

At its initial response to the petition at HCt 7302/07 the State argued it had operated under a "diplomatic understanding" concluded orally between Egyptian President Husni Mubarak and

²⁵ Israel State Attorney Office, re: "The handling of infiltrators via the Egypt border in relation to HCt 7964/05, letter dated 26 August 2007 (Hebrew, copy on file with the authors)

²⁶ HCt 7302/07 State's response to the petitioner's request for an injunction dated September 1, 2008 (Hebrew, we attach the response and the affidavit in Hebrew as well as a free translation to English)

²⁷ 11 September 2008, authors letter to the Chief Military Counselor re: "Complaint and a request to initiate an investigation regarding the violation of IDF procedures and the return of potential asylum seekers in violation of the "Coordinated Immediate Return" procedure.

Israel's Prime-Minister Ehud Olmert. The State added that UNHCR – Cairo will supervise the fate of the returnees.²⁸

Contrary to the State's submissions, UNHCR - Cairo was not allowed access to any of the people who were deported by Israel to Egypt, and was unable to ascertain their whereabouts.²⁹ According to various sources, at least some of the people who were returned by Israel to Egypt were subsequently deported by Egypt to Sudan and Eritrea where they may face torture or indefinite incarceration under harsh conditions.³⁰

On November 3, 2007 Human Rights Watch reported that at least 5 of the people who were deported by Israel to Egypt were forcefully deported to Sudan after having spent several months in detention in Egypt.³¹

On February 26, 2008 an Associated Press essay quoted an Egyptian Foreign Ministry official who told the reporter that 20 of the deportees who were returned by Israel "were asked to leave" and were returned to Sudan".³²

On January 1, 2009 Human Rights Watch published that Egypt deported at least 45 Eritrean asylum seekers who were previously returned by Israel.³³

²⁸ HCt 7302/07 State response to the petitioner's request for an injunction, September 9, 2007 (Hebrew, copy on file with the authors).

²⁹ On December 17, 2007 the Head of Liaison office UNHCR Representation in Israel informed the authors that "UNHCR has yet to be granted access to the individuals to whom reference is made in your letter [the 48 people deported on August 2007 – the authors]" (copy on file with the authors). On November 27, 2008 the Head of Liaison office UNHCR Representation in Israel informed the authors: "UNHCR has informed the authorities that access has not yet been granted to the individuals who were returned from Israel. UNHCR does not have information about the identities of those persons" (copy on file with the authors).

³⁰ In early July, 2007, an Israel Radio report cited the Sudanese minister of interior as threatening to prosecute any Sudanese who had participated in an alleged Israeli plot encouraging their emigration in order to damage the Khartoum government's image. Sheera Claire Frenkel, Ilana Diamond, and Jerusalem Post staff, "Sudan: Israel encouraging emigration," Jerusalem Post, July 9, 2007. In July 2007, the Sudanese Refugees Commissioner, Mohammed Ahmed al-Aghbash, claimed that Sudanese refugees in Israel wanted to "implement Zionism agendas against Sudan," and called on Egyptian authorities to "firmly penalize any Sudanese refugees if they were found trying to infiltrate through Egypt into Israel." Agence France-Presse, "Egypt sends refugees to uncertain fate in Sudan," October 29, 2007, available at <http://www.reliefweb.int/rw/rwb.nsf/db900sid/EMAE-78FM49?OpenDocument>. Eritrea's harsh treatment of failed asylum seekers, draft evaders and deserters have been well documented, see: US State Department, 2008 Human Rights Report: Eritrea, found at: <http://www.state.gov/g/drl/rls/hrrpt/2008/af/119000.htm>

³¹ Human Rights Watch, Egypt: Do not return detained Sudanese, Government should provide UN access to 48 asylum seekers transferred by Israel, November 2, 2007, found at: <http://www.hrw.org/en/news/2007/11/02/egypt-do-not-return-detained-sudanese>

³² The Associated Press, Israel struggling to deal with influx of African asylum seekers, February 26, 2008 found at: <http://www.iht.com/articles/ap/2008/02/26/africa/ME-GEN-Israel-Escaping-Africa.php>

The US State Department's annual report on human rights practices published on 25 February 2009 included an incident of the detention of 23 Sudanese refugees in Sinai on August 26, 2008 and their subsequent deportation to Sudan on November 7, 2008 for allegedly crossing the border illegally into Israel.³⁴ The date of the detention of the 23 Sudanese (August 26, 2008) corresponds with one of the deportations described in Brigadier General Strick's affidavit.

