INTRODUCTION

Over the years, feminist engagement with asylum-seeking women has centered on an effort to identify these women as a discrete category of asylum seekers, worthy of protection under the refugee convention. Such efforts have focused on demonstrating that the forms of persecution women typically endure are unique and that protection gaps within the refugee convention and within the definition of refugees heighten women’s risk. This is due to the absence of gender as a convention-recognized ground for asylum, and in the general male-oriented convention grounds, both in text and interpretation. Feminist efforts have thus sought to argue that refugee law should protect women from acts of persecution carried out by private actors in the private sphere, often abetted by lax enforcement of state laws. Such efforts have proven to be fruitful. Since the mid-eighties, many Western democracies recognize practices such as female genital mutilation, forced marriages, child marriages, trafficking, domestic violence, sexual violence and others as recognized forms of persecution. Women who seek asylum from these types of persecution in these specific countries are often given protection, even when said persecution is not directly attributable to the state.

Recently there has been a call to further deepen the engagement of refugee law with feminist theory, to promote a feminist reading of core concepts in refugee law, such as the concept of exclusion or surrogate state protection. Such cases highlight the fact that these concepts not only disproportionately affect women, but also influence women and men differently and can thus benefit from application of feminist methodologies.

In this paper, we draw from our work with refugees and asylum-seeking women in Israel to argue that international refugee law would benefit from an additional form of engagement with feminism. In particular, we argue that refugee law should not remain at the level of status, or even at the level of the
International Refugee Law framework. Instead of simply introducing feminist theory into International Refugee Law, we suggest that the underlying commonality among all women, regardless of status, would benefit from conjoining advocacy efforts on behalf of refugee women with those on behalf women more generally.

Such a legal perspective, arising from more fundamental human (women’s) rights would encourage the development of a legal framework that would allow the promotion of a deeper protection to asylum seeking women, changing the legal focus from questions of status in determining whether someone, either man or woman, qualifies for protection as a refugee, to a broader focus on an entire set of necessary civil, social, economic and cultural rights. It also creates opportunities for solidarity between asylum seeking women and other women, including other immigrants, citizens and residents, national minorities, general feminist and women’s rights groups. Moreover, such a linkage will 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 seeking rights exclusively as refugees.

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. The overarching question is this: Is it strategically preferable to advocate for the rights of refugees via instruments of International Human Rights, rather than via International Refugee Law?

In examining this question, 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 separately from other areas of international law. Since the adoption of other human rights instruments, namely the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1966, as well as regional human rights instruments, and, in the context of this paper, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1979, this tendency to view refugee law separately from international human rights law has been questioned. These international conventions on human rights should be applicable to refugees, as they apply to “all individuals within its
territory and subject to its jurisdiction,” (ICCPR) or “everyone” (ICCPR, ICESCR). In other words, their applicability is not limited merely to citizens, residents, lawfully staying persons, etc., and they apply not just within a state’s territory but also along its borders and in other areas where states apply coercive force.

While there have been calls to interpret International Refugee Law in light of International Human Rights Instruments (as well as International Humanitarian Law), the argument here goes further by asking, essentially: what would be the benefits of advocating for refugee rights – and not just for refugee women’s rights – through a Human Rights framework, rather than a Refugee Rights framework? Put differently, we ask which legal approach would be more beneficial in protecting refugees’ rights?

The exploration of this question draws on the work of the Refugee Women’s Coalition, a coalition on asylum seeking women and children in Israel which has been operating since September 2016, consisting of fifteen NGOs and clinics whose main goals are to promote migrants’ and refugees’ rights, women’s rights, or children’s rights. By embedding a theoretical legal question in the lived experience of women asylum seekers and women’s rights advocates, the expected outcome of this research beyond its theoretical value to a reflection on the advocacy effort and raison d’être of the coalition. It follows previous research on asylum seeking women in Israel, which concluded that despite the fact that there are justifications for treating the asylum-seeking women as a discrete group within the asylum-seeking community, due to their extreme vulnerability, they are rarely treated as such. That research also showed that feminist organizations are not inclined to engage with the asylum-seeking women, and advocacy to promote women’s rights is conducted within the confines of the “ghetto” of migrants rights NGOs and clinics. This renders asylum seeking women unable to enjoy the achievements of feminism in the Israeli society. The recently-formed coalition aimed to change precisely that.

Part I of the paper provides a critical overview of the intersection between feminist theory and International Refugee Law. Part II analyzes the relationship between International Refugee Law and International Human Rights Law. Part III discusses the convergence of gender struggles with refugee women’s rights struggles. Part VI provides a description of the Refugee Women’s Coalition as a test case
on promoting the rights of asylum seeking women in Israel, both through International Refugee Law and through convergence with the aims and advocacy efforts of broader feminist movements.

