

No Shelter

Protection Gaps in Israel
Facing Refugees Fleeing
Gender-Based Persecution

כשלים בהגנה על נשים
שנמלטו לישראל
מרדיפה בגין מגדר

חסרות מקלט



התכנית לזכויות פליטים
Refugee Rights Program
برنامج حقوق اللاجئين

הקליניקות המשפטיות, אוניברסיטת תל אביב
The Law Clinics, Tel-Aviv University
عيادات القانون, جامعة تل أبيب

February 2011

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The Refugee Rights Clinic at Tel Aviv University

Founded in 2003, The **Refugee Rights Clinic at Tel Aviv University** is Israel's first and only legal advocacy program devoted exclusively to refugees. The Clinic is part of the Tel Aviv University's Buchmann Law Faculty Clinical Legal Education Programs. It employs three interrelated strategies in its work to ensure that Israel is a safe haven for persons fleeing persecution: free legal aid for refugees and asylum seekers, research and advocacy to bring about legal and policy reform, and education of Israeli lawyers in the refugee field.

The **Refugee Rights Clinic** has played a central role in the development of refugee law and procedure in Israel, including key issues of eligibility, due process, and substantive protection. The Clinic cooperates closely with other Israeli and international NGOs.

More information about the **Refugee Rights Clinic** and its work is available online at www.law.tau.ac.il/Eng/?CategoryID=280.

ORAM – Organization for Refuge, Asylum & Migration

ORAM is a not-for-profit organization providing international and domestic advocacy, education, and representation on behalf of refugees fleeing sexual and gender-based violence. Headquartered in San Francisco, California, USA, ORAM is the leading NGO worldwide on issues concerning lesbian, gay, bisexual, transgender, and intersex (LGBTI) refugees and asylum seekers. ORAM works closely with the UN High Commissioner for Refugees (UNHCR), the U.S. Department of State, LGBTI community groups, and refugee NGOs to increase awareness of and improve international protection standards for these vulnerable refugees.

ORAM serves the international refugee community through cutting-edge research, publication, community education, advocacy, legal and procedural counseling, direct representation, and resettlement assistance. The organization provides free-of-charge representation through the creative marriage of modern technology and legal expertise. ORAM supports and empowers its clients directly as it works to ensure their protection and safe resettlement by governments, IGOs, NGOs, and communities.

More information about **ORAM** is available online at www.oraminternational.org.

**NO SHELTER:
PROTECTION GAPS IN ISRAEL FACING
REFUGEES FLEEING GENDER-BASED PERSECUTION**

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1. EXECUTIVE SUMMARY

There are approximately 34,000 asylum seekers in Israel today. A particularly vulnerable subgroup is made up of those fleeing honor killings, domestic violence, rape, forced marriage, and other forms of gender-based violence. **Israel fails to protect these refugees in two key ways: first, by refusing to recognize the refugee claims of women fleeing gender-based violence; and second, by prohibiting employment and withholding social benefits from asylum seekers, both of which detrimentally impact women.**

Israel consistently declines to grant refugee status to victims of gender-based persecution. Its refugee status decision makers assert that gender-based violence is a “social” or “cultural problem” that does not justify refugee protection. They also reject these claims on the basis that women do not form a “particular social group,” and that gender-based violence is usually perpetrated by non-state actors. These policies fall far outside the common interpretation of the 1951 *Convention Relating to the Status of Refugees*, as reflected in international jurisprudence and in UNHCR’s *Guidelines on Gender-Related Persecution*.

The government of Israel also requires those requesting complementary forms of protection, including trafficking victims seeking one-year “rehabilitation” visas, to withdraw their asylum applications, making long-term protection unattainable.

Moreover, the prohibition against work and lack of governmental social assistance to asylum seekers in Israel has a particularly harmful impact on women. Often destitute and without legal avenues to challenge insufficient social and financial assistance, women asylum seekers are at risk of resorting to sex work to survive. **As such, these women are twice victimized: first by their persecutors in countries of origin, and subsequently by an asylum system that consistently fails to recognize their legitimate protection concerns.**

To meet its obligations under the 1951 Convention and the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), Israel must:

- Recognize gender-based persecution as a legitimate basis for refugee status, and that persecutory treatment can be carried out by non-state actors;
- Add guidelines on gender-based persecution to existing asylum regulations;
- Train all personnel handling refugee claims on gender-sensitive procedures and techniques;
- Allow women who have been victims of trafficking and slavery a year of rehabilitation prior to being required to undergo the refugee status determination procedure; and
- Provide asylum seekers the right to work so that they can subsist with dignity.