In addition there are many reports indicating that during the last year Egypt returned dozens of Sudanese refugees and asylum seekers to Sudan and thousands of Eritrean asylum seekers to Eritrea.³⁵ As mentioned above, Human Rights Watch reported that migrants, asylum seekers and refugees who are caught in Egypt attempting to cross the border into Israel are tried by military tribunals; family members are separated from one another; access to asylum procedures is denied from people who were not registered with UNHCR prior to their detention, and many are deported without having had the chance to apply for protection; The detention conditions are harsh, medical services are inadequate and children are often detained with adults.³⁶

All those reports and others were brought to the knowledge of the State Attorneys and the High Court by the authors.³⁷ Nevertheless, the State continued to argue, at a hearing held on

³³ Human Rights Watch, Egypt: Stop deporting Eritrean asylum seekers, January 8, 2009, found at: <http://www.hrw.org/en/news/2009/01/08/egypt-stop-deporting-eritrean-asylum-seekers>

³⁴ US State Department 2008 Human Rights Report: Egypt, 25 February 2009, found at: <http://www.state.gov/g/drl/rls/hrrpt/2008/nea/119114.htm>

³⁵ OHCHR, High Commissioner for Human Rights urges Egypt to halt deportation of Eritrean asylum seekers, 19 June 2008, found at:

<http://www.unhcr.ch/hurricane/hurricane.nsf/view01/4F2034CEFE5D5462C125746D00415EBC?opendocument>; Amnesty International, Arbitrary detention/Fear of torture and other ill treatment - Up to 1,200 forcibly returned asylum seekers, 13 August 2008, found at:

<http://www.amnesty.org/en/library/asset/AFR64/004/2008/en/1a74a2e4-69ed-11dd-8e5e-43ea85d15a69/af640042008eng.html>; Human Rights Watch, Egypt: Investigate Forcible Return of Refugees to Sudan - Deported men and boys may face persecution in Sudan, 30 May 2008, found at:

http://hrw.org/english/docs/2008/05/30/egypt18977_txt.htm

³⁶ HRW, Sinai Perils report, ft. note. 11 supra, Chapter VI, p.61-71

³⁷ Authors letter to the State Attorneys dated August 27, 2008 re: "Information regarding the execution of "Hot Returns" during the last days"; Authors letter to the State Attorneys dated January 12, 2009 re: Demand for an immediate intervention to prevent the deportation of Eritrean asylum seekers who have been deported by Israel to Egypt, back to their country"; Authors letter to the State Attorneys dated January 27, 2009 re: "Demand for an immediate intervention to prevent the deportation of Eritrean asylum seekers who have been deported by Israel to Egypt, back to their country and for the cessation of further returns to Egypt; Authors letter to the State Attorneys dated February 17, 2009 on the same issue. The only response received was that the letters were presented by the State Attorneys to the authorized authorities.

October 7, 2008 at the High Court, that it considers Egypt to be a safe country. Attorney Yochi Gnessin, head of the Administrative Division at the State Attorney's office argued that Egypt is a safe country and that the High Court should refrain from declaring Egypt to be unsafe, since UNHCR had not declared Egypt to be unsafe. In a recent hearing held on March 2, 2009 State Attorney Gilad Shirman made the same argument and declared that 'if the UNHCR, which is an independent objective body, devoted to the protection of the rights of refugee, has not declared that Egypt is currently violating the Refugee Convention, the Court should refrain from making such a statement.³⁸ In both hearings the Court was warned by the State Attorneys of the diplomatic ramifications of openly criticizing Egypt.

6. Israel's reliance on a "diplomatic understanding" with Egypt, dated June 2007, regarding the safety of the deportees

As mentioned above, Israel's policy of Coordinated Immediate Returns is based on "understandings" made in June 2007 between Egypt's President Hosni Mubarak and Israel's Prime-Minister Ehud Olmert. On July 1, 2007 the Prime-Minister's Spokesperson published the following announcement:³⁹

Prime Minister Olmert updated those present on his understanding with Egyptian President Hosni Mubarak, according to which Egypt will receive back infiltrators who cross the common border as well as all those who cross it in the future, and will work to prevent future infiltrations from its territory.