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. These trends have also driven drastic increase in the number of women who migrate to such an extent that some argue that immigration itself has become feminized. Among women migrants, more and more are immigrating on their own, initiating their own independent cross-border movement rather than accompanying their male relatives. According to the statistics published by the United Nations High Commissioner for Refugees (UNHCR) women currently make up 49% of the forced migrant population.

Refugee women are not just a significant and sizable group among all refugees, but they also are a group with distinctive characteristics, different from male refugees. As noted above, women often flee their home country for different reasons than men and often for persecution they experiences in their homes. Additionally, women are often persecuted by non-state actors, such as partners or family members, with their state unable or unwilling to protect them. The often private nature of women’s persecution also means that they cannot rely on family members to help prove the reasons for their persecution, or that they must rely on the asylum application of their (male) family members. As such, women constitute the secondary or dependent asylum applicant, lacking control and independence in managing their asylum claim. All of these unique characteristics of asylum seeking women make their asylum application process more challenging than that of men. Let us see how International Refugee Law addresses their 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 remain today the only international treaty that provides specific protection of refugees. For decades after it was written, any consideration 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, is unwilling to avail himself of the protection of that country.”

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 convention was post World War II, years before when women’s rights were recognized as human rights,¹ and during a historical context that assumed that the “refugee problem” was a concrete problem which could and would be resolved.² The prototypical refugee at this time was perceived as an individual persecuted by a totalitarian regime.

Thomas Spijkerboer notes that during the negotiations leading to the drafting of the Convention, gender was in fact discussed only once when the Yugoslav delegate proposed that the words ‘or sex’ be added to Article 3 of the convention, which stipulates that it shall be applied ‘without discrimination as to race, religion or country of origin’. The suggestion was rejected quickly because delegates considered equality of sexes as a matter for national legislation. 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’.³

These views, typical of a time in which gender equality and women’s rights were not yet considered to be central issues, have important implications today and create barriers for many women in utilizing the legal tools supposedly available to them when seeking refugee status in a country.

As time passed, and the “refugee problem” was not resolved, it was possible to assume that the Convention would have easily been interpreted to extend protection to women fleeing persecution, based on the clearly stated goal to protect basic human rights without discrimination⁴ and the development of

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¹ Fran P. Hosken, Toward a Definition of Women’s Human Rights, 3(2) Hum. RTS. Q. 1, 1. (1981)
³ Thomas Spijkerboer, Gender and Refugee Status, 1 (Aldershot, UK: Ashgate, 2000).
⁴ The introduction to the Refugee Convention opens with this declaration and connects the Refugee Convention to Human Rights in general from the year 1948.
international legal instruments for the protection of human rights.\textsuperscript{5} The recognition that women’s rights are human rights assumes the conclusion that if their rights are severely and systemically violated, this would constitute grounds for asylum according to the refugee convention. However, despite the gender-neutral legal definition, it is in fact constructed for the male migrant/refugee, ignoring the situations and interests of women.\textsuperscript{6} The prototypical male refugee experience, that of the refugee who is persecuted in “the public sphere” as a political, religious, or other kind of activist, is more explicitly protected by the language of the Convention than the prototypical female refugee whose persecution, even when state sanctioned – occurs in the “private sphere”, often due to the actions or affiliations of their male relatives. It became increasingly clear that, in order to apply these legal mechanisms to women, broader interpretation of the Convention would be required.\textsuperscript{7}

Over the years, legal tools have been developed in “soft law” which provide supplementary guidelines to the refugee convention directing states to apply gender-sensitivity and adopt a different standard for women asylum seekers. As an increasing number of cases were brought to international attention and more countries have had to deal with asylum claims based on gender-persecution, it became clear that some form of guidance on interpreting the Convention was necessary. This did not occur until the 1980s, largely due to pressure by transnational networks of women’s organizations who demanded that the UNHCR focus on the experience of women in its policies.

\textit{B. The introduction of new UNHCR guidelines and their intersection with Feminist theory}

In the mid-1980s, numerous western countries began to develop approaches to interpreting the refugee convention to allow for the recognition of women persecuted based on their gender. Typically these efforts relied on interpreting the Convention to include women as members of a “particular social group”, just like any other group persecuted based on particular characteristics. During this period, feminist theory assisted

\begin{flushleft} \textsuperscript{5} CEDAW \\
\textsuperscript{7} JACQUELINE BHABA & SUE SHUTTER, \textit{WOMEN’S MOVEMENT: WOMEN UNDER IMMIGRATION, NATIONALITY AND REFUGEE LAW} 245 (1994) \end{flushleft}
in highlighting the political aspects of women refugees’ actions and behaviors, either within the family (for example, the freedom to choose her own husband, or not to be married at all, the freedom to choose her way of dress, the freedom to work or to study), or outside the family.\(^8\)

