

MAINSTREAMING REFUGEE WOMEN'S RIGHTS ADVOCACY

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ABSTRACT

On June 11, 2018, then U.S. Attorney General Jeff Sessions issued a decision that signifies a regression in the willingness to protect women fleeing from domestic violence through the framework of the Refugee Convention. By contrast, this Article argues that International Refugee Law would benefit from an additional mode of engagement with feminism. Instead of introducing feminist theory into International Refugee Law, we suggest—in light of the underlying commonality among all women, regardless of status—that, in some jurisdictions, International Refugee Law would benefit from conjoining advocacy efforts on behalf of refugee women with those undertaken on behalf of marginalized and disempowered women more generally. Such a shift would be of particular importance in jurisdictions where the legal, social, or political willingness to protect and promote women's rights outweighs the willingness to protect the rights of refugees. Stemming from a more fundamental human rights framework that explicitly includes women as humans, this legal perspective would provide deeper protection to asylum-seeking women, changing the legal focus from questions of status determination as to whether someone—man or woman—qualifies for protection as a refugee—to broader questions regarding the personhood of women and the entire set of necessary civil, social, economic, and cultural rights deriving from said personhood. In other words, the shift would be from a mostly negative-duty of protection perspective to a dual negative- and positive-duty perspective. This shift would also create opportunities for solidarity between asylum-seeking women and other women, including other

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immigrants, residents, citizens, national minorities, and general feminist and women's rights groups. Such a linkage would allow asylum-seeking women to benefit from the progress already achieved by feminist movements regarding women's rights, rather than marginalizing them and confining them to seek their rights exclusively as refugees.

The call for mainstreaming the discourse on refugee rights into the discourse on women's rights offers an important theoretical contribution that goes beyond the discussion of asylum-seeking women's rights. Namely, this Article explores the question of whether it is strategically, theoretically, or doctrinally preferable to advocate for the rights of refugees via instruments of International Human Rights, rather than via International Refugee Law, and if so, under what circumstances. We find significant arguments in favor of abandoning the prevailing view that International Refugee Law is a separate branch of international law to be applied and interpreted according to its own fundamental concepts, and in isolation from other areas of international law. Instead, we argue that international conventions on human rights are applicable to refugees, as they apply to "all individuals within its territory and subject to its jurisdiction," or "everyone," and not merely to members of the political community.

We demonstrate the feasibility of our argument with a regional focus on the treatment of asylum-seeking women in Israel. The exploration of the questions in this Article draws on the work of the Coalition on Asylum Seeking Women and Children in Israel, which constitutes a rich, novel, and groundbreaking approach to the advocacy on behalf of asylum-seeking women. The Coalition has been operating since September 2016, and consists of women's rights, migrant women's rights, and children's rights organizations and clinics. By embedding this theoretical and doctrinal legal question in the lived experience of women asylum seekers and women's rights advocates, the examination of the advocacy efforts and *raison d'être* of the Coalition could demonstrate how this model can be applied in additional jurisdictions, *mutatis mutandis*.

TABLE OF CONTENTS

<i>Introduction</i>	373
I. <i>Gender and International Refugee Law</i>	381
A. <i>The History of Gender in the 1951 Refugee Convention</i>	382
B. <i>The Introduction of New UNHCR Guidelines and Their Intersection with Feminist Theory</i>	385
II. <i>Between International Refugee Law and International Human Rights Law</i>	389
A. <i>Reliance on the Refugee Convention and International Human Rights</i>	389

2019]	Mainstreaming Refugee Women’s Rights Advocacy	373
	<i>B. The Relationship Between International Refugee Law and International Human Rights Law</i>	392
	<i>C. Between International Refugee Law and International Women’s Rights Law</i>	394
	<i>D. Our Proposal: More International Human Rights Law, Less Refugee Convention</i>	396
	III. <i>Feasibility Study: Mainstreaming Asylum-Seeking Womens’ Rights as a Human and Womens’ Rights Issue in the Israeli Asylum System</i>	402
	<i>A. The Israeli Asylum System: Main Characteristics</i>	403
	<i>B. Women in the Israeli Asylum System</i>	405
	<i>C. The Status Front—Gender Sensitivity, Refugee Status Determination, and Judicial Review Thereof</i>	406
	<i>D. Beyond Status—Additional Legal and Extra-Legal Venues</i>	412
	<i>Conclusion</i>	417

INTRODUCTION

The feminist engagement with refugee law is contested and in crisis. In his recent decision from June 11, 2018, then-U.S. Attorney General Jeff Sessions issued a decision in *Matter of A-B-* according to which “[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.”¹ This decision formally reversed the Board of Immigration Appeals’ decision in *Matter of A-R-C-G-*,² and at the same time represented an attempt to reverse decades of case law which had determined that women who are victims of domestic violence and gang violence may qualify as refugees when their state is unwilling or unable to protect them.³ On the same day, the United States Citizenship and Immigration Services issued a policy memo articulating how the principles of Sessions’s decision should be implemented in different refugee status determination procedures, making his decision operational.⁴ The policy memo and the decision of then-U.S. Attorney General Sessions indicated that persons whose claim of asylum was made in relation to a well-founded fear of being persecuted in connection to their

¹ *Matter of A-B-*, 27 I&N Dec. 316, 320 (A.G. 2018).

² See 26 I&N Dec. 338, 394 (B.I.A. 2014).

³ Sabi Ardan, *Why Domestic Abuse and Anti-Gay Violence Qualify as Persecution in Asylum Law*, THE CONVERSATION (June 15, 2018), <https://theconversation.com/why-domestic-abuse-and-anti-gay-violence-qualify-as-persecution-in-asylum-law-98354> [https://perma.cc/J4S3-B8EU].

⁴ U.S. CITIZENSHIP & IMMIGRATION SERVICES, PM-602-0162, GUIDANCE FOR PROCESSING REASONABLE FEAR, CREDIBLE FEAR, ASYLUM, AND REFUGEE CLAIMS IN ACCORDANCE WITH *MATTER OF A-B-* (July 11, 2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.pdf> [https://perma.cc/958D-9DDR].

inability to escape from life-threatening abusive relationships will no longer be understood as substantiating an argument that they are persecuted on account of belonging to a particular social group, as per the legal definition of refugee.⁵

The decision was eventually reversed on December 19, 2018 in *Grace v. Whitaker* by Judge Emmet G. Sullivan of the United States District Court for the District of Columbia.⁶ The court granted a permanent injunction to plaintiffs, non-citizen adults, and children whose asylum claims were rejected based on the implementation of *Matter of A-B-* into immigration policy. Perhaps most importantly, the court held that *Matter of A-B-* “create[d] a general rule against [domestic and/or gang violence] claims at the credible fear stage” and that the rule was “not a permissible interpretation of the statute.”⁷ Additionally, *Matter of A-B-* was deemed arbitrary and capricious, as well as contrary to immigration law, in several ways.⁸ Judge Sullivan’s decision allowed those who had been removed from the United States following Sessions’s decision to return for re-examination in accordance with immigration standards.⁹ Following the decision, the administration announced that it is “reviewing options with regard to this ruling.”¹⁰

This sequence of events and the human drama that unfolded highlighted just how fragile the protection of women is in refugee law. This is especially true given the general “compassion fatigue” amongst states accepting refugees¹¹ and the tendency of many signatories of the Refugee Convention to evade their duties and exclude refugees as much as possible. Since women are not explicitly protected in the Refugee Convention, states are often able to exclude women refugees from protection without directly violating the Refugee Convention. Over the years, feminist engagement with asylum-seeking women has centered on efforts to identify these women as a discrete category of asylum seekers, worthy of protection under the Refugee Convention. Such efforts have focused on outlining the forms of persecution women often endure and highlighting protection gaps within the Refugee Convention and within the definition of “refugees” that increase women’s risk of

⁵ Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention], art. 1(A)(2).

⁶ See *Grace v. Whitaker*, 344 F. Supp. 3d 96, 146 (D.D.C. 2018).

⁷ *Id.* at 56.

⁸ *Id.* at 69–91. The Court found the supplementary policy memorandum implementing *Matter of A-B-* to be contrary to immigration law because it failed to recognize domestic violence as a basis for persecution in a credible fear determination; because it required asylum-seekers to present facts to determine their “particular social group” during the credible fear stage; and because it required asylum officers to ignore circuit law contrary to *Matter of A-B-* and to only apply case law from the circuit in which the interview took place.

⁹ *Id.* at 144–45.

¹⁰ Bill Mears & Brooke Singman, *Judge Orders Deported Asylum Seekers to be Returned to US, in Trump Administration Rebuke*, FOX NEWS (Dec. 19, 2018), <https://www.foxnews.com/politics/judge-orders-deported-asylum-seekers-to-be-returned-to-us-in-trump-administration-rebuke> [https://perma.cc/72U2-A39K].

¹¹ See *infra* note 95.

harm. These efforts have been seen as necessary due to the absence of gender as a convention-recognized ground for asylum within the generally male-oriented convention grounds,¹² both in text and in interpretation. Feminist efforts have sought to compel refugee law to protect women from acts of persecution carried out by private actors in the private sphere, which are often abetted by lax enforcement of state laws.¹³ Such efforts have proven to be fruitful. Since the mid-eighties, many Western democracies recognize certain practices as forms of persecution, such as female genital mutilation, forced marriages, child marriages, trafficking, domestic violence, and sexual violence.¹⁴ Women who seek asylum from these types of persecution in such countries are often given protection, even when said persecution is not directly attributable to the state.

However, recent pushback against these efforts, the most prominent of which is the aforementioned Attorney General's decision,¹⁵ demonstrates the need for further reflection on the gendered aspects of refugee protection. As this decision illustrates, protection of women using the legal category of "refugee" is largely (and incorrectly) understood by conservative governmental agencies' personnel to be discretionary, rather than deriving from a legal obligation, since protection from gender-based persecution is not explicitly included in the Refugee Convention. The Refugee Convention thus puts women at risk of losing their protection at the whim of the state. Even before this decision, some prominent scholars in this field have pointed to the fact that in the context of gender, "[i]nternational refugee law is coming of age."¹⁶ Others have argued that "gender, as an issue *per se*, is still considered to be relevant only to a particular set of cases, rather than as a principal of refugee law."¹⁷

Recently, there has been a call to further deepen the engagement of refugee law with feminist theory, and to promote a feminist reading of core principles in refugee law.¹⁸ Feminist readings highlight the fact that core

¹² Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT'L L.J. 625, 627–29 (1993).

¹³ See, e.g., *Sarhan v. Holder*, 658 F.3d 649 (7th Cir. 2011).

¹⁴ See, e.g., Bethany Lobo, *Women as a Particular Social Group: A Comparative Assessment of Gender Asylum Claims in the United States and United Kingdom*, 26 GEO. IMMIGR. L.J. 361, 365 (2012); Melinda McPherson et al., *Marginal Women, Marginal Rights: Impediments to Gender-Based Persecution Claims by Asylum-seeking Women in Australia*, 24 J. REFUGEE STUD. 323, 331 (2011).

¹⁵ *Matter of A-B-*, 27 I&N Dec. 316, 320 (A.G. 2018).

¹⁶ Deborah E. Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15 HARV. HUM. RTS. J. 133, 133 (2002).

¹⁷ Georgina Firth, *Refugee Law, Gender and the Concept of Personhood*, 25 INT'L J. REFUGEE L. 470, 471 (2013).

¹⁸ Such core concepts include, for example, the concept of exclusion. According to Article 1F of the Refugee Convention, a person can be excluded from refugee status if there are serious reasons for considering that she or he has committed certain crimes, such as war crimes or crimes against humanity. Another core concept is the concept of surrogate state protection, which means that the host state of refugees provides the protections that would otherwise be afforded by the refugee's country of nationality or habit-

concepts of refugee law not only disproportionately affect women, but also influence women and men differently and can thus benefit from an application of feminist methodologies.¹⁹ In recent years, and in light of the contestation surrounding the “refugee crisis” and government attempts to minimize the number of refugees to whom they grant asylum, there are reasons to fear that governments may try to pare back the protection afforded to asylum-seeking women²⁰ just as the United States has recently done.

In this Article, we recognize the theoretical and practical progress achieved by the various forms of engagement between feminism and International Refugee Law (hereinafter IRL), which have facilitated protection for many women. At the same time, we wish to acknowledge the discrepancy that still exists between the protection granted to asylum-seeking and undocumented women, on the one hand, and the protection afforded to women with documented legal societal status, on the other hand. This gap not only negatively impacts the ability of asylum-seeking women and undocumented women to enjoy the progress of feminism in some of the countries in which they reside, but also places gender-specific roadblocks in their paths when they seek safety or redress.²¹ Moreover, this gap calls into question the progress of feminism overall, as it affords one group of women a full panoply of rights while denying those rights to another, thus casting doubt on the authenticity of the promise of gender equality.

We also recognize that attempts to essentialize the experiences of asylum-seeking women through the existing and allegedly gender-neutral categories of IRL, even if through gender-inclusive readings, may have disempowering effects.²² It may also result in women’s behavior, such as resisting domestic abuse, being categorized as non-political and “private.”²³ We therefore wish to argue that IRL would benefit from an additional form of engagement with feminism. In particular, we argue that efforts for protection of asylum-seeking women should not remain at the level of status, or

ual residence. *See generally* Kate Ogg, *The Future of Feminist Engagement with Refugee Law: From the Margins to the Centre and Out of the ‘Pink Ghetto’?*, in RESEARCH HANDBOOK ON FEMINIST ENGAGEMENT WITH INTERNATIONAL LAW (Susan Harris & Kate Ogg eds., forthcoming 2019).

¹⁹ *Id.* Ogg points to gendered discrepancies when it comes to some core elements of refugee protection, such as exclusion and surrogate protection. According to Ogg, women’s experiences with human rights abuses are sometimes intimately connected to their participation in excludable crimes, and these abuses are often not considered relevant when deciding to exclude women from the Refugee Convention. For example, a female victim of human trafficking can be excluded based on crimes her trafficker forced her to commit.

²⁰ JESS BRAVIN, *Jeff Sessions to Rule on Asylum for Battered Woman*, WALL ST. J. (Mar. 12, 2018), <https://www.wsj.com/articles/jeff-sessions-to-rule-on-asylum-for-battered-woman-1520897494> [<https://perma.cc/BW6W-JTEK>].

²¹ *See* Nina Rabin, *At the Border Between Public and Private: U.S. Immigration Policy for Victims of Domestic Violence*, 7 J.L. & ETHICS HUM. RTS. 109, 111 (2013).

²² Firth, *supra* note 17, at 472.

²³ Doreen Indra, *Gender: A Key Dimension of the Refugee Experience*, 6 REFUGEE 3, 3 (1987).

even at the level of the IRL framework. Instead, they should include a broader effort to promote a range of comprehensive women's rights, including general social, political, and economic rights. Rather than simply introducing feminist theory into IRL, we suggest that, at least in some jurisdictions, in light of the underlying commonality between all women regardless of status, efforts to protect refugee women would benefit from conjoining advocacy efforts on behalf of refugee women with those undertaken on behalf of women more generally. We believe this would be an important shift, at the very least, in jurisdictions in which there is greater legal, social, or political willingness to protect and promote women's rights than there is willingness to protect the rights of refugees.

Such a legal perspective, arising from a more fundamental human rights framework that explicitly includes women, would allow for the promotion of deeper protections for asylum-seeking women, as it would shift the legal focus away from concepts of status and protection in *non-refoulement* towards a broader focus on personhood²⁴ and the entire set of necessary civil, social, economic, and cultural rights deriving from said personhood. In other words, it would shift from a mostly negative-duty protection perspective to a dual negative- and positive-duty perspective.²⁵ It would also create new opportunities for solidarity between asylum-seeking women and other women, including other immigrants, residents, citizens, national minorities, and general feminist and women's rights groups. Moreover, such a linkage would allow asylum-seeking women to benefit from the progress already achieved in some jurisdictions by feminist movements regarding women's rights, rather than marginalizing them and confining them to seek fulfillment of their rights exclusively as refugees. Put differently, this would also render feminists and feminist organizations responsible for efforts to defend, protect, and promote the human rights of all women, *including* refugee women. One important implication of this expanded focus is that progress made in the protection of women's rights should be measured by the progress made in protecting the rights of all women, *including* asylum-seeking women.

The call for mainstreaming the discourse of refugee rights into the discourse of women's rights offers an important theoretical contribution that goes beyond the discussion of asylum-seeking women's rights. It does so by examining the questions of whether it is strategically, theoretically, or doctrinally preferable to advocate for the rights of refugees via instruments of International Human Rights Law (hereinafter IHRL), rather than via IRL, and, if so, when.

In examining this question, we find significant arguments in favor of abandoning the prevailing view that IRL is a separate branch of international law to be applied and interpreted according to its own fundamental concepts

²⁴ Firth, *supra* note 17, at 497–500.

²⁵ On the difference between negative and positive duties, see generally Marcus G. Singer, *Negative and Positive Duties*, 15 PHIL. Q. 97 (1965).

and in isolation from other areas of international law, especially in jurisdictions in which adherence to IRL lags behind adherence to other branches of international law. Since the adoption of other human rights instruments, namely the International Covenant on Civil and Political Rights (ICCPR),²⁶ the International Covenant on Economic, Social and Cultural Rights (ICESCR),²⁷ and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),²⁸ this tendency to view IRL separately from IHRL should be questioned. These international conventions on human rights should clearly be applicable to refugees, as they apply to “all individuals within its territory and subject to its jurisdiction,”²⁹ or “everyone.”³⁰ While in principle the application of IHRL in refugee cases is virtually uncontested, in practice, the prevalence of nationalist and territorial approaches to human rights often means that the ability to enjoy these rights is limited to citizens, residents, lawfully staying persons, etc. However, we argue that these norms should apply to everyone—not only within a state’s territory, but also along its borders and in other areas where states apply coercive force.³¹

While there have been calls to interpret IRL in light of International Human Rights Instruments (as well as other branches of international law, such as International Humanitarian Law),³² the argument here goes further by asking, essentially: What would the benefits be of advocating for refugee rights—including, but not limited to, refugee women’s rights—through a Human Rights framework, rather than through a Refugee Rights framework? Our suggestion in this Article is that there are distinct advantages to referring to refugee rights issues as human rights issues in some jurisdictions, and this suggestion carries with it a serious commitment to the universalization of human rights. We believe, however, that advocacy through either the refugee rights or the human rights framework carries a price, and thus singular reliance on either framework should be avoided.