The authors requested further details and asked for a copy of the "understandings". The PMO Legal Advisor office replied that the agreement was not made in writing.⁴⁰

³⁸ In his argument attorney Shirman referred to a letter signed by Mr. Michael Bavly, former Honorary Correspondent of the UNHCR office in Israel, dated July 23, 2007. In this letter Mr. Bavly wrote: "There is no reason preventing Israel not to admit into its territory (even just as an emergency measure in a situation which is going out of hand) or to allow the return to Egypt of those who are already in Israel and who should have, to begin with, asked for asylum in Egypt." (Hebrew, copy on file with the authors). Attorney Shirman argued that the situation has indeed deteriorated out of control and that therefore, the deportations are justified, even according to UNHCR's instructions. This argument ignored a later letter written by UNHCR and presented to the Court, according to which asylum seekers should not be summarily denied entry into the country; They should have the opportunity to present their asylum claims and have them duly and properly heard and decided upon and that a formal readmission agreement should be established between the two Governments (letter dated September 20, 2007, on file with the authors).

³⁹ Prime Minister's Office, PM Olmert Holds Discussion on Infiltrations into Israel via the Egyptian Border, July 1, 2007, found at: <http://www.pmo.gov.il/PMOEng/Archive/Press+Releases/2007/07/dar010707.htm>

⁴⁰ The Prime-Minister's Legal Advisor Office, re: Your letter regarding "The Prime-Minister's announcement regarding the return of refugees and asylum seekers from Israel to Egypt" and the announcement of the office for Internal Security re "The establishment of a refugee camp", dated August 21, 2007 (copy on file with the authors)

Soon after this announcement, the Egypt Ministry of Foreign Affairs denied having reached any such understandings with Israel, an announcement published on August 11, 2007 declared:⁴¹

The diplomatic source underlined that, unlike what has been circulated by the media, Egypt did not agree to re-admit the persons who have previously trespassed to Israel through the Egyptian borders, affirming that Egypt officially conveyed to Israel that it is not obligated to receive any non-Egyptian citizen who has illegally trespassed to Israel.

In its answers to the Court the State declared that the Israeli Prime-Minister and the Egyptian President "agreed that the coordinated return will be performed under the assurances that the infiltrators will not be returned from Egypt to Sudan, and that the lives and well-being of the infiltrators will be guarded".⁴² The State added that the Egyptian office of UNHCR will supervise the Egyptian authorities handling of the 48 people who were deported.⁴³ At the first hearing of the petition at HCt 7302/07 on September 24, 2007, the High Court, the State rejected the demand that a readmission agreement should be done in writing and argued that Israel will never be able to reach a written agreement with Egypt and that ordering the State to produce such an agreement is tantamount to prohibiting any deportations to Egypt.

The Egyptian denial of the understandings and UNHCR's inability to access the returnees, did not deter the State from performing further "Coordinated Immediate Returns" on August 2008, as described above. In a hearing held in the High-Court on October 7, 2008 Attorney Yochi Gnessin argued for the State that until August 2008 there was no coordination between the Israeli Division commander and his Egyptian counterpart, thus no "Coordinated returns" were performed. She added that at the time, such coordination existed only in one section along the border and therefore only in that section returns took place. The authors' argued that this situation proves the lack of commitment by Egypt's central Government and that an Egyptian army commander cannot ensure the treatment of migrants, asylum seekers and refugees after they are returned (i.e. access to asylum procedures and respect for basic refugee and human rights). This argument as well as the information according to which some of the

⁴¹ Egypt Ministry of Foreign Affairs, Egyptian efforts to combat trespassing across the international borders with Israel, August 11, 2007, Found at: http://www.mfa.gov.eg/MFA_Portal/en-GB/MFA_News/Press_Releases/Press_Releases_Archive/Egypt+Israeli+border118.htm

⁴² HCt 7302/07 Complementary Announcement by the State, submitted on September 23, 2007, article 13

⁴³ Ibid. article 15.

people returned by Israel were exposed to subsequent refoulement, did not lead the State to the necessary conclusion that the "understandings" with Egypt can not be relied upon.

7. Israel's "Coordinated Immediate Return Procedure"

The petition at HCt 7302/07 brought about one significant change; the High Court demanded that the State present a detailed procedure to "conduct an adequate examination to ascertain if a person is an asylum seeker who claims he should be recognized as a refugee or if the person is an infiltrator who is not seeking asylum. In addition the Court asked the State to detail the training of the people who will handle the questioning of asylum seekers.⁴⁴ On December 3, 2007 the State presented to the Court its new procedure entitled "Coordinated Immediate Return" (Permanent Operational Order 1/3.000, November 2007). A copy of the State's submission and the new procedure with a free translation to English is attached as **annex "b"**.⁴⁵

Nowhere in the December 2007 Complementary Announcement, which includes the infiltrator's report, or in the overview of the training as described in the November 2008 Complementary Notification is there any mention of the Convention against Torture or even the word "torture." As such, there is no evidence the procedures have even taken the Convention into consideration.