2. INTRODUCTION

Israel is party to both the 1951 *Convention Relating to the Status of Refugees* (1951 Convention) and its 1967 Protocol.¹ However, it has not incorporated the 1951 Convention into domestic law and has been slow to establish administrative and regulatory mechanisms necessary for its implementation. In July 2009, the Israeli government assumed full responsibility for refugee status determination, which had formerly been performed by the United Nations High Commissioner for Refugees (UNHCR).²

In 2007, Israel emerged as a significant refugee-receiving country in the Middle East. With growing protection problems in Egypt and heightened barriers facing migrants attempting to access Europe, large numbers of asylum seekers began to make their way to Israel through the Sinai Desert, clandestinely crossing the Egypt–Israel border. The Israeli government does not share detailed statistical information regarding this phenomenon, however, according to the Israeli Ministry of the Interior (MOI), there are approximately 34,000 asylum seekers in Israel.³

This report highlights the two key protection gaps currently facing vulnerable asylum-seeking women in Israel: first, the State’s failure to recognize the refugee claims of women fleeing gender-based persecution; and second, the prohibition on employment and the withholding of social benefits available to asylum seekers, both of which detrimentally impact women.

The report’s findings are derived from an evaluation of reasoning provided by the State when rejecting gender-based asylum claims, case files, and information provided by refugee and migrant women and men. The identities of the individuals referenced in this report have been withheld for their privacy and safety.

¹ Israel ratified the 1951 Convention on October 1, 1954 and acceded to the 1967 Protocol on June 14, 1968. See Multilateral Treaties Deposited with the Secretary-General, Vol. I, Ch. V, §§ 2 & 5, available at http://treaties.un.org/Pages/ViewDetailsII.aspx?&src=TREATY&mtdsg_no=V~2&chapter=5&Temp=mtdsg2&lang=en [last visited January 4, 2011]; see generally United Nations Convention Relating to the Status of Refugees, Art. 1, opened for signature July 28, 1951, 189 U.N.T.S. 150.; United Nations Protocol Relating to the Status of Refugees, opened for signature Jan. 31, 1967, 606 U.N.T.S. 267 [hereinafter Protocol] [together hereinafter U.N. Refugee Convention or 1951 Convention].

² This transition from UNHCR to state oversight of refugee status determination in Israel took place without the implementation of regulations or a formal announcement. New regulations entitled “Procedure for Handling Political Asylum Seekers in Israel” came into force only in January 2011, six months after the state’s Ministry of the Interior assumed responsibility for the status determination procedure. See Procedure for Handling Political Asylum Seekers in Israel (2011), available at <http://piba.gov.il/Regulations/Procedure%20for%20Handling%20Political%20Asylum%20Seekers%20in%20Israel-en.pdf> [last visited Jan. 4, 2011].

³ HCT 6312/10 *KavLaoved v. Government*, Preliminary Response by the Respondents, filed on Jan. 6, 2011 (Isr.).

3. BACKGROUND ON ASYLUM IN ISRAEL

The government of Israel has proffered several justifications for its restrictive policies vis-à-vis gender-based claims for protection. It frequently argues that the individuals in question are not asylum seekers, but "infiltrators," and that granting asylum will exponentially increase the number of gender-based applicants.

In recent years, the numbers of asylum seekers arriving in Israel has increased dramatically. From 2001 to 2005, between 1,000 and 1,200 asylum applications were filed each year in Israel.⁴ According to information provided by the Israeli government, the annual number of asylum seekers who arrived via Israel's southern borders averaged from 4,500 (in 2009) to over 13,000 (in 2010).⁵ Lacking legislation, regulations, or a culture of refugee reception, the Israeli government responded to the new phenomenon with a series of *ad hoc* measures which included: indefinite detention of Sudanese asylum seekers who were defined as "enemy nationals;"⁶ summary return of asylum seekers at the

border, following brief questioning by IDF soldiers;⁷ proposed legislative amendments permitting indefinite detention;⁸ a decision (not yet implemented) to build a physical barrier along the border; and other deterrence measures.