When discussing the rights of refugees, and refugee women in particular, we refer to two typologies of rights. First, there are status and protection-

²⁶ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

²⁷ International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

²⁸ Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

²⁹ ICCPR, *supra* note 26, art. 2(1).

³⁰ ICESCR, *supra* note 27, pmb., arts. 6–9, arts. 11–13, art. 15.

³¹ See generally Colin Harvey, *Time for Reform? Refugees, Asylum-seekers, and Protection Under International Human Rights Law*, 34 REFUGEE SURV. Q. 43, 47 (2015). On the application of refugee rights obligations in places where states apply coercive force, see generally Tally Kritzman-Amir & Thomas Spijkerboer, *On the Morality and Legality of Borders*, 26 HARV. J. HUM. RTS. 1 (2013).

³² JANE MCADAM, *Human Rights and Forced Migration*, in *The Oxford Handbook of Refugee and Forced Migration Stud.* 203, 204–10 (ELENA FIDDIAN-QASMIYEH ET AL. EDS., 2014); JAMES C. HATHAWAY, *Reconceiving Refugee Law as Human Rights Protection*, 4 J. REFUGEE STUD. 113, 120–24 (1991).

related rights, such as the protection from *non-refoulement* and the right to documentation, legal identity, and legal status.³³ These rights are currently at the core of the legal efforts of lawyers assisting refugees around the world, and there are well-established processes and significant infrastructures in place that aim to determine eligibility for protection and status, such as Refugee Status Determination units. In situations in which these infrastructures are significantly dysfunctional, unfair, or inefficient, however, reliance on international human rights arguments could be beneficial. Second, there are also social and economic rights, which include a range of health, education, housing, employment, and family rights. Pursuing these rights has not been a priority among refugee lawyers' efforts to promote refugees' rights: protection and status have prevailed. We argue, however, that because social and economic rights greatly impact refugees' day-to-day life experiences, their personal safety, their ability to lead dignified lives, and their likelihood to thrive, these rights ought not to be ignored or minimized.

We demonstrate our argument with a regional focus on the treatment of asylum-seeking women in Israel. This Article follows previous research on asylum-seeking women in Israel,³⁴ which concluded that although there are justifications for treating asylum-seeking women as a discrete group within the asylum-seeking community due to their extreme vulnerability, they are rarely treated as such.³⁵ That research also showed that general feminist organizations are not inclined to engage with asylum-seeking women, and thus advocacy to promote these women's rights is conducted within the confines of the "ghetto" of migrants' rights NGOs and clinics, which, though potentially committed to feminist values, may not necessarily have the expertise or the ability to focus on issues specific to refugee women. This renders asylum-seeking women unable to enjoy the achievements of feminism in broader Israeli society.³⁶

The exploration of the questions in this Article draws on the work of the Coalition on Asylum Seeking Women and Children in Israel (hereinafter "the Coalition").³⁷ The Coalition was created following the findings of the aforementioned research, and has been operating actively since September 2016. It started operating after staff at migrants' rights NGOs and clinics realized that issues of status were not at all at the forefront for asylum-seeking women, who were instead consumed with issues relating to their family life, welfare, housing, employment, and/or health care. The Coalition con-

³³ Refugee Convention, *supra* note 5, arts. 1 & 27–28.

³⁴ See generally Tally Kritzman-Amir, Anat Ben Dor & Nurit Wurgaft, *Between Neutrality and Neglect: On Female Asylum Seekers in Israel*, 15 L. & GOVERNANCE [MISHPAT U'MIMSHAL] 329 (2013) (Isr.). See also Habtom M. Ghebregziabher & Pnina Motzafi Haller, *Eritrean Women Asylum Seekers in Israel: From a Politics of Rescue to Feminist Accountability*, 28 J. REFUGEE STUD. 570, 573–75 (2015).

³⁵ See generally Kritzman-Amir, Ben Dor & Wurgaft, *supra* note 34.

³⁶ *Id.*

³⁷ The Authors were instrumental in initiating the Coalition and took part in running it, forming its agenda, and participating in its actions.

sists of representatives from fifteen different NGOs and clinics whose main goals are to promote migrants' and refugees' rights, women's rights, and children's rights. Each representative contributes its expertise in either status or rights issues. Because the Coalition embeds this notion of advocating for asylum-seeking women through women's rights norms and alongside other women, the examination of the advocacy efforts and *raison d'être* of the Coalition could provide guidance for applying the Coalition's model in additional jurisdictions, *mutatis mutandis*.

The notion of promoting refugee women's rights through the work of a coalition that explicitly includes general women's rights organizations, and through human and women's rights arguments generally, is not unique to Israel. We have identified similar coalitions in other jurisdictions, including, for example, in Ireland.³⁸ We have also identified several NGOs that broadly deal with women's rights but also include refugee women's issues on their agendas.³⁹ Nevertheless, it seems that the Israeli Coalition has done the most comprehensive work thus far. With that, we will focus specifically on the work of the Coalition, with the hope that an in-depth review of the associated costs and benefits of its work could be beneficial to organizations, academics, and practitioners engaged in similar kinds of advocacy in different national and political contexts.

Part I of this Article provides a critical overview of the current intersection between feminist theory and IRL, and will point to the achievements as well as the weaknesses of IRL in protecting asylum-seeking women. Part II analyzes the relationship between IRL and IHRL and recommends a different form of engagement with asylum-seeking women through human and women's rights claims, rather than merely through refugees' rights claims. Part III discusses the Coalition as a feasibility case for promoting the rights of asylum-seeking women in Israel, both through IRL and through convergence with the aims and advocacy efforts of broader feminist movements.

³⁸ This approach has been used, for example, in Ireland, where a coalition of NGOs, including the NISC, the Irish Immigrant Support Center, and LINC: Advocating for Lesbian and Bisexual Women in Ireland, formed in order to conduct outreach events explaining the legal rights of asylum-seeking women who identify as LGBT. *See, e.g., Latest News, LGBT+ Information Session: Saturday 14th April*, NASC (Apr. 12, 2018), <http://www.nascireland.org/latest-news/lgbt-information-session-saturday-14th-april/> [<https://perma.cc/U3D5-DMJW>]. We are thankful to Tehmina Kazi for bringing this information to our knowledge.

³⁹ Some of these organizations are MADRE, <https://www.madre.org/> [<https://perma.cc/35J8-3RY5>]; EQUALITY NOW, <https://www.equalitynow.org/> [<https://perma.cc/PQ7Z-MEMT>]; WOMEN'S LINK WORLDWIDE, <http://www.womenslinkworldwide.org/en> [<https://perma.cc/GQY9-NZQJ>]; OUTRIGHT ACTION INTERNATIONAL, <https://www.outrightinternational.org> [<https://perma.cc/Y8TF-ZTAG>]; AWID (ASSOCIATION FOR WOMEN IN DEVELOPMENT), <https://www.awid.org/> [<https://perma.cc/83Y3-V5AW>].

I. GENDER AND INTERNATIONAL REFUGEE LAW

We have witnessed over the last few decades a significant increase in international migration, spurred by political unrest, climate upheaval, and forced migration.⁴⁰ These trends have also driven a drastic increase in the number of women who migrate, to such an extent that some argue that immigration itself has become feminized.⁴¹ Among women migrants, more and more are immigrating on their own, initiating their own independent cross-border movement rather than accompanying their male relatives.⁴² According to the statistics published by the United Nations High Commissioner for Refugees (UNHCR), women currently make up about half of the forced migrant population,⁴³ the total number of which is about 68.5 million persons.⁴⁴

Refugee women are not only a significant and sizable group among all refugees, but they also often bear characteristics that distinguish them from male refugees.⁴⁵ Women often flee their home countries for different reasons than men and often suffer from different forms of persecution. For example, women are more frequently subjected to sexual assault and sexual discrimination.⁴⁶ Another difference between asylum-seeking women and men has to do with their role in the asylum application. Women sometimes rely on the asylum applications of their male family members and are listed as the secondary or dependent asylum applicant, which leaves women lacking control and independence in managing their asylum claim.⁴⁷ In some asylum cases, women are perceived primarily through their association with males and persecuted as relatives of men, which introduces evidentiary issues. For example, women may often need to provide supplementary evidence concerning

⁴⁰ See generally Stephen Castles, Hein de Haas & Mark J. Miller, *THE AGE OF MIGRATION: INTERNATIONAL POPULATION MOVEMENTS IN THE MODERN WORLD* (5th ed. 2014).

⁴¹ See generally Roberto Marinucci, *Feminization of Migration?*, 15 REMHU - REVISTA INTERDISCIPLINAR DA MOBILIDADE HUMANA 5 (2007), <http://www.redalyc.org/pdf/4070/407042006002.pdf> [<https://perma.cc/DL9U-HXHK>]; Katharine M. Donato & Donna Gabaccia, *The Global Feminization of Migration: Past, Present, and Future*, MIGRATION POL'Y INST. (June 1, 2016), <https://www.migrationpolicy.org/article/global-feminization-migration-past-present-and-future> [<https://perma.cc/F7Z3-XND9>]; Katharine M. Donato et al., *Variations in the Gender Composition of Immigrant Populations: How and Why They Matter*, 45 INT'L MIGRATION REV. 495 (2011).

⁴² Paulina Lucia Maymon, *The Feminization of Migration: Why Are Women Moving More?*, CORNELL POL'Y REV. (May 5, 2017), <http://www.cornellpolicyreview.com/the-feminization-of-migration-why-are-women-moving-more/> [<https://perma.cc/VAG5-RYPQ>].

⁴³ *What We Do - Safeguarding Individuals - Women*, UNHCR, <http://www.unhcr.org/women.html> [<https://perma.cc/JM7Q-KX9U>] (last visited May 6, 2018).

⁴⁴ *About Us - Figures at a Glance*, UNHCR, <http://www.unhcr.org/figures-at-a-glance.html> [<https://perma.cc/G9E2-BJ86>].

⁴⁵ Kritzman-Amir, Ben Dor & Wurgaft, *supra* note 34, at 337-39.

⁴⁶ Jacqueline R. Castel, *Rape, Sexual Assault and the Meaning of Persecution*, 4 INT'L J. REFUGEE L. 39, 40 (1992).

⁴⁷ Alice Bloch et al., *Refugee Women in Europe: Some Aspects of the Legal and Policy Dimensions*, 38 INT'L MIGRATION 169, 175 (2000).

their male relative(s), thereby detracting from their own story in their asylum application.⁴⁸

Additionally, the category of refugees is often interpreted along the private/public divide, offering significantly more robust protections to women who face persecution in the public sphere than to those whose persecution occurs in the private sphere.⁴⁹ Women who are expected to assume more “private” roles and operate in “private” locations are more often than men to be persecuted by “private” non-state actors, such as partners and family members.⁵⁰ In many cases, the state may be unable or unwilling to protect women from these private actors, due to either practical difficulties or patriarchal perceptions that are sometimes infused with religious beliefs.⁵¹ The often-private and familial nature of women’s persecution also means that many women cannot rely on family members to help prove the reasons for their persecution. As a result, these women may have difficulty substantiating arguments about past persecution or future fear of being persecuted with corroborating testimonies and other evidence.⁵²

Migratory processes also render women particularly vulnerable. Women have a heightened risk of extreme physical and emotional hardship, trafficking, discrimination, marginalization, and physical abuse.⁵³ Status application processes are sometimes ill-suited for addressing gender biases, or for creating a gender-sensitive and safe environment for women.⁵⁴

These unique characteristics of asylum-seeking women often make their asylum application process more challenging than that of men. In the following sections, we will explore how IRL currently addresses these particular needs and vulnerabilities.

A. *The History of Gender in the 1951 Refugee Convention*

The 1951 Convention Relating to the Status of Refugees, together with its 1967 Protocol, remains today the only international treaty that provides specific protection for refugees. For decades after it was written, any consid-

⁴⁸ THOMAS SPIJKERBOER, *WOMEN AND REFUGEE STATUS: BEYOND THE PRIVATE/PUBLIC DISTINCTION* 47 (1994) [hereinafter *SPIJKERBOER, WOMEN*].

⁴⁹ Deborah Anker, *Refugee Status and Violence Against Women in the Domestic Sphere: The Non-State Actor Question*, 15 *GEO. IMMIGR. L.J.* 391, 392 (2000).

⁵⁰ *Id.* See also Audrey Macklin, *Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian and Australian Approaches to Gender-Related Asylum Claims*, 13 *GEO. IMMIGR. L.J.* 25, 28 (1998).

⁵¹ See, e.g., *Sarhan v. Holder*, 658 F.3d 649 (7th Cir. 2011) (holding that the “Jordanian government was complicit in harm she would suffer if her brother followed through on his threat to kill her”).

⁵² THOMAS SPIJKERBOER, *GENDER AND REFUGEE STATUS* 47 (2000) [hereinafter *SPIJKERBOER, GENDER*].

⁵³ See generally Mary Kawar, *Gender and Migration: Why Are Women More Vulnerable?*, in *FEMMES EN MOUVEMENT* 71 (Fenneke Reysoo & Christine Verschuur eds., 2004).

⁵⁴ Kelly, *supra* note 12, at 630–32.

eration of gender issues was absent from discourse and debate on refugees and asylum.

The gender-neutral definition of a “refugee” refers to a person who, “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country.”⁵⁵ This definition of a “refugee” does not include gender-based persecution as one of the five grounds mentioned above. This was in part due to the fact that the Refugee Convention was held shortly after World War II, i.e., years before the era in which women’s rights were recognized as human rights.⁵⁶ In addition, the Refugee Convention was drafted during a historical context in which it was assumed that the “refugee problem” was a concrete issue that could and would be resolved within a short period of time, and thus the definition created therein was not meant to cover future refugee crises.⁵⁷ The prototypical refugee at this time was perceived as an individual persecuted by a totalitarian regime for his actions in the “public sphere,” which meant that most “refugees” were likely to be men. While some women were politically active in such efforts, it was frequently the case that their political engagement was more “private” than that of men.⁵⁸ In addition, women often suffered from other forms of persecution that were not clearly imagined nor publicly considered at the time the Refugee Convention was drafted.

During the negotiations leading to the drafting of the Refugee Convention, gender was in fact discussed once, and only once, when the Yugoslav delegate proposed that the words “or sex” be added to Article 3 of the Refugee Convention, which stipulates that the Refugee Convention shall be applied “without discrimination as to race, religion or country of origin.”⁵⁹ The suggestion was rejected quickly—delegates considered equality of sexes as a matter for national legislation.⁶⁰ Van Heuven Goedhart, the then-UN High Commissioner for Refugees, noted that he doubted strongly “whether there would be any cases of persecution on account of sex.”⁶¹ These views, typical of a time in which gender equality and women’s rights were not yet considered to be central human rights, have dramatic implications in today’s refugee context and make it far more challenging for many women to utilize the

⁵⁵ Refugee Convention, *supra* note 5, art. 1.

⁵⁶ For an overview of the embryonic perceptions of women’s rights at the time the Refugee Convention was drafted, and the evolution of women’s rights since, see e.g., Charlotte Bunch, *Women’s Rights as Human Rights: Toward a Re-Vision of Human Rights*, 12 HUM. RTS. Q. 486, 486–98 (1990).

⁵⁷ Joan Fitzpatrick, *Revitalizing the 1951 Refugee Convention*, 9 HARV. HUM. RTS. J. 229, 232–33 (1996).

⁵⁸ Jacqueline Greatbatch, *The Gender Difference: Feminist Critiques of Refugee Discourse*, 1 INT’L J. REFUGEE L. 518, 519–20 (1989).

⁵⁹ Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Rec. of the Fifth Meeting, U.N. Doc. A/CONF.2/5, at 9 (July 4, 1951).

⁶⁰ *Id.* at 10–12.

⁶¹ SPIJKERBOER, GENDER, *supra* note 52, at 1.

refugee framework. In fact, the lack of an explicit gender convention ground has allowed some states to refrain from granting protection to women victims of gender-based persecution.⁶²

As time passed and women's rights became recognized as human rights, it was possible to assume that the Refugee Convention would be extended to include protection for women fleeing persecution, especially given its clearly stated goal to protect basic human rights without discrimination⁶³ and the development of international legal instruments for the protection of women's rights.⁶⁴ Although gender has been mainstreamed into the refugee system to a certain extent, the system is still constructed primarily for the male migrant/refugee, as it ignores the unique situations and interests of women.⁶⁵ It has become increasingly clear that, in order to adequately apply these legal mechanisms to women, a broader interpretation of the Refugee Convention is required.⁶⁶

To some extent, this discussion of the failure of the category of "refugee" to incorporate many of the issues around women's persecution may lead legitimately to asking whether IRL is bad for women. We would like to offer a more nuanced approach, which falls short of suggesting that IRL, even in its early stages, could be construed as broadly bad for women. Not all women are victims of "private" persecution—women who are persecuted in "male-like" manners for their actions in the public sphere, for example, are protected by IRL. Moreover, over the years, IRL has become "better" for women in general. As more countries began to deal with asylum claims based on gender persecution, and as more cases recognizing gender-based persecution as grounds for asylum were brought to international attention, guidance on interpreting the Refugee Convention soon became crucial. This guidance finally came in the 1980s, largely due to pressure by transnational networks of women's organizations that demanded that the UNHCR focus on the experience of women in its policies.⁶⁷ Since then, legal tools have been developed in "soft law"⁶⁸ and case law,⁶⁹ both of which provide

⁶² See *infra* Part III (for the analysis of the Israeli approach to the issue of gender-based persecution). See also HEAVEN CRAWLEY & TRINE LESTER, U.N. HIGH COMM'R FOR REFUGEES, *Comparative Analysis of Gender-Related Persecution in National Asylum Legislation and Practice in Europe*, U.N. Doc. EPAU/2004/05 (2004).