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, particularly in the strenuous interpretative efforts required from various judicial courts around the world in order for such grounds to sufficiently corroborate an asylum claim.\(^9\) In some courts and jurisdictions, women in general were indeed recognized as a “particular social group,” while 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.”\(^10\) It is worth noting that in some cases, other grounds from the Convention were used to protect women being persecuted. 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.\(^11\)

Feminist critique of refugee law started focusing on the refugee definition in the 1980s.\(^12\) These critiques brought to light the ways in which the definition of a refugee was tailored to reflect typical male experiences of persecution and neglected the reasons which often force women and girls to seek international protection. Responding to such critiques, the UNHCR’s Executive Committee (EXCOM) recommended that member states interpret the Refugee Convention in a manner that would provide increased protection for women persecuted because of their gender. In 1985, EXCOM published a conclusion suggesting that countries adopt an interpretation of the Convention that recognizes that women

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\(^8\) JACQUELINE BHABA & SUE SHUTTER, WOMEN’S MOVEMENT: WOMEN UNDER IMMIGRATION, NATIONALITY AND REFUGEE LAW 246 (1994)


who are at risk of being harmed due to violating society’s social conventions should be categorized as members of a “particular social group.” This was a partial step towards redress but still excluded for example, women victimized by sexual violence on account of her gender.

Addressing this discrepancy, and after sustained and strategic campaigns by feminist scholars and practitioners, the refugee definition was eventually interpreted in a more gender-sensitive manner. In 1993, EXCOM published an additional conclusion that included persecution based on sexual violence as a ground for asylum. The Committee established that sexual violence is not only a violation of human rights, but also a violation of human dignity. The Committee called on countries to recognize women persecuted by sexual violence as refugees under any one of the five grounds for asylum, and to adopt guidelines on how to deal with women asylum seekers, recognizing that women experience persecution differently than men asylum seekers. These recommendations had 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 female genital mutilation (FGM), forced or early marriage, honor killings, domestic violence and more. Additionally, in some western countries, domestic laws and policies were legislated and adopted specifying gender-conscious interpretations of the Convention when processing the applications of women asylum seekers. This was yet another step in the direction of broadening the protection of women through the Refugee Convention, but still this was set in non-binding 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. These guidelines were crucial in order

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14 The Executive Committee on the International Protection of Refugees, Conclusion 73 (XLIV) – Refugee Protection and Sexual Violence, (Oct. 8, 1993).
15 The Executive Committee on the International Protection of Refugees, Conclusion 73 (XLIV) – Refugee Protection and Sexual Violence, paragraph (d) (Oct. 8, 1993).
16 The Executive Committee on the International Protection of Refugees, Conclusion 73 (XLIV) – Refugee Protection and Sexual Violence, paragraph (e) (Oct. 8, 1993).
to address the ambiguity expressed by States with regard to gender-based asylum.\textsuperscript{19} 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.\textsuperscript{20}\”

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.\textsuperscript{21}

In relation to the necessary nexus required between the actual persecution and one of the five grounds for asylum listed in the convention, the guidelines follow the instructional court decision given by the British House of Lords, \textit{Shah & Islam,} from 1999, (which resulted in numerous other courts in other countries adopting similar interpretations).\textsuperscript{22} 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.\textsuperscript{23} Harm perpetrated by non-state actors can amount to persecution if the state is unable or unwilling to provide protection.\textsuperscript{24}

To summarize, the UNHCR’s guidelines interpreting the Convention on gender-related asylum claims, basically recommends that states adopt a gender sensitive interpretation of the Convention.

\textsuperscript{19} 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 (May 7, 2002).

\textsuperscript{20} 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 paragraph 9 (May 7, 2002).

\textsuperscript{21} 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 paragraph 16-18 (May 7, 2002).

\textsuperscript{22} Islam v. Secretary of State for the Home Dep’t, and Regina v. Immigration Appeal Tribunal, \textit{ex parte} Shah, [1999] 2 A.C. 629 (H.L.)

\textsuperscript{23} \textsc{karen Musalo, Jennifer Moore & Richard A. Boswell,} \textsc{Refugee Law and Policy: A Comparative and International Approach} 74 (4th ed. 2011).

\textsuperscript{24} \textit{Khawar} (2002) 210 CLR 1, 8 [29]-[31] (Gleeson CJ), 37 [112]-[114] (Kirby J).
Accordingly, the court of appeals in New Zealand dealing with asylum claims criticized the notion that all
gender-related asylum claims need to be interpreted within the framework of the “particular social group”
grounds, suggesting instead a gender sensitive approach to the entire Convention.25

The UNHCR and EXCOM guidelines and court decisions from several countries do not constitute
a mandatory normative source in international law. However, they do point to positive development in
policies from around the world, recognizing that the correct interpretation of the Convention is a gender-
conscious one in which women’s experiences are recognized as the basis for asylum claims. These
guidelines and decisions constitute “soft law,”26 which has some normative significance even if it is not
formally obligatory. As was mentioned, today many countries recognize gender-related persecution as a
basis for asylum and have adopted this into domestic law. A country that chooses to flagrantly disregard
this interpretation may be considered liable of not upholding its international commitments to the refugee
Convention.27

These advancements have widened the scope of the refugee definition for female, male, transgender
and intersex asylum-seekers. Today, those fleeing violence perpetrated by non-state actors now have the
basis of a claim to refugee status.