The procedures, as presented by the State to the High Court in a complementary announcement dated December 3, 2007, direct that:

- An "infiltrator" would be questioned "by the capturing force in the field" within three to six hours of capture.
- The questioner-described as "a soldier or a policeman"-needs only to have the "basic ability to communicate with the infiltrator."
- If questioning in the field is impossible, the migrant would be taken to an army camp where the same procedures would apply.

⁴⁴ HCt 7302/07 Decision dated 24.9.07, found at:

<http://elyon1.court.gov.il/files/07/020/073/N04/07073020.n04.htm> (Hebrew)

⁴⁵ HCt 7302/07, Complementary Announcement on Behalf of the State (December 3, 2007). The complementary announcement includes, as an annex, the proposed procedures, entitled, "IDF permanent operational order 1/3.000, Procedure for Immediate Coordinated Returns, Infiltrators on the Israeli / Egyptian Border, November 2007, Southern Sector."

- This questioning would be based on a questionnaire that does not direct the interviewer to ask directly whether the migrant fears any risk in his or her country of origin or in Egypt.
- If the questioning raises suspicions of a “security or criminal infiltration,” the “infiltrator would be transferred to the relevant treatment avenues,” but the procedures do not specify whether the migrant would have access to further asylum procedures.
- The information derived from the questioning would be transferred to a lieutenant colonel or colonel in the Israel Defense Force (IDF), who would decide whether the migrant, based on “his personal circumstances, the circumstances of his capture and his status in Egypt,” should be returned to Egypt.
- If the migrant’s file indicated that the migrant had claimed a serious danger to his life if he were returned, the army officer would ask for the advice of “a legal authority from the army legal division” or with another authorized government authority.
- The migrant would not be returned if the relevant authority believed that there was a danger to the migrant’s life or liberty in Egypt. However, this authority would not take into account any “risk of prosecution or imprisonment or punishment due to the infiltration or other criminal offenses committed within Egypt.”
- The authority could direct the migrant to be transferred to the civil immigration authorities if he believes that “there is danger to the life or liberty of the infiltrator in Egypt.”
- Otherwise, migrants would be deported to Egypt within 72 hours upon “receiving the necessary approval” in “coordination with the relevant Egyptian authorities.”
- Until that time, the migrant would be detained by the IDF according to temporary or permanent deportation orders.

In a letter provided to the High Court of Justice Human Rights Watch describes and analyzes the problems of the Coordinated Immediate Return Procedure as follows (attached as annex "c").⁴⁶

An additional analysis was provided to the High Court in an application to join the procedures as an Amicus Curiae served by Prof. Andrew I. Schoenholtz.⁴⁷ We attach here several of Prof. Schoenholtz's important comments:

The standard [used by the procedure - the authors] for determining “danger to life and liberty” is itself in direct conflict with the Convention against Torture. That is, an infiltrator who “may be brought to justice or might be punished for infiltration or another criminal felony”⁴⁸ is precluded from claiming he is in danger, but this contravenes the absolute nature of the bar on torture. There are no exceptions to the refoulement obligations under the Convention against Torture neither for criminals or anyone else. Moreover, it is exactly in these situations, prosecution or imprisonment, where torture in Egypt is reported to occur. In 2008, the U.S. Department of State reported that “Article 42 of the constitution prohibits the infliction of ‘physical or moral harm’ upon persons who have been arrested or detained... However, police, security personnel, and prison guards routinely tortured and abused prisoners and detainees.”⁴⁹ When Brigadier General Strick stated that “it was clarified to me that as a rule after the capture of the infiltrator at the border, the Egyptians transfer the infiltrators to the handling of the local justice system.” Such a practice raises the issue of whether there is a torture risk because, as stated above, the U.S. government and

⁴⁶ Human Rights Watch, re: Proposed Border Asylum Procedure, dated December 21,2007 (copy on file with the authors)

⁴⁷ HCt 7302/07 Application to Join the Proceedings as Amicus Curiae, served by Prof. Andrew J. Schoenholtz on January 13, 2009.