⁴ The State Comptroller and Ombudsman, ANNUAL REPORT 58B FOR THE YEAR 2007 (May 20, 2008), 105, *available at* <http://www.mevaker.gov.il/serve/contentTree.asp?bookid=514&id=190&contentid=&parentid=undefined&sw=1024&hw=698> [last visited Jan. 17, 2011].

⁵ Deputy Minister of Defense, Answer to Question 823 regarding the Coordinated Immediate Return Procedure of infiltrators who crossed the border (Oct. 31, 2010) [on file with authors]; *see also KavLaoved v. Government*, *supra* note 3.

⁶ In 2006, the Government detained Sudanese asylum seekers under the 1954 Anti-Infiltration Law, which does not provide for a periodic judicial review of the detention. Israeli Government, Anti-Infiltration Bill, Felonies and Jurisdiction Amendment (2010) [hereinafter Anti-Infiltration Bill Amendment]. Until then, Sudanese asylum seekers who entered Israel without a permit were detained under the 1952 Entry to Israel Law. The use of the Anti-Infiltration Bill started after the Detention Review Tribunal, which operates under the Entry to Israel Law, began releasing Sudanese asylum seekers. The detention period under the Anti-Infiltration Bill was drastically reduced following a High Court petition. *See* HCT 3208/06 *John Does v. The IDF*, [2008] (Isr.) (reducing the implementation of detention to the first two weeks only).

⁷ This is a practice known as "Hot Return" or "Coordinated Immediate Return." This practice was never explicated in law or formal policy. The Israel Defense Forces simply started implementing the policy. Later, after the High Court of Justice ordered the state to issue a procedure, the practice was articulated in "IDF Operational Order."

The government of Israel has proffered several justifications for its restrictive policies vis-à-vis refugee protection. It frequently argues that the individuals in question are not asylum seekers, but “infiltrators”⁹ who arrive in Israel in an attempt to secure better living conditions.¹⁰ This argument is advanced despite the fact that the overwhelming majority of the new arrivals are from refugee-producing countries (such as Sudan and Eritrea) whose asylum applications are never processed.¹¹ In a cabinet meeting Prime Minister Netanyahu commented:

Israel is the only developed country that you can reach on foot from the poorest countries in Africa. Many have already done so and the flow of infiltrators is only growing as the Israeli economy advances and develops. The phenomenon of infiltrators into Israel endangers the Jewish and democratic character of the State of Israel and burdens its social welfare services, health system, law enforcement authorities and local councils.¹²

Israeli policy makers also argue that the relative ease with which people can enter Israel will lead to an untenable influx of asylum seekers.¹³ Citing national security concerns, the government also justifies its restrictive stance toward asylum seekers by noting that many of them are either nationals of countries that are at war with Israel, or have passed through such countries on their way to Israel.¹⁴ The government argues that a policy of allowing “enemy

The legality of this practice is currently being challenged in a petition to the High Court. HCT 7302/07 *Hotline for Migrant Workers et al. v. Minister of Defense et al.* [2007] (Isr.).

⁸ Anti-Infiltration Bill Amendment, *supra* note 6.

⁹ In Hebrew, the term “infiltrator” carries the connotation of a saboteur. Legally, the term is used in the 1954 Anti-Infiltration Law, *supra* note 6, for a person who entered Israel illegally; such person is subject to severe criminal penalties. The use of this term therefore stigmatizes the asylum seekers as criminal offenders.

¹⁰ This argument is based on the facts that many of the asylum seekers have been in Egypt prior to their arrival in Israel; some have sought asylum in Egypt; and others, according to the government, could have sought asylum in Egypt. The government concludes that since Egypt is also a signatory to the 1951 Refugee Convention, people who continued their journey to Israel did so to improve their living conditions and therefore do not qualify for asylum. See state submission to the High Court dated September 17, 2009, *Hotline for Migrant Workers*, *supra* note 7.

¹¹ Sudanese and Eritreans currently receive a form of “temporary protection” therefore precluding the review of their individual asylum applications.