Based on this history, it is tempting to conclude that international feminist legal scholarship’s
intersection with refugee law has been a success story. After more than three decades of feminist scholarship
and advocacy, scholars, practitioners, the United Nations High Commissioner for Refugees (UNHCR),
refugee law judges and legislators have acknowledged the importance of gender as an analytical category.28
However, it would be premature to proclaim this story as a fully successful one. In the next sections we
consider the shortcomings of the efforts to gender the international asylum and refugee debate.

25 New Zealand Refugee Status Appeals Authority, Refugee Appeal No. 76044, paras. 70-72, 86-90 (Sep. 11, 2008).
26 ANTONIO CASSESE, INTERNATIONAL LAW 196-197 (2nd ed. 2005)
27 Tally Kritzman-Amir, Not in My Backyard: On the Morality of Responsibility Sharing in Refugee Law, 34
28 Efrat Arbel, Catherine Dauvergne and Jenni Millbank, ‘Introduction, Gender in Refugee Law – From the Margins
to the Centre’ in Efrat Arbel, Catherine Dauvergne and Jenni Millbank (eds), Gender in Refugee Law: From the
Margins to the Centre (2014, Routledge) 1 (‘Gender in Refugee Law’).
II. BETWEEN INTERNATIONAL REFUGEE LAW AND INTERNATIONAL HUMAN RIGHTS LAW

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

In 1951, when the Refugee Convention was opened for signature, it marked significant progress in international law. This convention followed the Universal Declaration on Human Rights\(^29\) (UDHR) from 1948. Unlike the UDHR, the Refugee Convention marks the first time in which states chose to make the status of refugees – a matter that is closely related to human rights – a matter governed not merely by state sovereignty, but also by international law.\(^30\)

For many years, however, the Refugee Convention – together with its Protocol,\(^31\) the regional instruments on refugee law,\(^32\) and the case law and the soft law norms\(^33\) which developed in the field, have 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. Since the entry into force of other human rights instruments, namely International Covenant on Civil and Political Rights\(^34\) (ICCPR) and the International Covenant on Economic, Social and Cultural Rights\(^35\) (ICESCR) in 1966, but also others such as the Convention on the Elimination of All Forms of Discrimination against Women\(^36\) (CEDAW) in 1979, as well as regional human rights instruments,\(^37\) this tendency to view refugee law as an area of law separate from international human rights law has increasingly been questioned. Below we summarize the relative merits of the Refugee Convention v. International Human Rights Law (IHRL) as the legal basis for protecting the human rights of refugees.

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It can be understood by reading the Conventions that international human rights are applicable to refugees, as they apply to “all individuals within its territory and subject to its jurisdiction,” or “everyone.” In other words, their applicability is not limited merely to citizens, residents, lawfully staying persons, etc., and they apply not just within a state’s territory but also along its borders and in other areas where states apply coercive force. Some of the later General Comments specifically recognize a duty to protect the rights of refugees. In a sense 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 as “lawfully present” or “lawfully staying.” 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, as well as differentiate the scope of their access to rights based on their level of attachment.

Despite the clearer legal standard afforded by IHRL, the reality is that states apply international human rights differently to citizens and to different categories of migrants. Moreover, IHRL lacks domestic implementation mechanisms, leading some to view its instruments as weak compared to the Refugee Convention, particularly in light of the preference exhibited by many states to use the Refugee Convention as guidance in their provision of rights to refugees. Also in support of the reliance on the Refugee Convention rather than on International Human Rights is that the 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.\textsuperscript{45}

Nevertheless, despite arguments in favor of relying on the Convention to protect the human rights of refugees and asylum seekers, there are weaknesses in the 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,\textsuperscript{46} as with IHRL, many countries attempt to evade their obligations under the Refugee Convention or to interpret it so narrowly that their actions divert from the purpose of the convention. Second the advantages of the Convention over IHRL are not clear, as most states which join on to the International Human Rights treaties also join on to the Refugee Convention.\textsuperscript{47} Third, it should be noted that the interpretations countries give them different rights within the Refugee Convention may differ, sometimes significantly, and are inherently attuned to the different rights afforded to different categories of persons within the specific state of asylum. Finally, beyond states’ evasions of obligations to refugees or varying legal interpretations, there are weaknesses in the framework of the Convention itself. In particular the Refugee Convention doesn’t have an individual complaint mechanism, unlike some of the International Human Rights treaties,\textsuperscript{48} rendering it difficult to enforce both internationally and domestically.