⁴⁸ Complementary Announcement on Behalf of the State (December 3, 2007), at Annex 1, IDF permanent operational order 1/3.000, Procedure for Immediate Coordinated Returns, Infiltrators on the Israeli / Egyptian Border, November 2007, Southern Sector, Art. 5.A.1.

other credible sources have reported that “police, security personnel and prison guards routinely torture and abused prisoners and detainees.”⁵⁰

The procedures also provide that the “infiltrator” must raise “on his own initiative, claims regarding danger to his life or from being a refugee.”⁵¹

Whether an infiltrator is precluded from later raising a claim of “danger to life” if he initially claims only refugee status is unclear. Furthermore, only if he raises any claims is he then asked in detail about the claims. Under the Convention against Torture, however, the State has an affirmative duty to find out if an individual may be subject to torture. The specifics of the type of questioning are provided in the Report documenting the capture of an infiltrator/form of individual question. The report does not provide any standard “form” questions that must be asked by the IDF officer. As a result, the questions are left to the officer’s discretion.

Generally, those fleeing violence and torture are under tremendous duress. Under the procedures, they are not allowed any time to rest and recover before they are expected to affirmatively disclose the conditions that gave rise to their immediate situation. Further, they are required to communicate their complaints without knowledge of the protections they are entitled to under international law. Moreover, they are required to communicate with soldiers who may not be trained on the conditions of their country of origin or on the Convention against Torture. Finally, the soldiers need only “at the least, [have] the basic ability to

⁴⁹ U.S. Dep’t of State, Country Reports on Human Rights Practices: Egypt, 2007, Section 1(c) (March 11, 2008).

⁵⁰ *Id.*

⁵¹ Complementary Announcement on Behalf of the State (December 3, 2007), at Annex 1, IDF permanent operational order 1/3.000, Procedure for Immediate Coordinated Returns, Infiltrators on the Israeli / Egyptian Border, November 2007, Southern Sector, Art. 5.A.1.

communicate with the translator.”⁵² Communication at a “basic” level may not be adequate to convey the information necessary to make a determination under the Convention against Torture.

After the report is completed, the IDF officer then determines whether the conditions for immediate coordinated return have been fulfilled. To do this, one of the conditions is that the IDF officer “believes” there is no “danger to the life and liberty of the infiltrator in Egypt.”⁵³ First, for an officer to make a proper determination, the officer must have objective information about the human rights conditions in Egypt or the country of origin, particularly regarding the treatment of refugees. This also raises the important issue that the term “danger” is undefined in the procedures. As stated above, “the fact that the infiltrator might be brought to justice or might be punished for infiltration or another criminal felony, shall not be considered as such danger.”⁵⁴

It is unclear if “danger” at a minimum encompasses “torture” under the Convention against Torture. Moreover, as stated above, excluding prosecution or imprisonment punishment as danger directly conflicts with Article 2 of the Convention against Torture.

However, if an IDF officer “believes” there is “real danger to life and liberty,” the IDF officer is to consult with a lawyer in the IDF legal unit or with another authorized Government authority regarding the ability to perform a Coordinated Return. Given that protection under Convention against Torture is absolute,

⁵² Complementary Announcement on Behalf of the State (December 3, 2007), at paragraph 7.

⁵³ Complementary Announcement on Behalf of the State (December 3, 2007), at Annex 1, IDF permanent operational order 1/3.000, Procedure for Immediate Coordinated Returns, Infiltrators on the Israeli / Egyptian Border, November 2007, Southern Sector, Art. 5.A.1.

⁵⁴ *Id.*

however, a determination that “real danger” exist would prohibit any Coordinated Return.

More issues regarding the GOI’s position on the Convention against Torture arise upon examination of the training that is provided to IDF officers. According to the State in its latest submission to the Court, there were two training seminars, one in September 2008 and one in November 2008. The subjects covered in the earlier seminar included law and legislation but there is no mention of the Convention against Torture in the list of the laws and legislation. Furthermore, the November session is described as having been “even more extensive,” however, there is no evidence there was any training on the Convention against Torture.

From what has been presented to the Court thus far, there is no evidence the GOI took into account the factors listed in the General Comments to Article 3 when drafting the procedures. Along the same lines, there is no evidence the IDF officers have been trained to take into account these factors when making their determinations. In fact, none of the submissions by the State have even addressed the Convention against Torture in any respect whatsoever.