¹² See Press Release, Israel Ministry of Foreign Affairs, Cabinet to Discuss Establishment of Open Housing Center for Infiltrators (Nov. 24, 2010), http://www.mfa.gov.il/MFA/Government/Communiques/2010/Cabinet_discuss_establishment_housing_center_infiltrators_23-Nov-2010 [last visited Jan. 17, 2011].

¹³ *Ibid.*, citing Prime Minister Benjamin Netanyahu as saying “Israel is the only developed country that you can reach on foot from the poorest countries in Africa.”

¹⁴ See HCT 3208/06 *Hotline for Migrant Workers et al. v. IDF et al.*, Response by the Respondents, May 7, 2006 (Isr.), arts. 3, 33, 35, 38, & 42.

nationals” to claim *sur place* refugee status¹⁵ simply by arriving in Israel is overly permissive and not within the ambit of the 1951 Convention.¹⁶ Israel contends that if such claims are recognized, the country will become hostage to numerous enemy nationals who would cross the border and seek asylum in Israel. The underlying concern is that some of those asylum seekers may indeed constitute a security risk.¹⁷

The government’s rejection of refugee claims involving sexual and gender-based violence reflects its concern that to do otherwise would open the floodgates to similar claims from across the region. Israel acknowledges that foreign nationals often seek protection in Israel because of “the sad fact” that neighboring states persecute women, sexual minorities, and others whom they perceive as possessing “inferior morals.”¹⁸ Nevertheless, the government refuses to acknowledge that sexual and gender-based persecution falls well within the ambit of the 1951 Convention.¹⁹

It is important to note that a grant of asylum in Israel is always temporary. Those few who receive official refugee protection are subject to the 1951 Convention’s “Cessation Clause,” according to which they may be returned to their countries of origin if conditions there no longer support a fear of persecution.²⁰

¹⁵ A *sur place* refugee is a person who was not a refugee when she left her country but who became a refugee at a later date, either due to a change in the circumstances in the country of origin during her absence or due to her own action in the host country. UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (1992) paras. 94–96 [hereinafter UNHCR Handbook on Refugees].

¹⁶ For refugees from perceived enemy states, merely arriving in Israel may present an additional risk factor that prevents them from returning to their country of origin. Many refugees fear that the Israeli government will punish them for having sought asylum in Israel or perceive them as enemy collaborators. See generally MICHAEL KAGAN & ANAT BEN-DOR, TEL AVIV UNIVERSITY, *NOWHERE TO RUN: GAY PALESTINIAN ASYLUM-SEEKERS IN ISRAEL* (2008).

¹⁷ It should be mentioned, however, that although this concern is always present, the government admitted in its explanatory note to the 2008 Anti-Infiltration Bill, that this risk has not yet materialized. Anti-Infiltration Bill Amendment, *supra* note 6.

¹⁸ The social groups provided by the government include prostitutes, gay men, and women subject to honor killings for desecrating the family’s honor. H.C.J. 4487/09 *Doe v. Ministry of the Interior*, State’s response [2009] (Isr.), trans. from Hebrew [original on file with author].

¹⁹ *Ibid.*

²⁰ See *Procedure for Handling Political Asylum Seekers in Israel*, Sec. 11, effective Jan. 2, 2011, available at <http://piba.gov.il/Regulations/Procedure%20for%20Handling%20Political%20Asylum%20Seekers%20in%20Israel-en.pdf>; see generally U.N. Refugee Convention, *supra* note 1, Art. 1(C)5, 6.

4. ASYLUM PROCEDURES IN ISRAEL

Prior to July 2009, UNHCR was responsible for assessing refugee claims in Israel. Based on information gathered during detailed interviews and an evaluation of relevant country of origin conditions, UNHCR issued detailed claim assessments to Israel's Refugee Advisory Committee.²¹

The Refugee Advisory Committee formulated recommendations based on the UNHCR's assessment and its own evaluation of claims. Final decisions on whether to grant status were made by the Interior Minister. While applicable regulations did not provide a right to appeal, there was a limited option to request a re-hearing of the case if new evidence was discovered, or if there was a change in case circumstances. Requests for re-hearing were heard pursuant to the same procedure and by the same bodies that rendered the initial decision. Rejected asylum seekers were subject to detention and deportation.