For all of these reasons, one could argue that it makes sense to rely on human rights treaties rather than the Refugee Convention in the vast majority of countries which are parties to most of the International Human Rights treaties.\textsuperscript{49}

\textbf{B. The Relationship Between Refugee Law and International Human Rights Law}

There are different kinds of discussions on what the relationship should be between the Refugee Convention and International Human Rights. Several scholars have argued that the Refugee Convention

\textsuperscript{45} Jane McAdam, 6.
\textsuperscript{46} Compare the list of countries parties to the Refugee Convention with those parties to the ICCRP and ICESCR, as listed above.
\textsuperscript{47} Compare the list of countries parties to the Refugee Convention with those parties to the ICCRP and ICESCR, as listed above.
\textsuperscript{48} Optional protocol to the ICCPR.
\textsuperscript{49} Compare the list of countries which are parties to the ICCPR and ICESCR.
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.” 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 instruments 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 Rights treaties. An interpretation of the Refugee Convention in light of International Human Rights treaties is consistent with the non-discrimination principle which cuts through both the Refugee Convention and the various Human Rights treaties.

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

When evaluating the relationship between the Refugee Convention and International Human Rights Law, one could think that the Refugee Convention is more expansive since refugees are carved out of the broader category of immigrants as particularly vulnerable and framed as particularly “deserving.” Accordingly, there are some rights the refugee convention grants to refugees which international human rights law do not cover, namely the right to be issued travel documents. Yet, it has been argued that this

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51 Compare Art. 33 in the Refugee Convention with Art. 3 of CAT. This is also considered by some a customary international legal norm. guy Goodwin gill.
54 Jane McAdam
56 Art. 19.
right too could be inferred from a broad interpretation of the right to freedom of movement found in IHRL.57

Another right that exists in the Refugee Convention and not in IHRL, is the right of refugees not to be criminalized and sanctioned in connection with their undocumented entry.58 It should be noted, that despite this right, most countries detain undocumented entrants, including asylum seekers.59 It is also worth mentioning that in criminal proceedings asylum seekers have good defenses, such as necessity or duress, for their undocumented entry. These defenses are considered to be a part of customary international law. Another right that is missing in International Human Rights Law but exists in International Refugee Law is the right to naturalization.60 Yet the manner in which this right was defined in refugee law is quite minimal – requiring only that states facilitate naturalization as far as possible, and can be inferred through the duty of non-discrimination in naturalization proceedings.61

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

[This part, to be completed, looks in to the General Recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women made by Committee on the Elimination of Discrimination against Women in November 2004 and the relationship it portrays between International Refugee Law and International Human Rights Law as well as International Women’s Rights Law]


Despite the applicability of International Human Rights norms to the protection of refugees’ rights, International Refugee Law prevails as the main legal framework for the protection of refugees. This sets a strong divide between refugees and other humans, a divide that translates into a separate institutional

58 Art. 31.
60 Art. 34.
framework—internationally, in the separation of institutions UNHCR from other human rights entities, and domestically, with the formation of specialized bureaucratic and judicial bodies where the administration of refugees is dealt with.\textsuperscript{62}

Application of the human rights framework on issues of refugees may improve the ability to protect the rights of refugees for several reasons. Below we will name a few: \textit{First}, certain rights are more broadly protected within IHRL than within refugee law. Perhaps the most notable right is the right of non-refoulement,\textsuperscript{63} and the principle of non-discrimination.\textsuperscript{64}

\textit{Second}, international human rights instruments have monitoring treaty bodies, which gradually developed a body of jurisprudence on immigration related issues, such as entry, stay and removal,\textsuperscript{65} thus protecting the rights of persons irrespectively of the question of whether they are refugees or have been recognized as such. Some of these international and regional treaty bodies consider individual complains, which is a procedure that the Refugee Convention does not have. These treaty bodies have been criticized as slow and overtly careful,\textsuperscript{66} and yet sometimes they are more effective in fleshing out practices which breach the rights of refugees.

\textit{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, whereas the framework of the Refugee Convention is mostly useful in the country of asylum.


\textsuperscript{63} See, i.e, ECtHR, Chahal v. United Kingdom (Judgment) (1996) Appl. No. 22414/93, para. 80, comparing the scope of the non-refoulement principle within art. 32 and 33 of the Refugee Convention and art. 3 of the ECHR. See Also HRC, General Comment No. 31, para. 12 on the relationship between art. 33 of the Refugee Convention and arts 6 and 7 of the ICCPR. \url{http://journals.sagepub.com.ezp-prod1.hul.harvard.edu/doi/pdf/10.1177/092405199901700402} p. 395-6.

\textsuperscript{64} Tom Clark & Francois Crepeau, Mainstreaming Refugee Rights. The 1951 Refugee Convention and International Human Rights Law, 17 Netherlands Quarterly ofHuman Rights, 389, 395 (1999), explains 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.