8. The deportation of 2 Sudanese asylum seekers to Gaza Strip

In a discrete incident during 2003, IDF officers deported to the Palestinian Authority controlled Gaza strip, two Sudanese asylum seekers. We attach a translation of an affidavit signed by one of the deportees, who is currently in Israel as **annex "d"**. We ask that his name and personal details not be exposed or published by the Committee since his status in Israel is precarious. Our client (referred to here as: "R") fears that disclosing either the fact that he is in Israel or the fact that he had reported incidents of torture at the hands of the Palestinian Authority and the Egyptian security forces might place him in danger in the future.

In his affidavit R describes his arrival at the Israeli border with another Sudanese refugee on November 2003. After a short interrogation and despite the fact he declared he wishes to make an asylum claim, an IDF officer ordered his return to Egypt (article 8 to the affidavit). The two asylum seekers were taken to the Egyptian border and ordered to return to Egypt. On the next evening, since they failed to comply with the order, they were transferred by the IDF to Gaza. The asylum seekers were immediately arrested by the Palestinian Muhabarat (intelligence) and violently tortured due to the suspicion that they were working with the Israeli secret service (the "Mossad", articles 11-14 to the affidavit). R was detained in extreme conditions: he was isolated for long periods of time, placed in a small under-ground cell, had no bed, was not taken out for excursions (article 14 to the affidavit). Only after 14 months in detention R and the other asylum seeker were released. They remained in Gaza several additional months until the ICRC and UNHCR facilitated their return to Egypt (articles 17-19 to the affidavit). When R was transferred to Egypt he suffered an additional violent interrogation by the Egyptian security forces. Allegations were made again that he served the Israeli secret services (articles 20-21 to the affidavit).

These events left R with a severe trauma, after he made a suicide attempt, he was treated in the Nadim Center for victims of violence in Cairo (article 24 to the affidavit). R left Cairo in 2006 after he was detained by the Egyptian police and threatened that next time he will be deported to Sudan. He currently has no protection papers in Israel and this exasperates his distress (article 29 to the affidavit).

The authors are aware of one more case in the past in which an Iraqi asylum seeker was deported from Israel to Gaza (and suffered similar treatment to that which is described by R), but such incidents seem to be an exception.

9. Summary

The Committee against Torture has officially stated in its General Comments that the danger of torture must be assessed not just for the initial receiving state, but also to states to which the person may be subsequently expelled, returned or extradited.⁵⁵ While Israel does provide for individual questioning under the Coordinated Returns procedure, at issue is whether this

⁵⁵ The Committee against Torture, at its nineteenth session, 317th meeting, held on 21 November 1997, adopted the general comment for the guidance of State parties and authors of communication.

questioning effectively implements the state's obligations under the Convention against Torture. Based on the information provided by the State in the course of the litigation at HCt 7302/07, there is no evidence that the Coordinated Returns procedure ensures that the State ascertains information from the individual and other sources regarding any danger of torture upon return. Nor is there any evidence that the Israeli official questioning the individual is trained to recognize the need for and application of protection from return to torture consistent with Israel's obligations under Article 3 of Convention against Torture. In sum, there is no evidence that Israel has addressed its obligations under the Convention against Torture in devising and executing its Coordinated Returns procedures.

The Government of Israel based its policy of coordinated immediate returns on diplomatic assurances allegedly received from Egypt. The reliability of these assurances comes into question not only because of the Egyptian government's most recent actions and their statement above regarding the assurances but also because of reports of Egypt's record of torture and ill treatment of detainees.⁵⁶

Basic requirements of due process when relying on diplomatic assurances were not met. The requirement of due process (effective, independent and impartial review) in the Convention against Torture proceedings was addressed by the Committee in *Agiza v. Sweden*.⁵⁷ UNHCR has also outlined certain requirements that should be satisfied when obtaining diplomatic assurances.⁵⁸ It has been reported that Egypt has returned many asylum seekers to Eritrea and Sudan. Egypt's actions could implicate both Egypt's and Israel's obligations under the Convention against Torture.

⁵⁶Conclusions and recommendations of the Committee against Torture : Egypt. 23/12/2002. CAT/C/CR/29/4. (Concluding Observations/Comments),

[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CAT.C.CR.29.4.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CAT.C.CR.29.4.En?Opendocument). U.S. Dep't of State, Country Reports on Human Rights Practices: Egypt, 2007, Section 1(d), Section 4 (March 11, 2008).

⁵⁷ Ahmed Hussein Mustafa Kamil Agiza v. Sweden, CAT/C/34/D/233/2003 (U.N. Comm. against Torture May 20, 2005).

⁵⁸ UNHCR, Note on Diplomatic Assurances and International Refugee Protection, para 19-20, August 2006