⁶³ The introduction to the Refugee Convention, *supra* note 5, opens with this declaration and connects the Refugee Convention to Human Rights in general from the year 1948. See, e.g., G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

⁶⁴ CEDAW, *supra* note 28.

⁶⁵ See generally Jane Freedman, *Mainstreaming Gender in Refugee Protection*, 23 CAMBRIDGE REV. INT'L AFF. 591 (2010).

⁶⁶ See also JACQUELINE BHABA & SUE SHUTTER, WOMEN'S MOVEMENT: WOMEN UNDER IMMIGRATION, NATIONALITY AND REFUGEE LAW 245 (1994) (explaining how the Refugee Convention is limited when it comes to protecting women).

⁶⁷ See generally Freedman, *supra* note 65.

⁶⁸ ANTONIO CASSESE, INTERNATIONAL LAW 196–97 (2d ed. 2005). Soft law refers to international guidelines or policy declarations which are not directly enforceable but set a standard of conduct in the international community.

supplementary guidelines to the Refugee Convention and direct states to apply gender-sensitivity when interpreting the Refugee Convention in relation to women asylum seekers.

B. The Introduction of New UNHCR Guidelines and Their Intersection with Feminist Theory

In the mid-1980s, numerous countries began to develop approaches to interpreting the Refugee Convention in order to allow for the protection of women persecuted based on their gender. Typically, these efforts relied on interpreting the Refugee Convention to include women as members of a “particular social group.” During this period, feminist theory highlighted the political aspects of women refugees’ actions and behaviors, either within the family (e.g., the freedom to choose her own husband, or not to be married at all), or outside the family (e.g., the freedom to choose her way of dress, or the freedom to work or study).⁷⁰

While the aforementioned development afforded protection from persecution to more women, the inclusion of gender within the grounds of a “particular social group” contained numerous pitfalls, especially because protection depended on favorable interpretations from courts.⁷¹ While some courts and jurisdictions were willing to recognize women generally as a “particular social group,”⁷² other courts hesitated in providing such a broad legal categorization, and instead chose to recognize only women with particular characteristics as constituting a “particular social group.”⁷³ Similarly,

⁶⁹ For U.S. cases see, for example, *Fatin v. INS*, 12 F.3d 1233, 1242 (3d Cir. 1993) (recognizing feminism as a political opinion, but denying asylum); *Matter of Kasinga*, 21 I&N Dec. 357 (B.I.A. 1996) (granting refugee protection to a Togolese woman who fled female genital mutilation); and *Matter of S-A-*, 22 I&N Dec. 1328 (B.I.A. 2000) (recognizing a Moroccan woman’s domestic abuse for violating religious rules governing women’s behavior and dress as persecution). For Canadian cases, see, for example, *Shahabaldin v. Canada (Minister of Employment & Immigr.)*, IAB Decision No. V85-6161 (Mar. 2, 1987) (unpublished) (recognizing opposing dress laws imposed on women in Iran as a form of political opinion); *Narvaez v. Canada (Minister of Citizenship & Immigr.)* [1995], 2 F.C. 55 (Can. Ont. T.D.); and *Diluna v. Canada (Minister of Employment and Immigr.)*, [1995] F.C.J. No. 399 (Can. Ont. T.D.) (recognizing Ecuadorian victims of domestic violence as a particular social group).

⁷⁰ See BHABA & SHUTTER, *supra* note 66, at 246.

⁷¹ See GUY S. GOODWIN-GILL & JANE McADAM, *THE REFUGEE IN INTERNATIONAL LAW* 81–84 (3d ed. 2007).

⁷² See, e.g., Victoria Foote, *Refugee Women as a Particular Social Group: A Reconsideration*, 14 REFUGEE 8 (1994).

⁷³ See Bret Thiele, *Persecution on Account of Gender: A Need for Refugee Law Reform*, 11 HASTINGS WOMEN’S L.J. 221, 225 (2000). Some examples in the U.S. include: *Matter of Kasinga* 21 I&N Dec. 357 (B.I.A. 1996) (recognizing “young women of the Tchamba-Kunsuntu Tribe who have not had FGC, as practiced by the tribe, and who oppose the practice”); DHS’s Supplemental Brief at 14, *Matter of L-R-* (B.I.A. Apr. 13, 2009), https://cgrs.uchastings.edu/sites/default/files/Matter_of_LR_DHS_Brief_4_13_2009.pdf [<https://perma.cc/47ZU-E3V9>] (recognizing “Mexican women in domestic relationships who are unable to leave”).

the recent decision of then-Attorney General Sessions⁷⁴ also attempted to enforce a narrow interpretation of “particular social group,” despite the previous case law interpreting “particular social group” broadly.⁷⁵

It is worth noting that in some cases, grounds other than “particular social group” were used to protect women from persecution. For example, a woman persecuted for refusing to wear a burka could be categorized as being persecuted for her political opinion or on the basis of her religious beliefs.⁷⁶

Feminist critiques of IRL began to target the refugee definition in the 1980s.⁷⁷ These critiques argued that the definition of a refugee only reflected typical male experiences of persecution, and that the definition ignored the reasons that often force women and girls to seek international protection.⁷⁸ Responding to such critiques, in 1985, EXCOM published a conclusion suggesting that countries adopt an interpretation of the Refugee Convention that recognizes that women who are at risk of being harmed due to violating society’s social conventions should be categorized as members of a “particular social group.”⁷⁹ This was a partial step towards redress but still excluded, for example, women victimized by sexual violence on account of their gender.

Addressing this discrepancy, and again after sustained and strategic campaigns by feminist scholars and practitioners,⁸⁰ the refugee definition was eventually interpreted in a more gender-inclusive manner. In 1993, EXCOM published an additional conclusion that included persecution based on sexual violence as a ground for asylum.⁸¹ The Committee called on countries to recognize women persecuted by sexual violence as refugees under any one of the five grounds for asylum through a broad interpretation of those grounds (i.e., despite the absence of a specific gender ground).⁸² In recognizing that women experience persecution differently than men asylum seekers, the Committee also called on countries to adopt guidelines on how to deal with women asylum seekers specifically.⁸³ These recommendations had a significant influence on many liberal democracies, and courts around the world began to recognize as refugees those who fled persecution based on their gender, such as those fleeing from female genital mutilation (FGM),

⁷⁴ See *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).

⁷⁵ See Ardalan, *supra* note 3.

⁷⁶ See SPIJKERBOER, GENDER, *supra* note 52, at 118. See also *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993).

⁷⁷ Alice Edwards, *Transitioning Gender: Feminist Engagement with International Refugee Law and Policy 1950–2010*, 29 REFUGEE SURV. Q. 21, 23 (2010).

⁷⁸ *Id.* at 23–40.

⁷⁹ U.N. High Comm’r for Refugees, Executive Committee’s Conclusions on Refugee Women and International Protection, No. 39 (XXXVI) (Oct. 18, 1985).

⁸⁰ See, e.g., Edwards, *supra* note 77.

⁸¹ U.N. High Comm’r for Refugees, Executive Committee’s Conclusions on Refugee Protection and Sexual Violence, No. 73 (XLIV) (Oct. 8, 1993).

⁸² See *id.* ¶ (d).

⁸³ *Id.* ¶ (e).

forced or early marriages, honor killings, domestic violence and more.⁸⁴ Additionally, a few countries began to adopt domestic laws and policies specifying gender-conscious interpretations of the Refugee Convention when processing the applications of women asylum seekers.⁸⁵ This was yet another step in the direction of broadening the protection of women under the Refugee Convention, even if through non-binding international legal norms.

In 2002, the UNHCR published a third set of guidelines stating that the correct interpretation of the refugee definition includes, *without a doubt*, gender related claims.⁸⁶ These guidelines were crucial in addressing inconsistent decisions by States with regard to gender-based asylum. The UNHCR additionally emphasized that harming a person because of their sexual orientation falls into the category of asylum claims based on gender-related persecution, and that the trafficking of women and children for sexual service constitutes severe harm in a gender asylum claim.⁸⁷ Finally, the nexus required between the persecution and one of the five grounds for asylum was also given a gender-inclusive interpretation.⁸⁸

To summarize, the UNHCR's guidelines for interpreting the Refugee Convention on gender-related asylum claims basically recommends that states adopt a gender-inclusive interpretation of the Refugee Convention. However, like other UNHCR interpretations of the Refugee Convention, these guidelines do not constitute binding international law, and the subse-

⁸⁴ See cases cited *supra* note 69.

⁸⁵ IMMIGRATION & REFUGEE BD. OF CAN., GUIDELINE 4: WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION (Nov. 13, 1996), <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir04.aspx> [<https://perma.cc/95NS-LMD8>]. For the US proposed regulations (which were never finalized), see Asylum and Withholding Definitions, 65 Fed. Reg. 76, 588 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

⁸⁶ UNHCR, Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees, HCR/GIP/02/01, at 3 (May 7, 2002). The guidelines state, for example that “[t]here is no doubt that rape and other forms of gender-related violence, such as dowry-related violence, female genital mutilation, domestic violence and trafficking, are acts which inflict severe pain and suffering—both mental and physical—and which have been used as forms of persecution, whether perpetrated by the State or private actors.”

⁸⁷ *Id.* ¶¶ 16–18.

⁸⁸ In relation to the necessary nexus required between the actual persecution and one of the five grounds for asylum listed in the Refugee Convention, the guidelines follow the instructional court decision given by the British House of Lords, *Shah & Islam*, from 1999, which resulted in numerous other courts in other countries adopting similar interpretations. *Islam v. Sec’y of State for the Home Dep’t* [1999] 2 AC (HL) 629 (appeal taken from Eng.). According to this court decision, the nexus requirement (demanding a causal relation between the “well-founded fear of being persecuted” and the Convention grounds) can be satisfied if the state or the non-state actor perpetrated the persecution, or did not provide necessary protection, based on one of the five grounds of asylum. KAREN MUSALO, JENNIFER MOORE & RICHARD A. BOSWELL, *REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH* 347 (4th ed. 2011). Harm perpetrated by non-state actors can amount to persecution if the state is unable or unwilling to provide protection. *Minister for Immigration and Multicultural Affairs v. Khawar* [2002] HCA 14 ¶¶ 29–31, 112–14 (Austl.)

quent court decisions from several countries⁸⁹ are only binding at the national level. However, they do point to a positive development in recognizing that the correct interpretation of the Refugee Convention is a gender-conscious one that recognizes women's experiences as a basis for asylum claims. In addition, these guidelines and decisions do have some normative significance even if not formally obligatory. As was mentioned, many countries today recognize gender-related persecution as a basis for asylum and have adopted this basis into domestic law.⁹⁰ The current position of the U.S. government, however, as seen in the decision of the then-Attorney General, can be understood as standing in contrast to this trend.⁹¹

The advancements discussed above in the interpretation of the Refugee Convention have widened the scope of the refugee definition for female, male, transgender, and intersex asylum-seekers. In many countries, those fleeing violence perpetrated by non-state actors now have the basis of a claim to refugee status.⁹² Based on this history, it is tempting to conclude that international feminist legal scholarship's intersection with IRL has been a success story. After more than three decades of feminist scholarship and advocacy, scholars, practitioners, UNHCR, IRL judges, and legislators have acknowledged the importance of gender as an analytical category in IRL.⁹³ However, the recent decision by the then-U.S. Attorney General proves that there is still an ongoing need to reinforce the protection of those persecuted on account of their gender, especially in the absence of a gender convention ground. The protection of women through IRL is still perceived as a discretionary broadening of the interpretation of the definition of refugee. Even though the decision of the Attorney General was later invalidated, the United States District Court for the District of Columbia could not make a firmly grounded case for the protection of asylum-seeking women in the definition of refugee.⁹⁴ While the decision of the Attorney General is the first of its

⁸⁹ For example, after the issuance of the UNHCR's guidelines for interpreting the Convention, the New Zealand Refugee Status Appeals Authority criticized the notion that all gender-related asylum claims should be interpreted within the framework of the "particular social group" grounds, suggesting instead a gender-sensitive approach to the entire Convention. See Refugee Appeal No. 76044, New Zealand Refugee Status Appeals Authority ¶¶ 70–72, 86–90 (2008).

⁹⁰ Tally Kritzman-Amir, Anat Ben Dor & Nurit Wurgaft, *Between Neutrality and Neglect: On Female Asylum Seekers in Israel*, 15 LAW & GOVERNANCE [MISHPAT U'MIMSHAL] 329 (2013) (Isr.).

⁹¹ It should also be mentioned that a country that chooses to flagrantly disregard the interpretation of the UNHCR may be considered in violation of its international commitments to the Refugee Convention. Tally Kritzman-Amir, *Not in My Backyard: On the Morality of Responsibility Sharing in Refugee Law*, 34 BROOK. J. INT'L. L. 335, 376–78 (2009).

⁹² See, e.g., Daniel Wilsher, *Non-State Actors and the Definition of a Refugee in the United Kingdom: Protection, Accountability or Culpability?*, 15 INT'L J. REFUGEE L. 68 (2003).

⁹³ Efrat Arbel, Catherine Dauvergne & Jenni Millbank, *Introduction: Gender in Refugee Law – From the Margins to the Centre*, in GENDER IN REFUGEE LAW 1, 1 (Efrat Arbel, Catherine Dauvergne & Jenni Millbank eds., 2014).

⁹⁴ *Grace v. Whitaker*, 344 F. Supp. 3d 96, 130–35 (D.D.C. 2018).

kind, it is reasonable to think that other countries may also try to pare back protections of asylum-seeking women, especially in light of the general “compassion fatigue” that states often exhibit toward refugees⁹⁵ and the inclination to copy interpretational standards from other jurisdictions.⁹⁶ Furthermore, because there is currently no specific convention ground that covers gender, this paring back of protections for persons suffering from gender-based persecution is more likely than the paring back of protection to those more explicitly protected through the Refugee Convention. In the next sections, we consider the shortcomings of the efforts to gender the international asylum and refugee debate.

II. BETWEEN INTERNATIONAL REFUGEE LAW AND INTERNATIONAL HUMAN RIGHTS LAW

A. *Reliance on the Refugee Convention and International Human Rights*

When the Refugee Convention was opened for signature in 1951, it marked significant progress in international law. This convention followed the Universal Declaration on Human Rights⁹⁷ (UDHR) from 1948. The Refugee Convention marked the first time since the UDHR that states chose to make the status of refugees—a matter that is arguably closely related to human rights—a matter governed not merely by state sovereignty, but also by international law.⁹⁸ It defined who is a refugee and granted those who met the definition a set of vaguely defined rights, duties, and immunities, ranging from protection from *refoulement* to rights regarding employment, education, health, family, property, and more.⁹⁹ The scope of the rights varies by the level of attachment of the refugee and the host country, with some rights being absolute and others contingent.¹⁰⁰

For many years, however, the Refugee Convention—together with its Protocol,¹⁰¹ the regional instruments on IRL,¹⁰² and the case law and the soft

⁹⁵ Maryellen Fullerton, *The International and National Protection of Refugees*, in GUIDE TO INTERNATIONAL HUMAN RIGHTS PRACTICE 245, 247 (Hurst Hannum ed., 4th ed. 2004); Alexander G. Higgins & Michael Rubinkam, ‘Compassion Fatigue’ Overwhelms Refugee Agencies, WASH. POST (Dec. 31, 2000), https://www.washingtonpost.com/archive/politics/2000/12/31/compassion-fatigue-overwhelms-refugee-agencies/f69ab589-77fb-48d0-9b5a-0e8506b30e82/?utm_term=.753879d51205 [https://perma.cc/E5HT-CH37].

⁹⁶ Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT’L L. 241, 262–69 (2008).

⁹⁷ G.A. Res. 217 (III) A, *supra* note 63.

⁹⁸ Jung-hyun Cho, *The Interaction and Co-Action of Refugee Law and Human Rights Law: The Protection of North Korean Escapees Under International Law* (2008) (unpublished Ph.D. thesis, University of Edinburgh) (on file with authors).

⁹⁹ Refugee Convention, *supra* note 5, arts. 12–24.

¹⁰⁰ JAMES C. HATHAWAY, *THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW* 41–47, 154–277 (2005).

¹⁰¹ Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

law norms¹⁰³ that developed in the field—has been treated as a separate branch of international law, to be applied and interpreted according to its own fundamental concepts, and separately from other areas of international law. Since the entry into force of other human rights instruments, however, namely the ICCPR¹⁰⁴ and the ICESCR¹⁰⁵ in 1976, but also others such as CEDAW¹⁰⁶ and various regional human rights instruments,¹⁰⁷ this tendency to view IRL as an area of law separate from IHRL has increasingly been questioned.¹⁰⁸

International human rights conventions are applicable to refugees, as they apply to “all individuals within [a state’s] territory and subject to its jurisdiction,”¹⁰⁹ or to “everyone.”¹¹⁰ In other words, their applicability is not limited to citizens, residents, or lawfully staying persons, and they apply not just within a state’s territory but also along its borders and in other areas where states apply coercive force.¹¹¹ Some of the later General Comments

¹⁰² For the African regional norms, see Convention Governing Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45. For the European regional norms on asylum, see generally FRA, ECTHR & COUNCIL OF EUROPE, HANDBOOK ON EUROPEAN LAW RELATING TO ASYLUM, BORDERS AND IMMIGRATION (2014), http://fra.europa.eu/sites/default/files/handbook-law-asylum-migration-borders-2nded_en.pdf [<https://perma.cc/8RAT-AJHL>]. For the American regional norms, see Convention on Territorial Asylum, Mar. 28, 1954, OAS Treaty Series No. 19; Convention on Diplomatic Asylum, Mar. 28, 1954, 1438 U.N.T.S. 104.