Fourth, protecting the rights of refugees through a human rights framework evades the need to determine who is a refugee, and to distinguish between refugees and other types of migrants. It is often the attempt to claim rights according to the Refugee Convention which are unsuccessful due to the debate on whether a person is or is not a refugee. This is beneficial for the protection of refugees’ rights in several ways. Due to the increasing “asylum fatigue”, states may be reluctant to provide rights and protection to those unrecognized by them as refugees, despite the fact that recognition is not constitutive but merely declarative. A human rights approach to refugees’ rights can help guarantee that even yet-to-be recognized refugees or unrecognized ones receive protection and rights. Additionally relying on a human rights basis, rather than on the refugee law framework allows refraining from making difficult distinctions between refugees and other types of forced migrants or nearly forced migrants, which some deem immaterial.67

Fifth, since it is quite widely acceptable that human right instruments apply extra-territorially in places where states have jurisdiction,68 including borderlands, the high seas, airports, etc., the applicability of refugee law in some of these territories is still debated as states are trying to externalize refugee admission,69 and despite the fact that in our legal analysis, refugee law equally applies in those territories.70

Sixth, basing rights claims on human rights instruments rather than on refugees’ rights instruments allows the mainstreaming of refugees’ rights. It instills and promotes the idea, which may sound very elemental but is still to some extent controversial, even if not explicitly – that refugees are first of all humans, and as such right bearers, and only later, they are people who can be defined but what they are lacking, which ranges from the protection of their state of nationality to status.

Seventh, and perhaps most importantly for the context of this paper, 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 than merely refugees. It is often that some of these groups may publically seem as more “rights deserving” than refugees; more

67 Socio-economic refugees.
68 Art. 2 ICCPR
69 Ayelet Shachar
70 Kritzman & Spijkerboer
politically represented and powerful; or better organized and funded. Joint advocacy can therefore promote the rights of refugees indirectly, through the promotion of the rights of those who may find whose rights claims enjoy more legitimacy.

III. THE NEED FOR A CONVERGENCE OF GENDER STRUGGLES AND REFUGEE RIGHTS

This section will look at the convergence of gender struggles with refugee women’s rights struggles and the tools that should be made available to refugee women.

IV. THE ISRAELI CASE STUDY

Israel is currently hosting about forty thousand asylum seekers, mostly from Eritrea and Sudan. It is hard to estimate how many asylum seeking women there are, for various reasons. Official statistics are unavailable, and while it can be assumed that most women present themselves to the authorities to receive protection, it is possible that some are undocumented. The government, which refers to this population as “infiltrators”, 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.

Most of the asylum seekers have arrived in Israel since the middle of the first decade of the twenty-first century. They enjoy a fragile status, and are protected from deportation under temporary collective arrangements. Generally speaking, Israel has been reluctant to admit and integrate asylum seekers. Israel's exclusionary methods which include a physical barrier on the southern border; extended periods of

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71 Population and Immigration Authority, Foreigners in Israel data, Edition 1/2017, First quarter of 2017 https://www.gov.il/BlobFolder/reports/foreign_workers_report_q1_2017/he/foreign_workers_stats_q1_2017.pdf, April 27, 2017 (in Hebrew, last visited July 9, 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.


immigration detention for those who enter in an undocumented manner;\(^{75}\) denial of social and economic rights, as well as political participation;\(^{76}\) resettlement to third countries;\(^{77}\) geographical limitations, restricting their ability to work or reside in certain urban areas;\(^{78}\) heavy taxation;\(^{79}\) extremely low recognition rates (0.1%);\(^{80}\) and imposition of bureaucratic hurdles and constantly changing policies.\(^{81}\) These exclusion mechanisms are deliberate with the goal of deterring asylum seekers from reaching Israel in first place, and deterring those who do reach Israel from staying.\(^{82}\) So, the asylum seekers are in a liminal situation in which they are physically present but legally absent and, in the foreseeable future, they have no chance of obtaining a stable civil status that will allow them to plan their future, build their lives, or settle down. A small minority of them hold work permits – usually those who arrived in Israel before 2007 – and several dozens of them have, nevertheless, been granted the status of refugees, while another few hundreds have been awarded collective protection for humanitarian reasons and have temporary residence status.\(^{83}\)

The Israeli asylum regime has been the subject of critique by the Court, academia, transnational organizations, and administrative bodies (The State Comptroller 2014; Eitan v. The Israeli Government 2014).\(^{84}\) It is important to note that the Israeli asylum system is still in a nascent stage, since Israel only started conducting Refugee Status Determination (RSD) on its own in 2009, and before that was only

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\(^{84}\)
partially involved in a hybrid RSD process administered by the United Nations High Commissioner for Refugees (UNHCR).  