In July 2009, Israel implemented its current asylum system. The new system designates the MOI, rather than UNHCR, as the body responsible for assessing refugee claims. MOI officials interview asylum seekers, assess their claims, and refer their assessments to the Refugee Advisory Committee. As under the previous system, the Refugee Advisory Committee then forms a recommendation that serves as the basis for the Interior Minister's decision. In the several months that have passed since the transfer of refugee status determination (RSD) procedures from UNHCR to MOI, it has become evident that MOI "interrogators" (as they often refer to themselves) conduct lengthy RSD interviews in a highly antagonistic manner.

The new asylum regulation, which became operative on January 2, 2011, does not include any gender-sensitive procedures. There is only one clause that refers to gender at all; it provides the right to request that the interview "be conducted by a staff member of the same gender as the asylum seeker."²² While the clause notes that, "the unit will make every possible effort, considering personnel limitations, to grant this request," it provides no guarantee to the asylum seeker.²³

²¹ Also known as the also known as the National Status Granting Body, this four-member committee includes a Chairperson (a person qualified to serve as a district judge but who is not a civil servant) and representatives of the Ministries of the Interior, Justice, and Foreign Affairs.

²² Ministry of the Interior, *Procedure for Handling Political Asylum Seekers in Israel*, Art. 3(b)(4), available at <http://piba.gov.il/Regulations/Procedure%20for%20Handling%20Political%20Asylum%20Seekers%20in%20Israel-en.pdf> [last visited Dec. 30, 2010] [hereinafter *Israel Asylum Regulations*].

²³ *Ibid.*

For years, the Refugee Advisory Committee operated in secrecy. Neither asylum seekers, nor their representatives were allowed to appear before the Committee. Moreover, because the Committee only provided limited reasoning for the denial of applications, and its deliberations were not disclosed, it was difficult for asylum seekers and their lawyers to identify the actual reasons for rejection. However, a recent Administrative Court ruling now obligates the Refugee Advisory Committee to disclose its deliberations.²⁴

The Refugee Advisory Committee's principled rejection of gender-based refugee claims is clear in its deliberations. These deliberations, together with legal briefs submitted by the State defending rejection decisions, and information gathered during interviews with asylum seekers, form the basis of the following analysis of protection gaps facing victims of gender-based persecution.

5. ISRAEL'S FAILURE TO RECOGNIZE GENDER-BASED PERSECUTION AS AN ASYLUM GROUND

Under the 1951 Convention, a refugee is someone "who owing to a 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."²⁵ Thus, in articulating a well-founded fear of persecution, a woman refugee applicant must demonstrate that the abusive treatment she fears constitutes persecution, and that it will be inflicted on her due to one or more of the five enumerated grounds. Also, in order to qualify as a refugee, she must be outside of her country of nationality when making her application.²⁶ Moreover, if she is persecuted by a non-state agent, she will be deemed eligible for international protection under the 1951 Convention only if she is able to show a failure of state protection.²⁷

Israel has adopted the stance that gender-based claims do not fall within the scope of the 1951 Convention. In point of fact, gender is not enumerated among the five grounds of protection provided for in Article 1 of the 1951 Convention. Nevertheless, the UNHCR has explicitly

²⁴ AD (Jerusalem) 22336-04-10 *Abdul v. The Freedom of Information Clerk at the Ministry of Interior*, Sept. 21, 2010 (Isr.) (responding to a petition filed jointly by the Refugee Rights Clinic at Tel Aviv University and the Hotline for Migrant Workers).

²⁵ U.N. Refugee Convention, *supra* note 1, at Art. 1(A)2.

²⁶ *Ibid.*

²⁷ *Ibid.*

recognized that gender claims fall within the 1951 Convention’s intended scope of protection.²⁸ Similarly, since the 1980s, courts in the United States, Canada, and many other jurisdictions, have recognized that gender may form a “particular social group” (PSG) for purposes of refugee status determination analysis and have also established gender guidelines.