¹⁰³ See, e.g., UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, HCR/1P/4/ENG/REV. 3 (reissued 2011), <http://www.unhcr.org/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html> [<https://perma.cc/HT8Z-WU2M>]. For an overview of the soft law regime on refugee protection, see Alexander Betts, *Research Paper No. 162: Towards a ‘Soft Law’ Framework for the Protection of Vulnerable Migrants, in UNHCR NEW ISSUES IN REFUGEE RESEARCH* (2008).

¹⁰⁴ See ICCPR, *supra* note 26.

¹⁰⁵ See ICESCR, *supra* note 27.

¹⁰⁶ See CEDAW, *supra* note 28.

¹⁰⁷ See, e.g., American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123; Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights: Protocol of San Salvador, Nov. 17, 1988; African Charter on Human and Peoples’ Rights, June 27, 1981, 1520 U.N.T.S. 217; African Charter on the Rights and Welfare of the Child, July 11, 1990; Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, July 11, 2003; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221; European Social Charter, Oct. 18, 1961, 529 U.N.T.S. 90; Revised European Social Charter, May 3, 1996, 2151 U.N.T.S. 277.

¹⁰⁸ Maria-Teresa Gil-Bazo, *Refugee Protection Under International Human Rights Law*, 34 REFUGEE SURV. Q. 11, 19 (2015); Jane McAdam, *The Refugee Convention as a Rights Blueprint for Persons in Need of International Protection* 4 (UNHCR Research Paper No. 125, 2006), <http://www.unhcr.org/afr/44b7b7162.pdf> [<https://perma.cc/32BB-MD6E>].

¹⁰⁹ ICCPR, *supra* note 26, art. 2(1).

¹¹⁰ ICESCR, *supra* note 27, prmb.

¹¹¹ Kritzman-Amir & Spijkerboer, *supra* note 31, at 10–28. See also the position of the HRC in U.N. Human Rights Committee, *Lopez Burgos v. Uruguay*, Communication No. 52/1979, ¶ 12.2, U.N. Doc. CCPR/C/OP/1 (July 29, 1981), stating that the duties under the ICCPR refer not just “to the place where the violation occurred, but rather to

specifically recognize a duty to protect the rights of refugees.¹¹² In some ways, there is something paradoxical in the relationship between the Refugee Convention and IHRL. While IHRL broadly applies to “everyone,” the Refugee Convention grants rights selectively to persons based on their level of attachment to their country of asylum using legal categories such as “lawfully staying,” “lawfully present,” and others.¹¹³ If the goal of IHRL is to assert that there are universal human rights that should apply to all humans, the Refugee Convention carves out a swath of especially vulnerable human beings (refugees and asylum seekers) and offers them more limited protection, differentiating the scope of their access to this protection based on their level of attachment to the state.

Despite the clearer legal standard afforded by IHRL, the reality is that states apply international human rights differently to citizens than to different categories of migrants.¹¹⁴ Moreover, unlike the Refugee Convention, which has been operationalized not just by courts but also by state-created apparatuses for refugee status determination and rights enforcement,¹¹⁵ IHRL lacks domestic implementation mechanisms, leading some to view its operationalization as weak compared to the Refugee Convention.¹¹⁶ Finally, the Refugee Convention provides a more consistent set of rights to refugees than those bestowed on refugees based on different international human rights treaties, which have been inconsistently ratified by the different countries.¹¹⁷

Despite arguments in favor of relying on the Refugee Convention to protect the human rights of refugees and asylum seekers, there are weaknesses in the Refugee Convention—both in its legal framework and in the manner in which it has been enacted by states—that call into question its ultimate impact. First, in today’s “compassion fatigue” environment,¹¹⁸ as with IHRL, many countries attempt to evade their obligations under the Refugee Convention or interpret it so narrowly that their actions divert from the purpose of the Convention. As the former Attorney General’s decision has demonstrated, this “compassion fatigue” could come at the direct expense of

the relationship between the individual and the State in relation to a violation of any of the rights set forth in the Covenant; wherever they occurred.”

¹¹² U.N. Comm. on Econ., Soc. & Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health, U.N. Doc. E/C.12/2000/4, ¶ 34 (Aug. 11, 2000).

¹¹³ Refugee Convention, *supra* note 5, arts. 14–15, 17, 19, 21, 23–24, 28 (lawfully staying), and arts. 18, 26, 32 (lawfully present). Other forms of attachment include being subject to a state’s jurisdiction, being physically present, and obtaining durable residency.

¹¹⁴ In other words, states violate international human rights conventions by failing to protect the rights of migrants, even when they uphold the rights of their nationals. Jane McAdam, *Research Paper No. 125: The Refugee Convention as a Rights Blueprint for Persons in Need of International Protection*, in UNHCR NEW ISSUES IN REFUGEE RESEARCH 4 (2006) (“strong in principle but weak on delivery”).

¹¹⁵ Guy S. Goodwin-Gill, *International Law of Refugee Protection*, in THE OXFORD HANDBOOK OF REFUGEE AND FORCES MIGRATION STUDIES, *supra* note 32, at 36, 44.

¹¹⁶ *Id.*

¹¹⁷ McAdam, *supra* note 114, at 4–6.

¹¹⁸ Fullerton, *supra* note 95.

women. Second, the advantages of the Refugee Convention over IHRL are not clear, as most states that join on to international human rights treaties also join on to the Refugee Convention.¹¹⁹ Third, it should be noted that the interpretations countries give to different rights within the Refugee Convention often differ—sometimes significantly—and are inherently bound up with the different rights afforded to different categories of persons within the specific state of asylum. Finally, beyond states’ evasions of obligations to refugees and varying legal interpretations, there are weaknesses in the framework of the Convention itself. In particular, the Refugee Convention lacks an individual complaint mechanism, unlike some of the international human rights treaties,¹²⁰ rendering the Refugee Convention difficult to enforce domestically and virtually impossible to enforce internationally.

For all of these reasons, it thus makes sense to rely on IHRL to protect the rights of refugees in countries that are parties to most of the international human rights treaties.

B. The Relationship Between International Refugee Law and International Human Rights Law

There are different kinds of discussions on what the relationship should be between the IRL and IHRL. Several scholars have argued that the Refugee Convention should be interpreted in accordance with human rights treaties, as per Art. 31 of the Vienna Convention, which instructs states to interpret treaties (e.g., the Refugee Convention) in light of “subsequent agreements” and “subsequent practices,” as well as “any relevant rules of international law.”¹²¹ Such an interpretation expands some of the rights provided in the Refugee Convention, namely the right to *non-refoulement*, which is more broadly defined in other human rights instruments¹²² than in the Refugee Convention. Additionally, it permits the imposition of obligations towards refugees despite reservation entered by a state to the Refugee Convention if that state has such obligations under international human

¹¹⁹ Compare UNHCR, States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol (listing countries that are parties to the Refugee Convention and Protocol), *with* International Covenant on Civil and Political Rights, U.N. TREATY COLLECTION (listing those that are parties to the ICCPR), *and* International Covenant on Economic and Social and Cultural Rights, U.N. TREATY COLLECTION (listing those that are parties to the ICESCR).

¹²⁰ Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

¹²¹ Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331; *see also* JAMES C. HATHAWAY & MICHELLE FOSTER, *THE LAW OF REFUGEE STATUS* 91–92 (2nd ed. 2014); Gil-Bazo, *supra* note 108, at 19.

¹²² Compare the Refugee Convention, *supra* note 5, art. 33, with the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, Dec. 10, 1984, 1465 U.N.T.S. 85. *Non-refoulement* is also considered by some to be a customary international legal norm. *See, e.g.*, The Institution of Asylum and Its Recognition as a Human Right in the Inter-American System of Protection, Advisory Opinion, Inter-Am. Ct. H.R. ¶¶ 177–78 (July 12, 2018).

rights treaties.¹²³ Furthermore, an interpretation of the Refugee Convention in light of international human rights treaties is consistent with the non-discrimination principle that cuts through both the Refugee Convention and the various human rights treaties.¹²⁴

Others have suggested an attempt to view IRL, IHRL, and humanitarian law as an interconnected, holistic framework that provides international protection to individuals other than those covered by the definition of “refugee” in the Refugee Convention, such as victims of generalized violence and others in refugee-like situations.¹²⁵

Would refugees “lose” any rights by relying on IHRL, rather than IRL? When evaluating the relationship between the IRL and IHRL, one could argue that the Refugee Convention is more expansive in its protections, since refugees are carved out of the broader category of immigrants as being particularly vulnerable and are framed as being particularly “deserving.”¹²⁶ Accordingly, there are some rights the Refugee Convention grants to refugees that IHRL does not cover, namely the right to be issued travel documents.¹²⁷ This right, however, can arguably be inferred from a broad interpretation of the right to freedom of movement found in IHRL.¹²⁸ Another right that exists in the Refugee Convention and not in IHRL is the right of refugees to not be criminalized and sanctioned in connection with their undocumented entry.¹²⁹ Despite this right, many countries do in fact detain undocumented entrants, including asylum seekers.¹³⁰ It is also worth mentioning that asylum seekers in criminal proceedings often have good defenses for their undocumented entry, such as necessity, duress, or other exemptions from criminality under customary international law, as well as protection from arbitrary detention.¹³¹ A third right that is missing in IHRL but that exists in IRL is the right to naturalization.¹³² The protection afforded under this right, however, is arguably quite minimal, as it requires only that states facilitate naturalization as far as possible.¹³³ Furthermore, this right can arguably be inferred from the

¹²³ See Tom Clark & Francois Crepeau, *Mainstreaming Refugee Rights: The 1951 Refugee Convention and International Human Rights Law*, 17 NETH. Q. HUM. RTS. 389, 393 (1999).

¹²⁴ *Id.* at 394.

¹²⁵ McAdam, *supra* note 114, at 1–2.

¹²⁶ Clark & Crepeau, *supra* note 123, at 394 (referring to the 1951 Refugee Convention as a method of affirmative action towards refugees). See generally Gil-Bazo, *supra* note 111.

¹²⁷ Refugee Convention, *supra* note 5, art. 19.

¹²⁸ See Clark & Crepeau, *supra* note 123, at 397.

¹²⁹ Refugee Convention, *supra* note 5, art. 31.

¹³⁰ See Clark & Crepeau, *supra* note 123, at 398.

¹³¹ See International Covenant on Civil and Political Rights art. 9, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

¹³² Refugee Convention, *supra* note 5, art. 34.

¹³³ See Clark & Crepeau, *supra* note 123, at 398.

duty of non-discrimination in IHRL, which also applies in naturalization proceedings.¹³⁴

C. Between International Refugee Law and International Women's Rights Law

In the context of women's rights, as mentioned above, IRL lacks a direct reference to refugee women, despite their unique vulnerability. As shown, important progress made in soft law and judicial interpretations have suggested that gender-based persecution should be recognized under IRL, and that women who have a well-founded fear of enduring it should be protected. Interestingly, however, the treatment of asylum-seeking women as a unique and vulnerable group does not limit itself to the realm of IRL, but expands also to soft law on women rights law. Perhaps the most important document addressing this issue was put forth by CEDAW in General Recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality, and statelessness of women.¹³⁵ These recommendations, which were long overdue,¹³⁶ were introduced in November 2014.¹³⁷

General Recommendation No. 32 (hereinafter GR) joins a long list of other soft law instruments that deal with asylum-seeking women under the CEDAW framework.¹³⁸ These instruments go far beyond the flattening language of non-discrimination and instead acknowledge the human price of migration,¹³⁹ thus requiring states to accommodate the special needs of asylum-seeking women.¹⁴⁰ These Recommendations are also unique in that they codify the different elements that make asylum-seeking women a distinct category of persons whose needs and rights should be addressed separately.¹⁴¹ Finally, GR also specifically acknowledges the overlap between

¹³⁴ *Id.* The duty of non-discrimination can be found in several international instruments, including the ICCPR's Article 26 and the ICESCR's Article 2(2).

¹³⁵ U.N. Comm. on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women, U.N. Doc. CEDAW/C/GC/32, ¶ 1 (Nov. 14, 2014) [hereinafter General Recommendation No. 32].

¹³⁶ See Melanie Randall, *Particularized Social Groups and Categorical Imperatives in Refugee Law: State Failures to Recognize Gender and the Legal Reception of Gender Persecution Claims in Canada, The United Kingdom and the United States*, 23 AM. U. J. GENDER SOC. POL'Y & L. 529, 568–69 (2015).

¹³⁷ General Recommendation No. 32, *supra* note 135.

¹³⁸ Some of these include General Recommendation No. 19 on violence against women; No. 26 on women migrant workers; No. 28 on the core obligations of States parties under Article 2 of the Convention; and No. 30 on women in conflict prevention, conflict, and post-conflict situations.

¹³⁹ See generally Elvira Pulitano, *In Liberty's Shadow: The Discourse of Refugees and Asylum Seekers in Critical Race Theory and Immigration Law/Politics*, 20 IDENTITIES 172, 173 (2013).

¹⁴⁰ *Id.*

¹⁴¹ General Recommendation No. 32, *supra* note 135, ¶¶ 4–8. GR, for example, recognizes that the unique vulnerability of women in the displacement process can be a result of state policies, thus requiring states to mitigate and address these vulnerabilities.

IRL and IHRL, and the cumulative/complementary effect of the application of both legal frameworks to cases.¹⁴²

In addition, GR suggests a broad perception of the legal category of refugees, taking into account regional instruments as well as other human rights norms, and goes beyond the language of the Refugee Convention to reflect a comprehensive, holistic, and complementary approach.¹⁴³ GR not only calls on states to become parties to IRL, but also to incorporate IRL into their domestic systems and to give it a gender-sensitive approach. Specifically, GR determines that:

States parties should interpret the definition of a refugee in the 1951 Convention relating to the Status of Refugees in line with obligations of non-discrimination and equality; fully integrate a gender-sensitive approach while interpreting all legally recognized grounds; classify gender-related claims under the ground of membership of a particular social group, where necessary; and consider adding sex and/or gender, as well as the reason of being lesbian, bisexual or transgender, and other status to the list of grounds for refugee status in their national asylum legislation.¹⁴⁴

Furthermore, GR suggests incorporating a gender-based persecution ground,¹⁴⁵ which, as mentioned above, is currently missing from the Refugee Convention. In doing so, GR acknowledges the various forms of persecution that are more common or unique to women, and urges states not to examine asylum-seeking women “through the lens of male experiences” in either substance or procedure.¹⁴⁶ GR also specifically refers to the different forms of persecution women endure at the hands of state and non-state actors,¹⁴⁷ and requires a gender-sensitive approach to refugee status determination.¹⁴⁸

Regarding the rights of refugee women, GR requires a non-discriminatory approach to these rights and broadens the interpretation of such rights in two ways: first, the rights themselves are interpreted broadly,¹⁴⁹ and second,

Id. at 8, 14. GR also suggests that states have a negative and affirmative duty to protect and promote the rights of asylum-seeking women. *Id.* at 8.

¹⁴² *Id.* ¶¶ 9–11.

¹⁴³ *Id.* ¶ 12.

¹⁴⁴ *Id.* ¶ 38. At the same time, GR also acknowledges that gender-related asylum applications could potentially fall under different Convention grounds and not just under the “particular social group” ground. *Id.* ¶ 13.

¹⁴⁵ General Recommendation No. 32, *supra* note 135, ¶¶ 5, 13.

¹⁴⁶ *Id.* ¶ 16. Regarding the procedural aspect of the refugee status determination, see the special accommodations that are suggested for asylum-seeking women, which include, for example, access to information and representation; provision of childcare during the asylum interview; and the opportunity to be interviewed by a same-sex interviewer. *See id.* ¶ 50.

¹⁴⁷ *Id.* ¶¶ 7–8, 27–28.

¹⁴⁸ *See, e.g., id.* ¶¶ 16, 25, 30, 50.

¹⁴⁹ *See* for example the broad perception of the principle of *non-refoulement* in the GR, *supra* note 135, ¶¶ 17–23.

“non-discrimination” is understood broadly, requiring accommodations and adjustments for asylum-seeking women.¹⁵⁰

Finally, GR also suggests that states should utilize CEDAW’s periodic reporting mechanisms and “report to the Committee on their national policy and legislation with regard to asylum seekers and refugees and gather, analyze and make available sex-disaggregated statistical data and trends over time on asylum claims, countries of origin, reasons for seeking asylum and recognition rates.”¹⁵¹ This recommendation addresses the lack of gendered statistics on asylum-seeking women, which is foundational to the ability to provide services to them. In addition, the requirement to include reportage of the national treatment of asylum-seeking and refugee women allows for some degree of enforcement and accountability.¹⁵²

Although only recently issued, GR has been referred to at least once already in IHR. This occurred in the adjudication of an individual complaint by the Committee on the Rights of the Child (CRC), which reviewed the individual complaint of a Somali woman against Denmark regarding her potential deportation with her daughter to Somalia, where her daughter was likely to be subjected to female genital mutilation.¹⁵³ The CRC interpreted the requirements of the Convention on the Rights of the Child, taken together with the duty of *non-refoulement*, through the gender-sensitive approach suggested by GR, in order to determine that Denmark should refrain from the *refoulement* of the mother and daughter to Somalia.¹⁵⁴

To conclude, the GR seems like an interesting and potentially promising mode of engagement of feminism with IRL, as it incorporates refugee protections into women’s rights law as opposed to incorporating women’s rights protections into refugee law, as the Article suggests. The potential of GR has yet to be seen, however, as GR has so far rarely been used.