A. The Status Front – Gender Sensitivity, Refugee Status Determination and Judicial Review thereof

It is against this backdrop that we should evaluate Israel’s policy towards female asylum seekers. In short, Israel refrains from interpreting the convention broadly to recognize gender-based persecution as falling under the definition of refugee. The legal position of the state is that gender based persecution cases do not impose a legal obligation on the state to allow entry or stay of the applicants. The state’s position was that some of the typical forms of persecution of women constitute “familial difficulties”, “romantic”, personal conflict or cultural and social issues and may not be the basis for a refugee claim. The state also mentioned that it should not be obligated to protect victims of gender-based persecution since this will lead millions to come to seek asylum in Israel. For this reason, despite the fact that migrants’ rights’ NGOs and legal services have tried to approach the authorities and assist asylum seeking women in an effort to gain status, their efforts have been mostly unsuccessful. Female asylum seekers’ applications are routinely rejected, as not meeting the requirements of the refugee convention, sometimes against the 

87 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 (a copy of which was given to the attorney of the asylum seeker, after most of its content was edited out), January 3, 2010.
90 Karen Musalo, Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action, 14 VA. J. SOC. POL’Y & L. 119, 132-3 (2007). Musalo presents statistics according to which 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 this as having to do with the fact that women often have a limited access to rights, on the one hand, and have obligations to their family members and children, and are therefore often unable to leave their country. Also, she claims women have a limited access to financial resources, which are necessary for fleeing, and are more exposed to dangers along the way.
recommendation of the UNHCR. Some of the applicants are transferred to request “humanitarian” forms of protection rather than to protection through the refugee convention.  

Asylum applicants are interviewed by several persons at different points in the process, shortly after their entry, during their registration, when they renew their papers and when they undergo RSD. The only interview which is subject to any regulation is the RSD interview. Recent amendment to the RSD internal guidelines includes a provision on gender sensitivity. Under the provision, “interviews […] would be conducted with sensitivity to gender considerations which may bear impact on the behavior, feelings or testimony of the interviewee. Special sensitivity is required when dealing with victims of gender violence, including sexual violence.” The provision continues with a requirement to conduct gender-sensitivity trainings, with emphasis on the impact of gender persecution, the impact of trauma on the interview, and cultural roles of women. The RSD interview will be held separately from other family members, and will allow the interviewee to present her account of the persecution she endured, while carefully making sure that trauma would not be exacerbated. The interviewee can ask to be interviewed by an interviewer and translator from their gender. Nevertheless, the guideline stipulates that the gender sensitivity clause should not be read to add or expand the persecution grounds specified in the refugee convention. In other words, the guidelines speak in two contradicting voices: recognizing the vulnerability of women in RSD

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92 Procedure for Handling Asylum Seekers in Israel (February 26, 2017), http://refugee-law.tau.ac.il/wp-content/uploads/2017/02/%D7%A0%D7%95%D7%94%D7%9C-%D7%94%D7%98%D7%99%D7%A4%D7%95%D7%9C-%D7%91%D7%9E%D7%91%D7%A7%D9%99-%D7%9E%D7%A7%D7%9C%D7%98-%D7%9E%D7%93%D7%99%D7%A0%D7%99-%D7%91%D7%99%D7%A9%D7%A8%D7%90%D7%9C-%D7%9E%D7%A2%D7%95%D7%93%D7%9B%D7%9F-%D7%9C%D7%99%D7%95%D7%9D-26.2.2017.pdf (in Hebrew, last visited July 10, 2017), Article 1.1.A.

93 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: Art. 1.1.A.2.A.

94 Procedure for Handling Asylum Seekers in Israel (February 26, 2017), http://refugee-law.tau.ac.il/wp-content/uploads/2017/02/%D7%A0%D7%95%D7%94%D7%9C-%D7%94%D7%98%D7%99%D7%A4%D7%95%D7%9C-%D7%91%D7%9E%D7%91%D7%A7%D9%99-%D7%9E%D7%A7%D7%9C%D7%98-%D7%9E%D7%93%D7%99%D7%A0%D7%99-%D7%91%D7%99%D7%A9%D7%A8%D7%90%D7%9C-%D7%9E%D7%A2%D7%95%D7%93%D7%9B%D7%9F-%D7%9C%D7%99%D7%95%D7%9D-26.2.2017.pdf (in Hebrew, last visited July 10, 2017) Article 1.1.B.
procedures due to the unique, traumatic forms of persecution which they endure, yet refraining from granting them protection from precisely these forms of persecution.

Some of the rejections of asylum applications were challenged in the courts, though most were not. Most asylum seekers do not have de-facto access to legal remedies, and to legal representation. Legal services are expensive and most asylum seekers are not able to afford them, and legal aid organizations, which have limited resources, are able to assist only a fraction of the asylum seeking community. Self-representation is cumbersome due to lingual, cultural and educational barriers, which make the process of naming-blaming-claiming virtually impossible to overcome. It should also be noted that the Israeli asylum system has only operated for a few years, so more litigation may arise in the future.