The UNHCR’s *Guidelines on International Protection No. 1: 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* (UNHCR Gender Guidelines) clearly state that a correct interpretation of the refugee definition “covers gender-related claims.”²⁹ Relying on human rights norms to define persecution, the UNHCR Gender Guidelines provide examples of gender-based persecution, including rape, sexual violence, dowry-related violence, female genital cutting, domestic violence, and trafficking.³⁰ They state that the implementation of a law or punishment for non-compliance with gender norms can also constitute persecution.³¹ Moreover, the UNHCR Gender Guidelines stress that discrimination, especially when it results in the State failing to “accord certain rights or protection from serious abuse [...] which results in serious harm inflicted with impunity” can constitute persecution.³²

Examples of gender-based persecution include rape, sexual violence, dowry-related violence, female genital cutting, domestic violence, and trafficking. Punishment for non-compliance with gender norms can also constitute persecution.

²⁸ See EXCOM, *Conclusion on Refugee Women and International Protection*, EXCOM Conclusion No. 39 (XXXVI), Oct. 18, 1985 (stating that States, “in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a ‘particular social group’ within the meaning of Article 1 A(2) of the 1951 United Nations Refugee Convention”); see also UNHCR EXCOM, *Conclusion on Refugee Protection and Sexual Violence*, EXCOM Conclusion No. 73 (XLIV), Oct. 8, 1993 (urging States to develop “appropriate guidelines on women asylum-seekers in recognition of the fact that women refugees often experience persecution differently from refugee men”); see also UNHCR, *Guidelines on International Protection No. 1: 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*, UN Doc. HCR/GIP/02/01, May 7, 2002; see generally Karen Musalo, *A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly be Inching Towards Recognition of Women’s Claims*, 29 REFUGEE SURVEY Q. 46 (2010).

²⁹ UNHCR, *Guidelines on International Protection No. 1*, *supra* note 28, at para. 5.

³⁰ *Ibid.*, at para. 6.

³¹ *Ibid.*, at para. 5.

³² *Ibid.*

A large number of states have demonstrated their commitment to the protection of refugees fleeing gender-based persecution by promulgating their own guidelines on the adjudication of such claims.³³ For example, Canada issued *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* (Canadian Gender Guidelines) in 1993, which explicitly recognize that women may fear persecution on any one or a combination of the five grounds enumerated in the refugee definition.³⁴ The Canadian Gender Guidelines also cite UNHCR Executive Committee Conclusion No. 39, stating that “women asylum seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live” should be granted asylum on the basis of membership in a particular social group.³⁵ In 1996, Australia also promulgated guidelines, noting that “[c]laims of gender-based persecution often involve persecution committed by non-state agents.”³⁶ The U.K.’s *Asylum Gender Guidelines* stress that the cultural acceptability of violence or discrimination against women is irrelevant in a determination on whether such violence constitutes persecution.³⁷

Taken in the aggregate, the UNHCR Gender Guidelines, along with those of several member states, provide unequivocal proof that gender-based claims for protection fall within the purview of the 1951 Convention.

Israel’s Refugee Advisory Committee, however, consistently refuses to grant refugee status to women fleeing gender-based persecution. Cases rejected to date include those involving: domestic violence; forced marriage; re-trafficking for sex trade; inability, due to cultural and social norms, to survive as a woman without family protection; and persecution based on sexual orientation. The Refugee Advisory Committee’s primary rationale for rejecting these claims is that they revolve around “social or cultural problems” that do not implicate any legal obligation on the part of Israel. The Committee also claims that persecution by non-state actors (*e.g.*, domestic partners, family members, and traffickers) does not fall within the ambit of the 1951 Convention, despite vast international jurisprudence to the contrary. It has refused to

³³ A thorough discussion of the national gender guidance of other States is beyond the scope of this article. For a list of gender guidelines by country, see Center for Gender & Refugee Studies, U. Cal. Hastings, *Gender Guidelines*, http://cgrs.uchastings.edu/law/gender_guidelines.php, [last visited Jan. 11, 2011].

³⁴ Immigration and Refugee Board of Canada, *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* 1 (1993), footnote 10.

³⁵ *Ibid.*, at para. k.

³⁶ Dept. of Immigration and Multicultural Affairs, *Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision-Makers* 4.1 (1996).

³⁷ Immigration Appellate Authority, *Asylum Gender Guidelines*, §2A.15 (2000).

recognize refugees' assertions that state authorities are unable or unwilling to provide them with protection from these non-state actors.