*D. Our Proposal: More International Human Rights Law,
Less Refugee Convention*

Despite the applicability of IHR norms to the protection of refugees’ rights, IRL has thus far prevailed as the main legal framework for the protec-

¹⁵⁰ See, for example, the interpretation of *non-refoulement* in the GR, *supra* note 135, ¶ 21, which encompasses asylum-seeking women “who claim that they would be exposed to the risk of sexual and/or gender-based violence and persecution if forcibly returned to their country of origin.”

¹⁵¹ *Id.* ¶ 39.

¹⁵² Interestingly, however, GR does not mention the individual complaint mechanism as a means for enforcement, though this mechanism is in theory accessible to asylum-seeking women. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, Oct. 6, 1996, 2131 U.N.T.S. 83.

¹⁵³ Comm. on the Rights of the Child, Views Adopted by the Committee on the Rights of the Child Under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure in Respect of Communication No. 3/2016, U.N. Doc. CRC/C/77/D/3/2016, ¶ 11.3 & n.14 (Jan. 25, 2018).

¹⁵⁴ *Id.* ¶ 12.

tion of refugees. Several cases have utilized human rights arguments to protect individuals from deportation, but these cases are still the exception rather than the rule.¹⁵⁵ This over-reliance on IRL creates a strong divide between refugees and other humans, a divide that translates into a separate institutional framework both internationally (i.e., in the separation of institutions such as UNHCR from other human rights entities), and domestically (i.e., with the formation of specialized bureaucratic and judicial bodies that deal with the administration of refugees).¹⁵⁶

Despite some of the weaknesses of IHRL discussed above, the application of the human rights framework on issues of refugees may improve the ability to protect the rights of refugees for several reasons. *First*, certain rights are more broadly protected within IHRL than within IRL. Perhaps the most notable right is the right of *non-refoulement*,¹⁵⁷ and the principle of non-discrimination.¹⁵⁸ The right to *non-refoulement* in IRL, as set in Art. 33(1) of the Convention, provides that “No Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”¹⁵⁹ This right is limited, however, since Article 33(2) of the Refugee Convention provides that the benefit of the *non-refoulement* principle may not be claimed by a refugee “whom there are reasonable grounds for regarding as a danger to the security of the country . . . or who, having

¹⁵⁵ See, e.g., *Mortlock v. United States*, Case 12.534, Inter-Am. Ct. H.R., Report No. 63/08, OEA/Ser.L/V/II.134, doc. 5 rev. 1 (2008); *Amrollahi v. Denmark*, App. No. 56811/00, Eur. Ct. H.R., ¶¶ 41, 43–44 (2002) (protecting a man from being deported because of a serious drug offense due to his right to family life and the fact that his family would face “serious difficulties”); *Boultif v. Switzerland*, App. No. 54273/00, Eur. Ct. H.R., ¶ 47 (2001) (protecting a man convicted of a violent crime from being deported because the sovereign right to deport for a criminal record must be put in “fair balance” with right to family life); Human Rights Comm., Views: Communication No. 1011/2001, ¶ 9.8, U.N. Doc. CCPR/C/81/D/1011/2001 (2004) (protecting the right to family life and thus preventing a deportation of a person who had lived in Australia for many years). See also Human Rights Comm., Views: Communication No. 930/2000, annex, U.N. Doc. CCPR/C/72/D/930/2000 (Aug. 16, 2001) (suspending deportation of failed asylum seekers who were parents of a 13-year-old son who had been born in Australia). We are grateful to Rebecca Sharpless for those references.

¹⁵⁶ See generally Clark & Crepeau, *supra* note 123 (explaining that there is considerable interaction between the Refugee Convention and some human rights treaties, but such interaction is still underdeveloped for economic and social rights).

¹⁵⁷ See, e.g., *Chahal v. United Kingdom*, 23 Eur. Ct. H.R. 413, ¶ 80 (1996) (comparing the scope of the *non-refoulement* principle within the Refugee Convention with that in other instruments, namely CAT and European Convention on Human Rights). See also U.N. Human Rights Comm., General Comment No. 31, ¶ 12, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004) (exploring the relationship between the Refugee Convention and ICCPR); Clark & Crepeau, *supra* note 123, at 395–96.

¹⁵⁸ Clark & Crepeau, *supra* note 123, at 395 (explaining that nationality-based discriminations have somewhat institutionalized in refugee law, despite the critique of international courts, but could be challenged through the general anti-discrimination principle of international human rights law).

¹⁵⁹ Refugee Convention, *supra* note 5, art. 33(1).

been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.”¹⁶⁰ By contrast, the principle of *non-refoulement* in IHRL is applicable both to refugees and non-refugees, and is not limited by Art. 33(2).¹⁶¹ In addition, it applies not only when there is a danger to the life and freedom of an individual, but also in other circumstances, such as a risk of torture or inhuman or degrading treatment.¹⁶² Similarly, the prohibition on discrimination is less expansive in the Refugee Convention than in other IHRL instruments. Whereas the Refugee Convention prohibits discrimination on account of “race, religion or country of origin,”¹⁶³ the ICCPR, for example, prohibits discrimination on account of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹⁶⁴

Second, international human rights instruments have monitoring treaty bodies, which have gradually developed a body of jurisprudence on immigration related issues, such as entry, stays, and removal,¹⁶⁵ thus protecting the rights of persons irrespective of the question of whether they are refugees or have been recognized as such. In addition, some of these international and regional treaty bodies consider individual complaints, which is a procedure that the Refugee Convention currently lacks. Although these treaty bodies and mechanisms have been criticized as slow and overly careful,¹⁶⁶ they are oftentimes more effective in flagging practices that breach the rights of refugees.¹⁶⁷

Third, the human rights framework protects refugees in all stages of their immigration process: from the time they are still in their countries of origin, to the period of transit, arrival to state of asylum, and even after they firmly settle and adjust their status, repatriate, or resettle. By comparison, the framework of the Refugee Convention is mostly applicable in the country of asylum and is more limited in its protection: typically, the protection of the Refugee Convention extends from the decision on admission, through the status determination process, to the recognition of a person as a refugee, and to the cessation or *refoulement* of a person. It may not protect those who are excluded, unadmitted, refouled, naturalized, those still in transit, or those whose protection was ceased.

¹⁶⁰ *Id.* art. 33(2).

¹⁶¹ See Office of the U.N. High Comm’r for Refugees, Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, ¶ 17 (Jan. 6, 2007), <https://www.unhcr.org/4d9486929.pdf> [<https://perma.cc/DZ2X-32SV>] (recognizing that under IHRL states cannot transfer “any individual” if it would “result in exposing him or her to serious human rights violations”).

¹⁶² Alice Farmer, *Non-Refoulement and Jus Cogens: Limiting Anti-Terror Measures That Threaten Refugee Protection*, 23 GEO. IMMIGR. L.J. 2, 34–36 (2008).

¹⁶³ Refugee Convention, *supra* note 5, art. 3.

¹⁶⁴ ICCPR, *supra* note 26, art. 26.

¹⁶⁵ Gil-Bazo, *supra* note 111, at 14.

¹⁶⁶ Clark & Crepeau, *supra* note 123, at 403–05.

¹⁶⁷ See, e.g., Comm. on the Rights of the Child, *supra* note 153, ¶¶ 3.3–3.5.

Fourth, protecting the rights of refugees through a human rights framework avoids the need to determine who is a refugee, and to distinguish between refugees and other types of migrants. This alternative approach would be beneficial for the protection of refugees' rights in several ways. Due to the increasing "compassion fatigue," states may be reluctant to provide rights and protection to those it does not currently recognize as refugees. A human rights approach to refugees' rights avoids the need to categorize migrants as refugees by rendering the categorization insignificant. A human rights approach to refugees' rights can help guarantee that even unrecognized refugees (for example, those who are processed through unfair or inefficient asylum systems) or yet-to-be recognized refugees (for example, those whose applications are pending) receive protection and rights. Additionally, relying on a human rights basis rather than on the IRL framework would allow states and official bodies to refrain from making difficult distinctions between refugees and other types of forced migrants or nearly-forced migrants.¹⁶⁸

Fifth, relying on IHRL would offer protection in regions where the applicability of IRL is still contested, such as borderlands, the high seas, and airports,¹⁶⁹ since it is widely accepted that human rights instruments apply extra-territorially in places where states have jurisdiction.¹⁷⁰

Sixth, basing rights claims on human rights instruments rather than on refugees' rights instruments allows for the mainstreaming of refugees' rights. It instills and promotes the idea—which, though seemingly elemental, is still to some extent controversial—that refugees are first of all humans, and as such are rights bearers. Invoking human rights arguments for refugees could decrease the social marginalization of refugees, and position them as persons whose rights are on the same level as everyone else's.

Seventh, a human rights approach to refugees' rights allows for a more holistic treatment of the different issues that refugees confront. A human rights approach will not only focus on the status of refugees, but will also deal with other issues related to the integration of refugees in contexts beyond those considered in the refugee status determination, such as rights

¹⁶⁸ Tally Kritzman-Amir, *Socioeconomic Refugees* (Apr. 2009) (unpublished Ph.D. dissertation, Tel-Aviv University) (on file with authors). See also Julian Lim, *Immigration, Asylum, and Citizenship: A More Holistic Approach*, 101 CAL. L. REV. 1013, 1039 (2013). In this context, it should be noted that similar suggestions to recruit human rights language to protect other categories of immigrants have been made, for example in the context of protecting victims of human trafficking. Though their success has been limited, they provide a useful and instructive framework of reference. Alison Brysk & Austin Choi-Fitzpatrick, *Introduction: Rethinking Trafficking*, in FROM HUMAN TRAFFICKING TO HUMAN RIGHTS 1, 6–10 (Alison Brysk & Austin Choi-Fitzpatrick eds., 2012).

¹⁶⁹ See generally Ayelet Shachar, *The Shifting Border of Immigration Regulation*, 30 MICH. J. INT'L L. 809 (2009) (explaining that immigration borders are contested, malleable and in flux, in the context of immigration regulation).

¹⁷⁰ ICCPR, *supra* note 26, art. 2. See also Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136 (July 9, 2004).

pertaining to family life, food, health care, housing, labor, political rights, privacy, and procedural justice. Such a holistic approach perceives barriers to accessing rights as interconnected and highlights that rights are necessary to refugees' existence as persons, thus bolstering the human rights of all. In other words, this approach conveys the perception that human rights are interconnected, interdependent, and indivisible.¹⁷¹

Eighth, and perhaps most importantly for the context of this Article, using a human rights approach to refugees' rights issues can create a legal basis for joint advocacy efforts with non-refugees. Human rights instruments are the shared basis for making rights claims on behalf of broader groups beyond merely refugees. It is often the case that some of these groups may publicly seem more "rights deserving" than refugees; that they are more politically represented and powerful than refugees, who lack political rights and are typically disempowered;¹⁷² or that these groups are better organized and resourced. Joint advocacy can therefore promote the rights of refugees indirectly through the promotion of the rights of those whose rights claims enjoy more legitimacy or support.

These joint advocacy efforts may cut across status and unite men and women along the lines of race, which has been noted as critically missing from the immigration and refugee-focused rights debates,¹⁷³ as well as along the lines of socio-economic class,¹⁷⁴ and—as is the focus of this Article—along the lines of gender.¹⁷⁵ Racial, gender, and class biases shape immigration policies¹⁷⁶ as well as other national policies, and therefore the focus on a binary citizens/aliens distinction may actually interfere with the ability to identify challenges associated with race or class and to address them properly in litigation and advocacy.¹⁷⁷ In addition, race, gender, and class often intertwine, constituting double or triple barriers to rights access.¹⁷⁸ A joint approach to advocacy efforts of refugees and others may also facilitate the assimilation of immigrants in their communities, as these efforts do not rely on the us-nationals versus them-immigrants narratives of rights claims.¹⁷⁹ For many refugees, the acquisition of status or even the acquisition of naturalization is not the end process at which rights are fully accessible to the individ-

¹⁷¹ See e.g., Hope Lewis, *Universal Mother: Transnational Migration and the Human Rights of Black Women in the Americas*, 5 J. GENDER, RACE & JUST. 197, 228–29 (2001).

¹⁷² Symposium, *Intersectional International Human Rights*, 5 GEO. J. GENDER & L. 857, 868 (2004).

¹⁷³ See generally Kevin R. Johnson, *Race Matters: Immigration Law and Policy Scholarship, Law in the Ivory Tower, and the Legal Indifference of the Race Critique*, 2000 U. ILL. L. REV. 525.

¹⁷⁴ Kevin R. Johnson, *The Intersection of Race and Class in U.S. Immigration Law and Enforcement*, 72 LAW & CONTEMP. PROBS. 1, 4–5 (2009).

¹⁷⁵ Johnson, *Race Matters*, *supra* note 173, at 530.

¹⁷⁶ On biases, see generally Tally Kritzman-Amir & Jaya Ramji Nogaes, *Nationality Bans*, 2019 U. ILL. L. REV. ___ (2019) (forthcoming).

¹⁷⁷ Johnson, *Race Matters*, *supra* note 173, at 541–43.

¹⁷⁸ See Lewis, *supra* note 171, at 200; Johnson, *supra* note 174, at 5.

¹⁷⁹ Cf. Johnson, *Race Matters*, *supra* note 173, at 537–41.

ual, especially in light of other barriers to accessing rights that exist for racial, class, and gender minorities. Thus, connecting the advocacy of those who have acquired status with those who have not is substantially justifiable.

In addition, in the case of gender, joint advocacy work could potentially build bridges between asylum-seeking women and other women, which may assist in refuting common negative stereotypes of asylum-seeking women,¹⁸⁰ and may also assist in the local integration of asylum-seeking women. Such efforts could also provide community support to refugee women, which could improve their quality of life and contribute to their empowerment. For example, joint advocacy could introduce a change to the current narrative focused on the defenselessness and vulnerability of asylum-seeking women, and replace it instead with a narrative emphasizing the legitimate political demands of disempowered women, as well as their need to uphold their dignity in current power relations.¹⁸¹

Finally, placing the rights of asylum-seeking women on the agenda of women's organizations would serve as a response to the argument often made in critique of the international women's rights movement. According to this argument, it is too often the case that women's rights organizations have addressed human rights violations of "women qua women [. . .] without distinction as to race, ethnicity, class, religion, sexual orientation or other factors that distinguish among women," thus failing to address and reflect different women's experiences.¹⁸² A counter-essentialist effort could acknowledge the different experiences of different women while recruiting the universal tools of human rights to their protection.¹⁸³ In other words, combining advocacy efforts could allow for composing a political rather than a strictly personal account of human rights disparities. Rather than merely focusing on the personal narrative that emerges over the course of a refugee status determination, that narrative can be broadened to view the asylum seeker as a member of a larger marginalized group. By focusing on collaborative advocacy between human rights activists and refugee activists, it is possible to place the refugee woman's narrative within a broader political discussion concerning the unequal distribution of power and resources between the Global North and Global South.¹⁸⁴

We therefore believe that there are several good reasons to apply the IHRL framework to cases of refugees in lieu of the IRL framework. We realize that this suggestion comes at the expense of forsaking the infrastruc-

¹⁸⁰ Ozlem Erden, *Building Bridges for Refugee Empowerment*, 18 INT'L MIGRATION & INTEGRATION 249, 263 (2018). Stereotypes have to do with the general stigma against people of color, as well as unfounded security concerns and feelings of superiority towards migrants. See, e.g., Suzy Casimiro, Peter Hancock & Jeremy Northcote, *Isolation and Insecurity: Resettlement Issues Among Muslim Refugee Women in Perth, Western Australia*, 42 AUSTL. J. SOC. ISSUES 55, 64–66 (2007).

¹⁸¹ Erden, *supra* note 180, at 253–54.

¹⁸² SYMPOSIUM, *supra* note 172, at 858.

¹⁸³ *Id.* at 859–60.

¹⁸⁴ *Id.* at 230–31.

ture that has been established by governments to identify refugees and grant them rights and protections. Unfortunately, there is currently no equivalent infrastructure for protecting the human rights of refugees outside of the IRL context. It is not always the case, however, that the existing refugee infrastructure is effective and fair, especially towards women. Therefore, we must weigh the benefits of relying on these existing infrastructures against the above-mentioned benefits of applying principles of IHRL. We would like to suggest that, at the very least, IHRL may work better than IRL in jurisdictions where the refugee label fails to trigger any significant recourse to protection, such as in jurisdictions that lack effective infrastructure for refugees. In the specific case of asylum-seeking women, reliance on IHRL over IRL may be beneficial in jurisdictions that are more likely to protect the rights of women generally than to protect the rights of woman refugees under a gender-sensitive interpretation of IRL. We believe that this may be the case in Israel and in other jurisdictions where the application of IHRL in general and of CEDAW specifically is more robust than the application of domestic or international refugee protections. This may also be true in jurisdictions where there is a stronger legal culture of gender-sensitive decision-making and a commitment to the promotion of women's rights overall.