We were able to identify a handful of court decisions which dealt with the status of asylum seeking women, a few of them were interim decision. All of these were cases of asylum seeking women whose application for asylum was rejected. In three cases the women were fleeing female genital mutilation (FGM), In three other cases they were fleeing persecution targeted due to their male relatives political or

95 http://www.justice.gov.il/En/Units/AppealsTribunal/Pages/About.aspx (in Hebrew, last visited July 10, 2017)
96 It should be noted that asylum seekers do have de jure access to the courts.
religious affiliation,\textsuperscript{101} two fled forced marriage,\textsuperscript{102} five escaped domestic violence,\textsuperscript{103} and another ran away from the family of a man she killed when he tried to rape her.\textsuperscript{104} Some of the other cases were of women who were persecuted due to their own political opinion,\textsuperscript{105} or sexual orientation,\textsuperscript{106} in what seems like “typical” and “male-like” circumstances of persecution, but might have had gendered nuances nevertheless.

The vast majority of the petitions and appeals were rejected,\textsuperscript{107} only in one case the court decided that the applicant should receive status,\textsuperscript{108} in one case the court reaffirmed a decision to release from detention a person whose asylum application was still pending,\textsuperscript{109} and in three cases the court ordered that the asylum application should be reconsidered by the authorities.\textsuperscript{110}

But it is not just the results that draw attention to the fact that the court accepts the narrow interpretation of the state that excludes those who flee gender-based persecution from the protection afforded to refugees, but also that the court often misses the gendered aspects of persecution all together. For example, the court suggests that internal flight alternatives should have been exhausted before seeking...

\textsuperscript{107} Adm. Pet. (J-M) 729-09-11 Berhane Solomon v. The Ministry of Interior. The court’s decision to recognize the petitioner as a refugee and grant her protection has little to do with her gender.
asylum in six of the cases,\textsuperscript{111} without acknowledging the difficulty this entails for a woman to live in a different part of her country without male relative protection.\textsuperscript{112} In one case the court rejected a petition of an asylum applicant who claimed to be a victim of domestic violence, concluding that her testimony is not credible because she stayed at her father’s house for a month after he abused her, before leaving. In a different case, the court found credibility issues with a testimony of another victim of domestic abuse, because she came back to visit her husband even after he had abused her.\textsuperscript{113} In another case, the court concluded that being HIV positive woman is not a humanitarian concern.\textsuperscript{114} In one case the court, when denying a petition, decided that the petitioner will submit a family reunification request in order to seek adjustment of status based on her relationship with an Israeli partner, rendering her dependent on male support and sponsorship, rather than granting her asylum based on her own merits.\textsuperscript{115} This was done by the court without any visible awareness of the vulnerability this destines her to, having to rely on a man for to receive protection. In one case the court’s reasoning stated that the interpretation of the definition of refugee should not be such that allows protection to tens of millions of battered women in the world\textsuperscript{116}. Only in a minority of those cases the narrative of the court is gender sensitive. Such is one case in which court criticizes the fact that the ministry of interior referred to an attempt to forcefully marry a person as a “personal-romantic” issue, while rejecting off-hand the asylum application.\textsuperscript{117} In another case the court accepted a request to waive court fees from an asylum seeking woman, assuming she is “not affluent” since she was pregnant and mother to a small child.\textsuperscript{118}

\textsuperscript{111} In one case the court also states in its reasoning that the petitioner did not prove that she would have been persecuted had she transferred to a neighbouring country to her country of origin. This

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In other words, the efforts concentrating at the level of the status did not bear much fruit. Most asylum applications were rejected, and thus far the state and the court have yet to embrace a gender sensitive understanding of persecution and the convention grounds.

**B. Beyond Status - Additional Legal Venues**

The result of the fruitless effort to assist asylum seeking women in gaining status is that many of them continue to reside in Israel in legal limbo, neither completely excluded nor contained, documented and integrated. Many women continue living in this liminal state, without much hope to have their status adjusted, but rather knowing that they are either legally non-deportable, as recipients of temporary protection from refoulement, or unlikely to be deported as long as they don’t cooperate with their deportation. For some this means that they are not free and are held in immigration detention. For others it means that their ability to find gainful, documented, employment is jeopardized. They form an underclass in the Israeli society, marginalized and rendered subordinate to both males and the hosting society. They remain unable to enjoy the feminist achievements of the Israeli society or their human rights, and bare the double (and sometimes even triple or quadruple) – as women, as foreigners, as undocumented, and often as women of color. Status is a key factor, which determines the scope of the “right to have rights”. Without status, asylum seeking women are exposed to heightened risk.

But as the effort of asylum seeking women to gain status fails, it might be worthwhile to consider or even venture other courses of action.

[This part, to be completed, offers a critical analysis of the coalition’s work, including a look at the impact litigation and individual representation, as well as the advocacy, mediation and lobbyism efforts of the coalition]

**Conclusion**

[To be completed]