Gender can surface in a woman's experience of persecution in a wide variety of ways. Forms of persecution that women either exclusively or disproportionately experience include: sexual violence in all its forms, including rape, forced impregnation and female genital cutting; physical abuse by immediate family members; forced marriage, trafficking and sexual slavery; honor killing and dowry-related murder; physical veiling and social cloistering by the religious state; severe gender-related discrimination; and the control of sexuality by cultural communities.

Israel contends that the brutalities committed against women are domestic, private, or personal occurrences, rather than violations of human dignity that governments are obligated to prevent.

Often, the fact that an asylum seeker is a woman impacts both the form that her persecution takes and the reason that persecution is threatened or carried out. The UNHCR Gender Guidelines view gender-related persecution within a social context, calling attention to the fact that gender identities have historical and cultural foundations.³⁸ They further acknowledge that these historical and cultural roots not only affect a woman's experience of persecution, but her ability to obtain governmental protection as well.³⁹

Israel contends that the brutalities committed against women are domestic, private, or personal occurrences, rather than violations of human dignity that governments are obligated to prevent. This view is inconsistent with the practice of courts internationally. Indeed, several of the forms of persecution that are particular to women have been found to constitute persecution within the meaning of the 1951 Convention by various treaty parties around the world.⁴⁰

³⁸ See generally UNHCR, *Guidelines on International Protection No. 1*, *supra* note 28.

³⁹ *Ibid.*

⁴⁰ A thorough discussion of the national gender-based asylum jurisprudence of other States is beyond the scope of this article. However, a few notable examples include: *Min. for Immigration and Multicultural Affairs v. Khawar* (2002) 76 A.L.R.J 667 (Australia finding that a Pakistani woman fleeing severe abuse by her husband and his family could qualify for protection as a refugee where the state could not or would not intervene); *Islam v. Sec. of State for the Home Dept*; *R. v. IAT, ex parte Shah* (1999) INLR 144 (the U.K. finding that two women who had suffered

The Refugee Advisory Committee also denies protection to women fearing gender-based persecution on the basis that establishing such a precedent will give rise to such a large number of refugee claims in Israel as to be untenable. However, this fear is baseless; countries that recognize gender-based persecution as a basis for refugee status have seen no such increase in claims by women refugees. As various jurists and scholars have recognized, most victims of gender-based violence simply do not have the resources or freedom to flee their countries of origin.

Since 1993, when Canada accepted gender-based persecution as a ground for protection under the 1951 Convention and promulgated its own Gender Guidelines,⁴¹ the government has kept a record of the number of women granted relief on gender grounds. The statistics repudiate the floodgates argument in its entirety:

Canada reported that there was no explosion of claims; to the contrary, gender claims consistently constituted only a minuscule fraction of Canada's total claims, and had actually declined in the seven-year period following the adoption of the Gender Guidelines.⁴²

domestic violence and were at risk of being accused of and punished for adultery if returned to Pakistan qualified for asylum under the 1951 Convention); *Atty-Gen. of Canada v. Ward, UN High Commissioner for Refugees et al., Interveners*, [1993] 2 S.C.R.689 (Canada recognizing non-State persecution for the purpose of refugee status); *Katrinak v. Sec. of State for the Home Dept.* (2001) EWCA Civ. 832, (2001) INLR 499 (U.K. holding that rape may constitute persecution); *Gao v. Gonzales*, 440 F.3d 62 (2d Cir. 2006)(U.S. granting asylum to a Chinese woman who had been sold into marriage); *Schweizerische Asylrekurs-kommission (ARK Zollikofen)*, EMARK 2006 Nr. 32 (Switzerland granting asylum to a young woman fearing abduction in Ethiopia for the purpose of marriage on the basis of inadequate state protection where the perpetrator has countrywide influence and connections); *In re Kasinga*, 21 I. & N. Dec. 357 (BIA 1996) (U.S. granting relief to a Togolese woman who fled an arranged marriage and the practice of female genital cutting); *In re D-V-*, 21 I. & N. Dec 77 (BIA 1993)(U.S. granting asylum to a Haitian woman who had been raped by government soldiers).