We will demonstrate the feasibility of the application of IHRL by examining the effort to promote asylum-seeking women's rights in the Israeli asylum system. The Israeli asylum system is one that we believe could be characterized as unfair¹⁸⁵ and inefficient,¹⁸⁶ and thus creates, in our opinion, a good feasibility case for the use of other normative bases in lieu of IRL. Unfortunately, the situation in Israel is not unique: because of the existing protection gaps in the IRL framework as discussed above, many jurisdictions vary in the amount of protections they afford to refugees, if they afford any protection at all.¹⁸⁷

III. FEASIBILITY STUDY: MAINSTREAMING ASYLUM-SEEKING WOMENS' RIGHTS AS A HUMAN AND WOMENS' RIGHTS ISSUE IN THE ISRAELI ASYLUM SYSTEM

The discussion of the advocacy on behalf of asylum-seeking women in Israel will focus on the work of the Coalition on Asylum Seeking Women and Children. We will begin by providing a short description of the Israeli

¹⁸⁵ *Israel: Don't Lock Up Asylum Seekers*, HUM. RTS. WATCH (Jan. 22, 2018), <https://www.hrw.org/news/2018/01/22/israel-dont-lock-asylum-seekers> [https://perma.cc/L45Z-M8TY].

¹⁸⁶ Reuven (Ruvi) Ziegler, *Questioning the Legality of Deporting Eritrean and Sudanese Asylum Seekers from Israel*, ISRAEL DEMOCRACY INSTITUTE (Feb. 4, 2018), <https://en.idi.org.il/articles/20708> [https://perma.cc/2W6M-C85J].

¹⁸⁷ For an explanation of the protection disparities between various parts in the U.S., see Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *REFUGEE ROUTE: DISPARITIES IN ASYLUM ADJUDICATION AND PROPOSALS FOR REFORM* 37 (2011).

asylum system generally, current failures in advocating for asylum-seeking women under the IRL framework, and will then acknowledge more recent, alternative attempts at women's rights advocacy for asylum-seeking women through the work of the Coalition.

A. *The Israeli Asylum System: Main Characteristics*

Israel currently hosts about forty thousand asylum seekers, most of whom arrived between 2007 and 2011 from Eritrea and Sudan.¹⁸⁸ Although it is difficult to provide an exact number, it is estimated that around seven thousand of these asylum seekers are women.¹⁸⁹ The government, which refers to this population as “infiltrators,”¹⁹⁰ does not provide any statistics with a gender breakdown, but rather focuses on distribution according to countries of origin, manner of entry, the assumed purpose of their entry, etc.¹⁹¹ While it can be assumed that most women present themselves to the authorities to receive protection, it is possible that some of these women are undocumented.

It is important to note that the Israeli asylum system is still in a nascent stage. Despite being a party to the Refugee Convention and its Protocol since their entry into force, Israel only began conducting a Refugee Status Determination (RSD) on its own in 2009. Prior to that, it was only partially involved in a hybrid RSD process administered by the United Nations High Commissioner for Refugees (UNHCR).¹⁹²

Most of Israel's asylum seekers entered undocumented to Israel by way of its southern continental border with Egypt.¹⁹³ Beginning in 2010, however, the journey to Israel became extremely difficult, and many asylum seekers were kidnapped and held captive by their smugglers, who tortured,

¹⁸⁸ POPULATION AND IMMIGRATION AUTHORITY, FOREIGNERS IN ISRAEL DATA, EDITION 1/2017 (2017). According to this report, there are 39,274 “infiltrators,” out of which 28,110 are from Eritrea and 7,939 are from Sudan. The state's authorities and the Court use the term “infiltrators” to describe the asylum-seeking population, but, in our view, a more accurate term would be “asylum seekers,” since the latter term focuses more on the purpose of these people's arrival in Israel rather than on the way they reached the country.

¹⁸⁹ Vered Lee, Opinion, *Israel Must Help Asylum Seekers Trapped in the Sex Industry*, HAARETZ (Apr. 27, 2018), <https://www.haaretz.com/opinion/.premium-israel-must-help-asylum-seekers-trapped-in-the-sex-industry-1.6032884> [<https://perma.cc/A9SV-6SQQ>]; ASSAF, WOMEN ASYLUM SEEKERS IN ISRAEL 6 (2016).

¹⁹⁰ Talila Neshet, *Netanyahu: Israel Could Be Overrun by African Infiltrators*, HAARETZ (May 21, 2012), <https://www.haaretz.com/netanyahu-israel-could-be-overrun-by-african-infiltrators-1.5160186> [<https://perma.cc/9Y5E-AL5Y>].

¹⁹¹ POPULATION & IMMIGRATION AUTH., FOREIGNERS IN ISRAEL DATA, EDITION 4/2017 (2018). https://www.gov.il/BlobFolder/generalpage/foreign_workers_stats/he/foreigners_in_israel_data_2017.pdf [<https://perma.cc/AVK9-XZCB>] (in Hebrew).

¹⁹² Sharon Harel, *The Asylum Apparatus of Israel: The Process of Transferring the Responsibility for Handling Asylum Applications from the United Nations High Commissioner for Refugees to the State of Israel*, in WHERE LEVINSKI MEETS ASMARA: SOCIAL AND LEGAL ASPECTS OF ISRAEL'S ASYLUM POLICY 43, 43–45 (Tally Kritzman-Amir ed., 2015) (in Hebrew).

¹⁹³ *Id.*

raped, and enslaved them in order to extort money from their families.¹⁹⁴ In 2013, this border became virtually impossible to cross after the erection of a border fence.¹⁹⁵ Only a few dozen asylum seekers have managed to cross the fence into Israel since 2013—in 2017, for example, not a single person managed to cross over.¹⁹⁶

Asylum seekers enjoy a fragile status in Israel. Although they are protected from deportation under temporary collective arrangements,¹⁹⁷ Israel has generally been applying various means of exclusion vis-a-vis the asylum seeking population, including by imposing strict border policies;¹⁹⁸ extending periods of immigration detention for those who enter in an undocumented manner;¹⁹⁹ denying asylum seekers social and economic rights, including the right to political participation;²⁰⁰ resettling asylum seekers (both voluntarily and forcibly) to third countries;²⁰¹ imposing geographical limitations, including restricting asylum seekers' ability to work or reside in certain urban areas;²⁰² imposing heavy taxes;²⁰³ issuing documentation which does not explicitly grant asylum seekers the right to work;²⁰⁴ extremely low refugee recognition rates (less than one percent);²⁰⁵ and imposing bureau-

¹⁹⁴ HUMAN RIGHTS WATCH, "I WANTED TO LIE DOWN AND DIE": TRAFFICKING AND TORTURE OF ERITREANS IN SUDAN AND EGYPT (2014), <https://www.hrw.org/report/2014/02/11/i-wanted-lie-down-and-die/trafficking-and-torture-eritreans-sudan-and-egypt> [<https://perma.cc/AGQ6-NW4C>].

¹⁹⁵ Harriet Sherwood, *Israeli Fence Construction Cuts off Migration from Egypt*, THE GUARDIAN (Dec. 31, 2012), <https://www.theguardian.com/world/2012/dec/31/israeli-fence-cuts-migration-egypt> [<https://perma.cc/G8QE-E5UG>].

¹⁹⁶ POPULATION AND IMMIGRATION AUTH., *supra* note 191, at 6.

¹⁹⁷ Tally Kritzman-Amir, *Introduction*, in WHERE LEVINSKI MEETS ASMARA: SOCIAL AND LEGAL ASPECTS OF ISRAEL'S ASYLUM POLICY, *supra* note 192, at 9, 23–25.

¹⁹⁸ On the border policy, see generally Kritzman-Amir & Spijkerboer, *supra* note 31.

¹⁹⁹ Yonatan Berman, *Detention of Refugees and Asylum Seekers in Israel*, in WHERE LEVINSKI MEETS ASMARA: SOCIAL AND LEGAL ASPECTS OF ISRAEL'S ASYLUM POLICY, *supra* note 128, at 147.

²⁰⁰ Kritzman-Amir, *supra* note 197, at 23, 33.

²⁰¹ Ilan Lior, *Israel Secretly Flying Asylum Seekers to Uganda*, HAARETZ (Feb. 19, 2014), <http://www.haaretz.com/israel-news/1.575028> [<https://perma.cc/F659-TABM>]; Press Release, UNHCR and Israel Sign Agreement to Find Solutions for Eritreans and Sudanese, UNHCR (Apr. 2, 2018), <http://www.unhcr.org/news/press/2018/4/5ac261bd4/unhcr-israel-sign-agreement-find-solutions-eritreans-sudanese.html> [<https://perma.cc/9H86-5F56>].

²⁰² Kritzman-Amir, *supra* note 197, at 34.

²⁰³ *New Tax in Israel Leaves African Migrants Feeling Unwanted and Unwelcome*, JERUSALEM POST (July 3, 2017), <https://www.jpost.com/Israel-News/New-tax-in-Israel-leaves-African-migrants-feeling-unwanted-and-unwelcome-498648> [<https://perma.cc/38AA-RZ64>].

²⁰⁴ The Israeli government often grants temporary residency visas to asylum seekers that do not formally authorize them to work. See *Employment*, ASSAF, <http://assaf.org.il/en/node/139> [<https://perma.cc/WP7R-ZY9Z>]. Although the government has pledged that it will not enforce this prohibition, this lack of any formal work authorization leaves employed asylum seekers in a vulnerable legal limbo. See *id.*

²⁰⁵ Kritzman-Amir, *supra* note 197, at 26.

cratic hurdles and constantly changing policies.²⁰⁶ These exclusion mechanisms are deliberate, and come with the twin goals of deterring asylum seekers from reaching Israel in the first place and of deterring those who do reach Israel from staying.²⁰⁷ As a result, the majority of Israel's asylum seekers are in a liminal situation in which they are physically present but legally absent, lacking any opportunity to obtain a stable civil status that will allow them to plan their future, build their lives, and settle down. Only a small minority of asylum seekers—those who arrived in Israel before 2007—hold work permits.²⁰⁸ Likewise, only a few dozen asylum seekers, including twelve Eritreans and one Darfuri, have been granted the status of refugees, while another few hundred have temporary residence status.²⁰⁹ As a result of its many weaknesses, the Israeli asylum regime has been the subject of critique by Israeli Courts, academia, transnational organizations, and administrative bodies.²¹⁰

B. Women in the Israeli Asylum System

The different means of exclusion in the Israeli asylum regime have had a harsh effect on asylum seekers, impeding their ability to plan their future, integrate into their host society, or to rehabilitate.²¹¹

The effects on asylum-seeking women, however, have typically been even more severe, as these exclusionary measures have been compounded by preexisting discrimination and marginalization against women, especially against those who have endured the triple burden of being undocumented, poor, and women of color. Many asylum-seeking women are economically marginalized in Israel, rendering them financially dependent on men and often forcing them into the sex industry or into other forms of exploitative, precarious employment.²¹² This economic dependency leaves asylum-seeking women especially vulnerable and directly impacted when asylum-seeking men are detained.²¹³ Furthermore, Israel's restrictions on health care,

²⁰⁶ Yonatan Paz, *Research Paper No. 205: Ordered Disorder: African Asylum Seekers in Israel and Discursive Challenges to an Emerging Refugee Regime*, in UNHCR NEW ISSUES IN REFUGEE RESEARCH (2011).

²⁰⁷ Hadas Yaron-Mesegene, *Divide and Conquer Through Order and Disorder: The Politics of Asylum in Israel – Bureaucracy and Public Discourse*, in WHERE LEVINSKI MEETS ASMARA: SOCIAL AND LEGAL ASPECTS OF ISRAEL'S ASYLUM POLICY, *supra* note 192, at 88.

²⁰⁸ See Nurit Wurgaft, *All Eritrean Refugees to Receive Work Permits*, HAARETZ (Jan. 8, 2008), <https://www.haaretz.com/1.4976888> [<https://perma.cc/33M4-EZ2T>].

²⁰⁹ Yuval Livnat, *Refuge and Permanent Status in the State of Asylum*, in WHERE LEVINSKI MEETS ASMARA: SOCIAL AND LEGAL ASPECTS OF ISRAEL'S ASYLUM POLICY, *supra* note 192, at 343.

²¹⁰ See, e.g., THE STATE COMPTROLLER, ANNUAL REPORT 64C 149–86 (2014) (Isr.) (in Hebrew) [<https://perma.cc/4VVK-3DS4>]; HCJ 7385/13 Eitan v. The Israeli Government (2014) (Isr.) (in Hebrew).

²¹¹ Kritzman-Amir, *supra* note 197, at 26.

²¹² See Lee, *supra* note 189, at note 170.

²¹³ Kritzman-Amir, Ben Dor & Wurgaft, *supra* note 34.

welfare, and social programs for asylum seekers compounds these economic vulnerabilities, as it leaves asylum-seeking women without an ability to fall back on virtually any Israeli state services.²¹⁴ In addition, many asylum-seeking women have been victims of domestic abuse or other forms of violence.²¹⁵ Others, especially those who choose to migrate with their children, face the additional burden of having to function as a sole provider and only parent in an unstable and precarious situation.²¹⁶ Their ability to receive only a volatile, short-term status negatively impacts their labor market integration, adding to the burden of the pre-existing discrimination against women, migrants, and people of color in the labor market.²¹⁷ Despite the unique difficulties that these asylum-seeking women face, however, they are even less likely than men to be found eligible for asylum in Israel.

C. The Status Front – Gender Sensitivity, Refugee Status Determination, and Judicial Review Thereof

Efforts to assist asylum-seeking women have focused mostly on attempts to adjust their status. The underlying assumption is that by acquiring status in Israel, asylum-seeking women would be eligible to benefits, have access to rights, and would enjoy more stability and a sense of belonging. Such efforts, however, have been largely unsuccessful.

Not only does Israel refrain from offering protection to asylum seekers more generally, but it also systematically fails to recognize gender-based persecution as falling under the definition of refugee, even for highly vulnerable women. Israel's legal position is that many of the typical forms of persecution that women face constitute "familial difficulties,"²¹⁸ "romantic"²¹⁹ personal conflicts, or cultural and social issues,²²⁰ and thus do not impose a

²¹⁴ *Id.*; see also generally ASSAF & The Eritrean Women's Community Center, WOMEN ASYLUM SEEKERS IN ISRAEL: SUBMISSION TO THE PRE-SESSIONAL WORKING GROUP OF THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN (CEDAW) (2016).

²¹⁵ See generally ASSAF, ASYLUM SEEKERS WHO ARE VICTIMS OF DOMESTIC VIOLENCE: THE NEXT MURDER IS AROUND THE CORNER (2015), <http://assaf.org.il/en/sites/default/files/u8/Asylum%20Seekers%20who%20are%20Victims%20of%20Domestic%20Violence.pdf> [https://perma.cc/MJK4-VQGW].

²¹⁶ ADI DRORI-AVRAHAM, ASSAF, ABANDONED: SINGLE MOTHER ASYLUM SEEKERS 3 (2016), <http://assaf.org.il/en/sites/default/files/Abandoned%20report%20summary.pdf> [https://perma.cc/2GPF-3586].

²¹⁷ See ASSAF, *supra* note 214, at 5 (discussing how lack of status exacerbates the discrimination that asylum-seeking women in Israel face).

²¹⁸ This is how the RSD interviewer characterized the case of a Mongolian asylum seeker who claimed to have been the victim of domestic violence, after her husband beat her and stabbed her with a knife. Refugee Evaluation Form (Jan. 3, 2010) (on file with authors) (a copy of which was given to the attorney of the asylum seeker, after most of its content was edited out).

²¹⁹ File No. 1736-15 AdminC (TA), Mahze Malkem v. The Ministry of Interior, PM (Mar. 12, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

²²⁰ Kritzman-Amir, Ben Dor & Wurgaft, *supra* note 34, at 355–57.

legal obligation on the state to allow entry or stay of the applicant.²²¹ Israel seems to be assuming that protecting victims of gender-based persecution would cause millions of other women to come seek asylum in Israel, but there are reasons to doubt this assumption.²²² For these reasons, many efforts by migrants' rights' NGOs to assist asylum-seeking women in gaining status have been mostly unsuccessful. Female asylum seekers' applications are routinely rejected as not meeting the requirements of the Refugee Convention, sometimes even against the recommendation of the UNHCR.²²³ Other applicants have had their applications changed to applications for "humanitarian" forms of protection rather than applications for protection under the Refugee Convention. Unlike refugee status, which affords concrete legal rights and imposes legal obligations on a state, humanitarian status is largely discretionary and vague in nature, leaving asylum-seeking women dependent on the state's discretion regarding whether they should receive protections or not.²²⁴

Despite recent amendments to the RSD internal guidelines, which include a provision on gender sensitivity,²²⁵ RSD assessment for female applicants has not meaningfully improved. Asylum applicants in Israel are interviewed at several different points in the application process: shortly after their entry, during their registration, when they renew their papers, and when they undergo RSD.²²⁶ The only interview that is subject to any regulation is the RSD interview.²²⁷ According to the recent provision, "interviews . . . would be conducted with sensitivity to gender considerations which may barely impact on the behavior, feelings or testimony of the interviewee. Special sensitivity is required when dealing with victims of gender violence, including sexual violence."²²⁸ The provision continues with a requirement to conduct gender-sensitivity trainings, with an emphasis on the impact of gender persecution, the impact of a history of trauma on the interview, and the cultural roles of women.²²⁹ The RSD interview is also held separately from

²²¹ This was the State's Response to a request for an interim injunction in File No. 2596/08 AdminA (TA), *Jane Doe v. The Ministry of the Interior* ¶ 27 (2008) (Isr.) (on file with authors).

²²² See, e.g., Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action*, 14 VA. J. SOC. POL'Y & L. 119, 132–33 (2007). Musalo presents statistics which show that the number of women seeking asylum did not increase in the United States and Canada after these countries recognized gender-based persecution as grounds for asylum. She explains that women often have limited access to rights and financial resources that are necessary for fleeing. Women also have obligations to their family members and children, and are more likely to face dangers while fleeing. Therefore, the number of women seeking asylum does not necessarily increase when countries recognize gender-based persecution as grounds for asylum.

²²³ Kritzman-Amir, Ben Dor & Wurgaft, *supra* note 34, 347–360.

²²⁴ *Id.* at 355–57.

²²⁵ Procedure for Handling Asylum Seekers in Israel, Procedure No. 5.2.0012, 2–3 (Isr.), https://www.gov.il/BlobFolder/policy/handling_political_asylum_seekers_in_israel/en/5.2.0012_eng.pdf [<https://perma.cc/7AZL-8Z34>].

²²⁶ *Id.* at 4–8.

²²⁷ *Id.*

²²⁸ *Id.* at 2–3.

²²⁹ *Id.* at 2–3.

other family members and allows the interviewee to present her account of the persecution she endured, while the interviewer seeks to ensure that her trauma will not be exacerbated while recounting traumatic experiences.²³⁰ In addition, the interviewee may ask to be interviewed by an interviewer and translator of their own gender.²³¹ Despite these promising steps, however, the guidelines also stipulate that the gender sensitivity clause should not be read as adding to or expanding the persecution grounds specified in the Refugee Convention.²³² In other words, the guidelines speak in two contradictory voices: while they recognize the vulnerability of women in RSD procedures due to the unique, traumatic forms of persecution they endure, the guidelines refrain from granting women protection from precisely these forms of persecution.

Although some asylum application rejections were challenged in the tribunals and courts,²³³ most were not.²³⁴ Most asylum seekers do not have de facto access to legal remedies or to legal representation,²³⁵ as most asylum seekers are unable to afford legal services, and legal aid organizations are only able to assist a fraction of the asylum-seeking community. Furthermore, self-representation is cumbersome due to linguistic, cultural, and educational barriers, which make it virtually impossible to successfully conduct a legal challenge.²³⁶

We were able to identify only a handful of court decisions that dealt specifically with the status of asylum-seeking women.²³⁷ A few of these de-

²³⁰ *Id.* at 3.

²³¹ This is subject to manpower constraints, and so it is not guaranteed that a woman would be interviewed by a female interviewer or a female translator. In the previous version of the guidelines, it was only possible to request to be interviewed by an interviewer of the same gender. *See id.* at 1.1.a.

²³² *Id.* at 3.

²³³ ISRAEL DEPARTMENT OF JUSTICE, ENTRY TO ISRAEL REVIEW TRIBUNALS, https://www.gov.il/he/departments/ministry_of_justice_appeals_tribunal [<https://perma.cc/66TP-UYPW>] (in Hebrew).

²³⁴ It should be noted, however, that the Israeli asylum system has only operated for a few years, and so more litigation may arise in the future.

²³⁵ It should be noted that asylum seekers do have de jure access to the courts.

²³⁶ *See* William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 L. & Soc'Y REV. 631, 645–647 (1980–81).

²³⁷ File No. 34324-09-13 AdminC (Jer), Argash Gudina Teresfe v. The Ministry of Interior (Jan. 12, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 35382-08-10 AdminC (Jer), Jane Doe v. The Ministry of Interior (Feb. 16, 2012), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 43371-03-10 AdminC (Jer), Rose Glarado v. Ministry of Interior (June 26, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 5613/14 AdminA, Jane Doe v. The Ministry of Interior (June 18, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 7854/12 AdminA, Jane Doe v. The Ministry of Interior (Aug. 25, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 56994-05-12 AdminC (TA), Hiroi v. The Minister of Interior (Nov. 13, 2012), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 53025-07-11 AdminC (Jer), Tebeke v. The Ministry of Interior (Mar. 7, 2012), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 729-09-11 AdminC (Jer), Berhane Solomon v. The Ministry of Interior (Dec. 16, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 1736-15 AdminC (TA),

decisions were interim decisions,²³⁸ but all concerned asylum-seeking women whose applications for asylum had been rejected. Three cases concerned women fleeing female genital mutilation (FGM),²³⁹ two other cases concerned women fleeing persecution due to their male relatives' political or religious affiliation,²⁴⁰ two cases concerned women fleeing from forced marriages,²⁴¹ five concerned women who had escaped from domestic violence,²⁴² and one concerned a woman who had run away from the family of a man she had

Mahze Malkem v. The Ministry of Interior, PM (Mar. 12, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 2001/12 AdminC (TA), A. K. v. The Ministry of Interior (Aug. 26, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 8978/12 Req. for App. (AdminA), Juliet Oluwakemi v. Ministry of Interior (Apr. 7, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 5203/13 Req. for App. (AdminA), The State of Israel – Ministry of Interior v. Altanke Enore (Aug. 26, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 20465-08-11 AdminC (BS), Boatang v. The Ministry of Interior (Aug. 17, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 1987-01-17 AdminC (Jer), Binta Idris v. The Director General of the Population and Immigration Authority – The Ministry of Interior (June 2, 2017), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 8870/11 AdminA, Loz Stella Pez Gonzales v. The Ministry of Interior (Apr. 25, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 42977-02-11 AdminC (TA), Mekaven v. The Ministry of Interior (Mar. 21, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 3193/11 AdminA, Mekaven v. The Ministry of Interior (May 23, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 48593-05-12 AdminC (TA), Mewara v. The Ministry of Interior (July 22, 2012), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 10159-11-11 AdminC (TA), Princess v. The Ministry of Interior (Dec. 22, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 11144-10-11 AdminC (CT), Osaloni v. The Ministry of the Interior (Oct. 6, 2011), Nevo Legal Database (by subscription in Hebrew) (Isr.).

²³⁸ File No. 8978/12 Req. for App. (AdminA), Juliet Oluwakemi v. Ministry of Interior (Apr. 7, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

²³⁹ File No. 5613/14 AdminA, Jane Doe v. The Ministry of Interior (June 18, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 2001/12 AdminC (TA), A. K. v. The Ministry of Interior (Aug. 26, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 8978/12 Req. for App. (AdminA), Juliet Oluwakemi v. Ministry of Interior (Apr. 7, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

²⁴⁰ File No. 53025-07-11 AdminC (Jer), Tebeke v. The Ministry of Interior (Mar. 7, 2012), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 729-09-11 AdminC (Jer), Berhane Solomon v. The Ministry of Interior (Dec. 16, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

²⁴¹ File No. 1736-15 AdminC (TA), Mahze Malkem v. The Ministry of Interior, PM (Mar. 12, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 20465-08-11 AdminC (BS), Boatang v. The Ministry of Interior (Aug. 17, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.) (concerning a woman fleeing from an impending forced marriage which she had refused).

²⁴² File No. 1987-01-17 AdminC (Jer), Binta Idris v. The Director General of the Population and Immigration Authority – The Ministry of Interior (June 2, 2017), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 42977-02-11 AdminC (TA), Mekaven v. The Ministry of Interior (Mar. 21, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 3193/11 AdminA, Mekaven v. The Ministry of Interior (May 23, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 48593-05-12 AdminC (TA), Mewara v. The Ministry of Interior (July 22, 2012), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 10159-11-11 AdminC (TA), Princess v. The Ministry of Interior (Dec. 22, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 11144-10-11 AdminC (CT), Osaloni v. The Ministry of the Interior (Oct. 6, 2011), Nevo Legal Database (by subscription in Hebrew) (Isr.).

killed after he had tried to rape her.²⁴³ A few of the cases concerned women who had been persecuted due to their own political opinion²⁴⁴ or sexual orientation²⁴⁵ in more “typical” and “male-like” circumstances of persecution, but these cases may have had gendered nuances nevertheless.

The vast majority of these petitions and appeals were rejected.²⁴⁶ In only one case did the court decide that the applicant should receive status.²⁴⁷ In one other case, the court reaffirmed a decision to release from detention a person whose asylum application was still pending.²⁴⁸ In three cases, the court ordered that the asylum application be reconsidered by the authorities.²⁴⁹

²⁴³ File No. 5613/14 AdminA, *Jane Doe v. The Ministry of Interior* (June 18, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

²⁴⁴ *See, e.g.*, File No. 35382-08-10 AdminC (Jer), *Jane Doe v. The Ministry of Interior* (Feb. 16, 2012), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

²⁴⁵ *See, e.g.*, File No. 7854/12 AdminA, *Jane Doe v. The Ministry of Interior* (Aug. 25, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 5203/13 Req. for App. (AdminA), *The State of Israel – Ministry of Interior v. Altanke Enore* (Aug. 26, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

²⁴⁶ File No. 34324-09-13 AdminC (Jer), *Argash Gudina Teresfe v. The Ministry of Interior* (Jan. 12, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 35382-08-10 AdminC (Jer), *Jane Doe v. The Ministry of Interior* (Feb. 16, 2012), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 5613/14 AdminA, *Jane Doe v. The Ministry of Interior* (June 18, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 7854/12 AdminA, *Jane Doe v. The Ministry of Interior* (Aug. 25, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 56994-05-12 AdminC (TA), *Hiroi v. The Minister of Interior* (Nov. 13, 2012), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 53025-07-11 AdminC (Jer), *Tebeke v. The Ministry of Interior* (Mar. 7, 2012), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 20465-08-11 AdminC (BS), *Boatang v. The Ministry of Interior* (Aug. 17, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 1987-01-17 AdminC (Jer), *Binta Idris v. The Director General of the Population and Immigration Authority – The Ministry of Interior* (June 2, 2017), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 8870/11 AdminA, *Loz Stella Pez Gonzales v. The Ministry of Interior* (Apr. 25, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 42977-02-11 AdminC (TA), *Mekaven v. The Ministry of Interior* (Mar. 21, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 3193/11 AdminA, *Mekaven v. The Ministry of Interior* (May 23, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 48593-05-12 AdminC (TA), *Mewara v. The Ministry of Interior* (July 22, 2012), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 11144-10-11 AdminC (CT), *Osaloni v. The Ministry of the Interior* (Oct. 6, 2011), Nevo Legal Database (by subscription in Hebrew) (Isr.).

²⁴⁷ File No. 729-09-11 AdminC (Jer), *Berhane Solomon v. The Ministry of Interior* (Dec. 16, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.). The court’s decision to recognize the petitioner as a refugee and grant her protection has little to do with her gender.

²⁴⁸ File No. 5203/13 Req. for App. (AdminA), *The State of Israel – Ministry of Interior v. Altanke Enore* (Aug. 26, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

²⁴⁹ File No. 43371-03-10 AdminC (Jer), *Rose Glarado v. Ministry of Interior* (June 26, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 1736-15 AdminC (TA), *Mahze Malkem v. The Ministry of Interior, PM* (Mar. 12, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.); File No. 2001/12 AdminC (TA), *A. K. v. The Ministry of Interior* (Aug. 26, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

In summary, not only do the Israeli courts accept as legitimate the state's exclusion of those who flee gender-based persecution from protection, but these courts also ignore the gendered aspects of persecution altogether. For example, the court in six of its cases suggested that internal flight alternatives should have been exhausted before seeking asylum,²⁵⁰ thus ignoring the difficulties faced by women compelled to live in a different part of her own country without male relative protection.²⁵¹ In one case, the court rejected the petition of an asylum applicant who claimed to be a victim of domestic violence, concluding that her testimony was not credible because she had stayed at her father's house for a month after he abused her, thus ignoring the obstacles faced by victims of domestic violence to depart from their abusive family members.²⁵² In a different case, the court found credibility issues with the testimony of another victim of domestic abuse because she had visited her husband after he had abused her,²⁵³ thus overlooking the many complicated reasons that lead women to keep in touch with their abusive partners.²⁵⁴ In another case, the court concluded that being an HIV-positive woman is not a humanitarian concern,²⁵⁵ thus ignoring information on the stigmatization and social marginalization of HIV-positive women. In another case, the court ordered the petitioner to submit a family reunification request with an Israeli partner in order to seek adjustment of status, thus rendering her dependent on male support and sponsorship rather than granting her asylum based on her own merits.²⁵⁶ Finally, the court in another case

²⁵⁰ File No. 5613/14 AdminA, *Jane Doe v. The Ministry of Interior* (June 18, 2015), Nevo Legal Database (by subscription, in Hebrew) (blsr.); File No. 7854/12 AdminA, *Jane Doe v. The Ministry of Interior* (Aug. 25, 2015), Nevo Legal Database (by subscription, in Hebrew) (lshr.); File No. 20465-08-11 AdminC (BS), *Boatang v. The Ministry of Interior* (Aug. 17, 2011), Nevo Legal Database (by subscription, in Hebrew) (lshr.); File No. 1987-01-17 AdminC (Jer), *Binta Idris v. The Director General of the Population and Immigration Authority – The Ministry of Interior* (June 2, 2017), Nevo Legal Database (by subscription, in Hebrew) (lshr.); File No. 11144-10-11 AdminC (CT), *Osaloni v. The Ministry of the Interior* (Oct. 6, 2011), Nevo Legal Database (by subscription in Hebrew) (lshr.).

²⁵¹ In one case, a court denied a petitioner's application because she had not proven that she would have been persecuted had she transferred to a neighbouring country. In our opinion, this is a misinterpretation of the internal flight requirement, and it is not a requirement of the Refugee Convention. File No. 1987-01-17 AdminC (Jer), *Binta Idris v. The Director General of the Population and Immigration Authority – The Ministry of Interior* (June 2, 2017), Nevo Legal Database (by subscription, in Hebrew) (lshr.).

²⁵² File No. 48593-05-12 AdminC (TA), *Mewara v. The Ministry of Interior* (July 22, 2012), Nevo Legal Database (by subscription, in Hebrew) (lshr.).

²⁵³ File No. 42977-02-11 AdminC (TA), *Mekaven v. The Ministry of Interior* (Mar. 21, 2011), Nevo Legal Database (by subscription, in Hebrew) (lshr.); File No. 3193/11 AdminA, *Mekaven v. The Ministry of Interior* (May 23, 2011), Nevo Legal Database (by subscription, in Hebrew) (lshr.).

²⁵⁴ File No. 48593-05-12 AdminC (TA), *Mewara v. The Ministry of Interior* (July 22, 2012), Nevo Legal Database (by subscription, in Hebrew) (lshr.).

²⁵⁵ File No. 34324-09-13 AdminC (Jer), *Argash Gudina Teresfe v. The Ministry of Interior* (Jan. 12, 2014), Nevo Legal Database (by subscription, in Hebrew) (lshr.).

²⁵⁶ File No. 53025-07-11 AdminC (Jer), *Tebeke v. The Ministry of Interior* (Mar. 7, 2012), Nevo Legal Database (by subscription, in Hebrew) (lshr.).

explicitly stated that the interpretation of the definition of refugee should not be such that it allows protection to tens of millions of battered women in the world.²⁵⁷

In only a minority of the cases did the court adopt a more gender-sensitive approach. In one such case, the court criticized the Ministry of Interior's rejection of an asylum application based on its classification of a forced marriage as a "personal-romantic" issue.²⁵⁸ In another case, the court accepted a request to waive court fees from an asylum-seeking woman, recognizing that she was "not affluent" since she was pregnant and mother to a small child.²⁵⁹ Unfortunately, it is difficult to derive any general explanation as to why a particular decision was more gender-sensitive than another.

To conclude, current efforts concentrated at the level of status have not borne much fruit. Although most asylum applications by both men and women were rejected, gender-based asylum applications were held to be entirely outside the scope of refugee protection. The State of Israel and the Israeli courts have yet to embrace a gender-inclusive understanding of persecution under Refugee Convention grounds. So far, the effort to introduce a gendered perspective to litigation about status has proven to be largely unsuccessful.

D. Beyond Status—Additional Legal and Extra-Legal Venues

As a result, many asylum-seeking women continue to reside in Israel in legal limbo, neither completely excluded nor included. While many of these women are legally non-deportable as recipients of temporary protection from *refoulement*, they have little hope of having their status adjusted.²⁶⁰ They thus form an underclass in Israeli society, marginalized and rendered subordinate to both males from their own community and from the hosting society writ large. They remain unable to enjoy the feminist achievements of Israeli society or the human rights derived from such achievements, and bear the double (and sometimes even triple or quadruple) burden of being women, foreigners, undocumented, or women of color. Having status is a key factor, as it determines the scope of the "right to have rights."²⁶¹ Without status, asylum-seeking women are exposed to heightened risk.²⁶²

In addition to the difficulties faced from lack of status, asylum-seeking women face numerous day-to-day legal issues. Their legal needs range from

²⁵⁷ File No. 11144-10-11 AdminC (CT), *Osaloni v. The Ministry of the Interior* (Oct. 6, 2011), Nevo Legal Database (by subscription in Hebrew) (Isr.).

²⁵⁸ File No. 1736-15 AdminC (TA), *Mahze Malkem v. The Ministry of Interior, PM* (Mar. 12, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

²⁵⁹ File No. 8978/12 Req. for App. (AdminA), *Juliet Oluwakemi v. Ministry of Interior* (Apr. 7, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

²⁶⁰ Kritzman-Amir, *supra* note 197, at 23–25.

²⁶¹ See generally STEPHANIE DEGOOYER, ALASTAIR HUNT, LIDA MAXWELL & SAMUEL MOYN, *THE RIGHT TO HAVE RIGHTS* (2018).

²⁶² Kritzman-Amir, Ben Dor & Wurgaft, *supra* note 34, at 25.

landlord-tenant conflicts to employment law issues to family law problems, all of which are issues typical of marginalized, discriminated against, and disempowered groups.²⁶³ In light of the difficulties in securing status for asylum-seeking women, advocates in Israel have begun to approach the legal issues of asylum-seeking women in a different way. Rather than trying to incorporate gender-sensitive discussions into the IRL context, advocates have attempted to mainstream the issues faced by asylum-seeking women into the agenda of feminist organizations, relying on IHRL advocacy that focuses on women's rights. It is for this purpose that the Coalition was formed in September 2016.

The Coalition, which is comprised of fifteen women's, children's, and migrants' rights organizations and clinics,²⁶⁴ represents an attempt to reframe the legal problems of asylum-seeking women as a feminist issue. The Coalition employs a feminist work style: a collaborative model, bringing together different types of organizations and clinics.²⁶⁵ The women and children's organizations and clinics that have been involved in the work of the Coalition include both "mainstream" organizations, such as those that address the human rights issues of women and children more generally, and organizations whose work focuses more on disempowered populations, such as women from certain minority groups.²⁶⁶

The migrants' rights organizations that comprise the Coalition recognized that their clients—many of whom are asylum-seeking women—faced a range of various legal issues and needs that were outside of their expertise, which is mainly focused on applying for status.²⁶⁷ These migrants' rights organizations were therefore unable to provide a holistic service to the women they were representing, as they were unable to address the legal and extra-legal issues (such as psychosocial assistance) that their clients required. The Coalition thus aimed to bring together the expertise of the women's, children's, and migrants' rights organizations in order to provide adequate representation for asylum-seeking women. It also brought together lawyers, social workers, mediators, and health professionals.²⁶⁸ The results have been con-

²⁶³ Coalition on Asylum Seeking Women and Children in Israel, Project Proposal, November 30, 2016 (on file with authors).

²⁶⁴ *Id.*

²⁶⁵ Minutes of Coalition Meeting (Sep. 15, 2016) (on file with authors); Minutes of Coalition Meeting (Jan. 24, 2017) (on file with authors); Minutes of Coalition Meeting (May 24, 2017) (on file with authors); Minutes of Coalition Meeting (Jan. 1, 2018) (on file with authors).

²⁶⁶ Some of the organizations include, for example, ITACH MAAKI, WOMEN'S LAWYERS FOR SOCIAL JUSTICE, <http://www.itach.org.il/> [<https://perma.cc/W2MN-YBSE>]; WOMEN'S SPIRIT (RUACH NASHIT) FOR ECONOMIC INDEPENDENCE OF WOMEN WHO ARE VICTIMS OF VIOLENCE, <http://www.ruach-nashit.org.il/> [<https://perma.cc/W929-29GY>] (full list of organizations on file with authors).

²⁶⁷ See Tally Kritzman-Amir, *Mainstreaming Refugee Women's Rights Advocacy*, FRESH IDEAS FROM HBI: THE HBI BLOG (Apr. 13, 2018), <http://blogs.brandeis.edu/freshideasfromhbi/mainstreaming-refugee-womens-rights-advocacy/> [<https://perma.cc/U5ZG-V8ZS>].

²⁶⁸ Minutes of Coalition Meetings, *supra* note 265.

crete and meaningful. For example, through such collaboration, migrant workers' organizations and feminist organizations have jointly represented asylum seekers in family law matters, where expertise in the background laws operating on asylum-seeking women is needed just as much as expertise in a feminist approach to family law is needed.²⁶⁹ This representation has assisted women in upholding their right to family life, bodily integrity, and property, and has assisted them in obtaining child support, visitation rights, restraining orders against violent partners, and child custody.²⁷⁰

The agenda of the Coalition was formed bottom-up, mostly on the basis of information gathered by migrants' rights organizations and clinics on the legal needs and concerns of asylum-seeking women in Israel. Grassroots asylum-seeking women's organizations participated in some of the Coalition meetings and were consulted with regularly when building the coalition.²⁷¹

The Coalition initiative was met, however, with a certain degree of objection by refugee men. For example, one leader in the refugee community criticized the gendered approach to asylum-seeking women's issues as inauthentic, arguing that problems of status and access to rights are shared by all asylum seekers, even if their impact on women is experienced differently.²⁷² This objection is supported by a critique raised in the literature, which argues that the focus on vulnerable asylum-seeking women stigmatizes men.²⁷³ Despite this pushback from some asylum-seeking men, however, we view the focus on asylum-seeking women as justified. As addressed above, asylum-seeking women are systematically marginalized and under-protected, and affirmative advocacy on their behalf need not detract in any way from the efforts of male refugees to receive status, recognition, and rights.

The Coalition also represents an attempt to build on the achievements of the feminist movement in Israel for the promotion of the rights of asylum-seeking women. Since before the foundation of the state of Israel, Israeli society has been influenced by a socialist ideology that advocates for equal

²⁶⁹ "Activities of the Coalition for Asylum Seeking Women in 2017" (Oct. 17, 2017) (on file with authors).

²⁷⁰ *Id.*

²⁷¹ Further effort is needed to improve the cooperation with grassroots organizations, which struggle to remain active in the Coalition, as asylum-seeking women are finding it increasingly difficult to organize in their communities and challenge the restrictive reality to which they are subjected in Israel. Without efforts to maintain and increase collaboration with asylum-seeking women, the Coalition will cease to be seen as a model for cooperation and may risk reproducing the social inequality between privileged white women with status and women who fall into other social, racial, and socioeconomic categories.

²⁷² Interview with Sarah Lewis, Director of the Migrants' Rights Clinic and the Coalition Organizer, (May 8, 2018) (on file with authors).

²⁷³ See, e.g., KARLA MCKANDERS, *Gender, Islamophobia and Refugee Exceptionalism, in ARABS AT HOME AND IN THE WORLD: HUMAN RIGHTS, GENDER POLITICS AND IDENTITY* 126 (2019).

access to rights for men and women alike.²⁷⁴ This has resulted in a large body of legislation that establishes the values of gender equality, as well as the issuance of several seminal court decisions that protect gender equality in various contexts.²⁷⁵ With the rise of judicial activism in the Israeli Supreme Court in the 1980s, women's rights organizations were able to promote gender equality in various realms, including in highly contested issues relating to religious practices and institutions and to military service.²⁷⁶ In short, there is a robust feminist legal tradition and culture in Israel, which asylum-seeking women have yet to be able to enjoy.²⁷⁷ In comparison, issues of refugee rights have only begun to be litigated in the last few years, and with much less success.²⁷⁸ Efforts by the Supreme Court to protect the rights of refugees have been received with significant pushback from the government, and the Court's ability to conduct judicial review on IRL matters has been challenged.²⁷⁹ The issue of women's rights is far less contested and far more instilled in Israeli society and its judicial system, and thus bears more persuasive power than issues of IRL. As such, asylum-seeking women have a much better chance of being protected for their gender identity than for their status as refugees.

To date, the flagship project of the Coalition is a submission of an amicus curiae brief on behalf of a dozen women's rights organizations²⁸⁰ in sup-

²⁷⁴ See Yoav Dotan, *The Boundaries of Social Transformation Through Litigation: Women's and LGBT Rights in Israel, 1970–2010*, 48 ISR. L. REV. 3, 8–9 (2015).

²⁷⁵ See *id.* at 9–10.

²⁷⁶ See *id.* at 10; see also generally Daphne Barak-Erez, *The Feminist Battle for Citizenship: Between Combat Duties and Conscientious Objection*, 13 CARDOZO J.L. & GENDER 531 (2007); Dafna N. Izraeli, *Gendering Military Service in the Israel Defense Forces*, 14 THEORY & CRITICISM 85 (1999) (in Hebrew); Yael Yishai, *BETWEEN THE FLAG AND THE BANNER: WOMEN IN ISRAELI POLITICS* (1997); Ruth Halperin-Kaddari, *WOMEN IN ISRAEL: A STATE OF THEIR OWN* 153 (2004); Noya Rimalt, *Equality with a Vengeance: Female Conscientious Objectors in Pursuit of a Voice and Substantive Gender Equality*, 16 COLUM. J. GENDER & L. 97, 99–100 (2007); Frances Raday, *Religion, Multiculturalism and Equality: The Israeli Case*, 25 ISR. Y.B. HUM. RTS. 193 (1996); Ruth Halperin-Kaddari, *Women, Religion and Multiculturalism in Israel*, 5 UCLA J. INT'L L. & FOREIGN AFFAIRS 339, 357–59 (2001).

²⁷⁷ Kritzman-Amir, Ben Dor & Wurgaft, *supra* note 34, at 334, 371.

²⁷⁸ Tally Kritzman-Amir, *The Role of the Court in the Formation of an Israeli Asylum System*, 5 MAASEI MISHPAT 175, 179–84 (2013) (in Hebrew).

²⁷⁹ Rivka Weil & Tally Kritzman-Amir, *Between Institutional Survival and Human Rights Protection: Adjudicating Landmark Cases of African Undocumented Migrants in Israel in a Comparative and International Context*, __ U. PA J. OF INT'L L. __, (2019) (forthcoming).

²⁸⁰ The women's rights organizations who joined the amicus brief included organizations for Palestinian and Bedouin women; organizations for women in south Tel Aviv (focusing on Mizrahi women and women of color); organizations for women in poverty, women who survived the sex industry; women who were victims of violence. See Request for Amicus Brief in H CJ 2293/17 Ester Tsegay Gresgeher v. Knesset (Isr.) (in Hebrew) [hereinafter Amicus Brief] (on file with authors). Some of these organizations were not members of the Coalition, but were recruited to collaborate in this brief by the Coalition members.

port of a petition challenging a law known as the “deposit law.”²⁸¹ The law required asylum-seekers to “deposit” one-fifth of their salaries each month and made these salaries available only upon their departure from the country. In the Amicus Brief, the women’s rights organizations detailed the expected impact of this law on asylum-seeking women, whose particular vulnerability stems not only from their fragile status but also from the structural discrimination against women generally in the labor market and in Israeli society.²⁸² Coalition members each contributed their specialized knowledge in order to argue that the deposit law violated a range of rights, including employment rights, the rights to dignity, equality, health, and access to housing and nourishment.²⁸³ The amicus brief also explained that this law would increase the dependency of women on men, and that this might force women to work in the sex industry, a fear that had already materialized soon after the law was passed.²⁸⁴

Following the submission of this amicus brief, new regulations were enacted,²⁸⁵ introducing a significantly decreased deposit for women and other vulnerable populations to just six percent of their salaries.²⁸⁶ While the regulations still constitute a breach of rights and remain a harsh exclusionary and discriminatory measure,²⁸⁷ the changes nevertheless reflect a realization that some asylum seekers are more vulnerable than others, including women, and that they should be “excluded with caution.”²⁸⁸

In addition to being a legal effort, the Coalition has also been a political one. By rejecting the common “us versus them” binary distinction in refugee law, which often separates issues pertaining to the rights of asylum seekers from those of the rights of nationals, the Coalition has arguably facilitated a discursive change in that it has shifted the focus from the experiences of individual women to a broader focus on the structural power relations that impede women’s legal interactions overall. The legal work of the

²⁸¹ Tali Heruti-Sover, *Law Requiring Asylum Seekers to Deposit 20 Percent of Salary Not Being Enforced*, HAARETZ (May 1, 2018), <https://www.haaretz.com/israel-news/.premium-law-forcing-asylum-seekers-to-deposit-fifth-of-salary-not-enforced-1.6045748> [<https://perma.cc/6CXQ-K4R9>]; Law for the Prevention of Infiltration (Offenses and Jurisdictions) (Legislative Amendments and Temporary Order), 5774-2014.

²⁸² Amicus Brief, *supra* note 280.

²⁸³ *Id.*

²⁸⁴ Lee, *supra* note 189.

²⁸⁵ MINSTER OF THE INTERIOR, MIGRANT WORKERS’ REGULATIONS (TYPES OF CASES AND CONDITIONS THAT IF MATERIALIZED THE INFILTRATOR MIGRANT WORKER WOULD BE ELIGIBLE TO RECEIVE THE DEPOSIT PRIOR TO LEAVING ISRAEL FOR A NON-TEMPORARY EXIT), 2018, at art. 1(3) (2018), https://www.nevo.co.il/law_html/law01/501_914.htm [<https://perma.cc/EYX7-C4GV>].

²⁸⁶ *Id.* Other populations included in the regulations are single fathers, the elderly, and minors.

²⁸⁷ *Id.* For example, the regulations only allow for a partial waiver of the deposit, and this waiver is only applicable to salaries after October 2018. The waiver also excludes persons with chronic or terminal diseases, persons with disabilities, victims of torture, and young adults, all of whom are particularly vulnerable populations in the employment market.

²⁸⁸ *Id.*

Coalition is based on the idea that the human rights situation of asylum-seeking women is both impacted by and impacts the rights of other women. This effort has resulted in mobilization through both public political protest and direct action. One example of such mobilization was the women's demonstration in 2018 on International Women's Day against Israel's plan to forcibly deport African asylum seekers to third countries.²⁸⁹ This demonstration was attended by both Israeli and asylum-seeking women, and its agenda was shaped by a feminist ideology of collaboration. Its participants jointly called on the government to refrain from deporting African asylum seekers and to address the human rights issues of disempowered natives of Israel, thus tying both issues together. This political choice was particularly unique since it reflected a shift from the common "us versus them" divisive discourse, as it refused to accept the axiom put forth by the Israeli government that the provision of rights to refugees comes at the expense of disempowered and marginalized Israeli citizens. Instead, the demonstration asserted that the deportation of asylum seekers would not improve the human rights situation of disempowered Israelis in any way, and that the disempowerment of both groups was, in fact, fundamentally connected.²⁹⁰ More specifically, the demonstration's organizers argued, using human rights rhetoric and relying on IHRL instruments,²⁹¹ that asylum seekers and native Israelis shared similar vulnerabilities, as both groups were in danger of losing their homes to deportation and gentrification respectively.²⁹²

CONCLUSION

The intersectionality of refugees' rights and women's rights requires further development in order to unveil the different ways in which lower class, often-undocumented women of color are disadvantaged, marginalized, excluded, and put at risk.²⁹³ While historically most efforts to address this intersectionality have focused on incorporating feminism into IRL, we suggest that the incorporation of IRL into feminism could also be beneficial in some jurisdictions, especially in light of current attempts to dilute the protections afforded to women through refugee law. Rather than relying on IRL as the main corpus of rights for asylum-seeking women, we suggest that IHRL, and in particular, women's rights norms, should be utilized in some jurisdictions.

²⁸⁹ Yael Marom, *Hundreds of Women March in South Tel Aviv Against Deportations*, +972 BLOG (Mar. 9, 2018), <https://972mag.com/hundreds-of-women-march-in-south-tel-aviv-against-deportations/133701/> [<https://perma.cc/65R9-HGEC>].

²⁹⁰ *Id.*

²⁹¹ *Id.* ("Dr. Esther Elam, one of the founders of the feminist struggle in Israel, also spoke during the rally. 'When we started the feminist struggle, we understood that the personal is political,' she told the crowd. 'The struggle against racism is inseparable from the feminist struggle. The liberation of women is the liberation of all humans.'").

²⁹² *Id.*

²⁹³ Johnson, *supra* note 174, at 4–5.

We make this suggestion with an acknowledgment of three common characteristics of the legal profession. The first is the tendency of lawyers to invoke all possible arguments they can possibly make on behalf of their clients. In this context, we argue that the invocation of refugee rights arguments may carry a price that the invoking of human or women's rights arguments would not. Refugee rights are inherently divisive, separating the "deserving" refugees from other "undeserving" migrants, and at the same time separating them from the national "us." There may therefore be situations in which opting for a less divisive approach would be more beneficial, in which case human and women's rights arguments, rather than refugee rights arguments, should be invoked.

The second characteristic is the role of lawyers in branding and packaging the cases of their clients. In some cases, lawyers choose to brand their clients as refugees rather than immigrants in order to receive protection under IRL. This Article is a reminder that the "branding" of refugees as *persons* or women as *women* has a persuasive power of its own right, which allows for the application of a significant body of law once triggered.

Thirdly, although lawyers often work independently, or with others whose work resembles their own, this Article stresses the importance of reliance both on coalitions and on collaborative work with other experts, including with non-lawyers (such as community organizers, psychosocial workers, and health experts). Coalitions are instrumental for combining expertise and for fostering creative reflection about how law as an institution, in its totality, can be utilized to protect disempowered groups, such as migrants and refugees, people of color, the poor, and women. This requires stepping out of our immediate group of peers and colleagues, and expanding our professional contacts and knowledge in a flexible manner in response to the changing political and legal needs of the people whose rights we seek to promote and protect.

The Israeli test case is not (yet) a story about how human rights advocacy or women's rights organizations have changed the lives of asylum-seeking women, at least for now. But it is a story that could illustrate the powerful legitimizing, discursive, political, and uniting benefit of relying on human and women's rights law, and on women's rights organizations overall, in the promotion of asylum-seeking women's rights, especially when IRL fails to provide adequate answers to their legal needs. Although Israel's asylum system is particularly weak and its policies regarding gender and asylum particularly exclusionary, Israel is unfortunately not an outlier. Many other jurisdictions have also shown reluctance to adequately protect asylum-seeking women, as the recent decision by the U.S. Attorney General demonstrates.²⁹⁴

More broadly, however, there are theoretical and doctrinal benefits to relying on IHRL in the promotion of asylum seekers' rights. IHRL provides

²⁹⁴ Matter of A-B-, 27 I&N Dec. 316 (A.G. 2018).

broader rights than IRL, and in some cases has better enforcement of those rights. In addition, IHRL offers a holistic approach to the rights of women throughout the different stages of their migration and in virtually all aspects of their lives. The IHRL approach also allows for collaboration with other disempowered groups and renders the efforts to determine who is a refugee and who is not far less significant. Finally, advocacy through IHRL serves as a still-necessary reminder that, like women, refugees are first and foremost, human beings, and that their humanity is what sits at the core of their rights eligibility.