⁴¹ With respect to gender-defined social groups, the Canadian Guidelines explicitly state that "the fact that the particular social group consists of large numbers of the female population in the country concerned is irrelevant—race, religion, nationality and political opinion are also characteristics that are shared by large numbers of people," Dept. of Immigration and Multicultural Affairs, *Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision-Makers*, footnote 11 (1996).

⁴² Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates, or Call to (Principled) Action*, 14 VA. J. SOC. POLY & L. 119, 133 (2007).

Similarly, in the United States, many feared there would be a deluge of women seeking asylum after the decision in *In re Kasinga* granted asylum to a Togolese woman fleeing female genital cutting and forced marriage.⁴³ However, critics' fears never materialized; the numbers of gender-based claims remained the same as those before *Kasinga*.⁴⁴

In her accomplished article on the matter, international scholar and lawyer Karen Musalo notes that:

There are several explanations why the number of women asylum seekers has not dramatically increased with the legal recognition of gender claims for protection. First, women who would have legitimate claims for gender asylum often come from countries where they have little or no rights, which limits their ability to leave their countries in search of protection. Second, they are frequently—if not always—primary caretakers for their children and extended family. Thus they often have to choose between leaving family behind, or exposing them to the risks of travel to the potential country of refuge. [...] Finally, women asylum seekers often have little control over family resources, making it impossible for them to have the means to travel to a country where they might seek asylum.⁴⁵

Women fleeing gender-based persecution are thus twice victimized: first in their countries of origin, where they confront sexual violence and gender-related discrimination, and later, in Israel, when they are denied adequate protection.

By refusing to provide protection to women fleeing persecution resulting from gender-based violence, Israel violates not only the 1951 Convention, but also CEDAW Articles 1, 2, and 15, which prohibit “any distinction, exclusion or restriction made on the basis of sex which has

⁴³ *Kasinga*, *supra* note 40.

⁴⁴ Immigration and Naturalization Services *Questions and Answers: The R-A- Rule* (Dec. 7, 2000), <http://uscis.gov/graphics/publicaffairs/quest-sans/RARule.htm> (noting that “[a]lthough genital mutilation is practiced on many women around the world, INS has not seen appreciable increase in the number of claims based on FGM”).

⁴⁵ Musalo, *Protecting Victims of Gendered Persecution*, *supra* note 42.

the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women” of their human rights.⁴⁶ Furthermore, Israel is obligated to “establish legal protection of the rights of women... and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination.”⁴⁷ Women fleeing gender-based persecution are thus twice victimized: first in their countries of origin, where they confront sexual violence and gender-related discrimination, and later, in Israel, when they are denied adequate protection. In February 2011, the Committee on the Elimination of Discrimination against Women expressed its concern that gender-based persecution is not recognized by Israel as a ground for refugee status.⁴⁸ It recommended that Israel “include gender-based persecution as a ground for refugee status, in accordance with the UNHCR Guidelines...”⁴⁹

5.1 CASE EXAMPLES

The following case descriptions showcase the rationale employed by Israel’s Refugee Advisory Committee when evaluating gender-based refugee claims. Also included are examples of claims based on persecution relating to sexual orientation, because the reasoning employed by the Committee in such cases is identical to that employed in gender claims.⁵⁰

HT (Central Asia)

HT was systematically beaten by her husband, a senior civil servant, after he discovered she was lesbian. The Refugee Advisory Committee rejected her refugee claim, holding it was based on “family problems.” She argued to the Refugee Advisory Committee that she would not find protection in her country, and that her husband’s position as a senior civil servant would enable him to locate her anywhere in the country. UNHCR recommended that she be recognized as a

⁴⁶ Convention on the Elimination of All Forms of Discrimination Against Women, Art. 1. GA res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46; 1249 UNTS 13; 19 ILM 33 (1980).

⁴⁷ *Ibid.* at Art. 2.

⁴⁸ Committee on the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women*, ¶ 46, CEDAW/C/ISR/CO/5 (Feb. 4, 2011). These findings followed presentation of the instant paper by the authors to the CEDAW Committee in January 2011.

⁴⁹ *Id.* at para. 47.

⁵⁰ The 2002 UNHCR guidelines on gender-related persecution note that “[a] claimant’s sexuality or sexual practices may be relevant to a refugee claim where he or she has been subject to persecutory (including discriminatory) action on account of his or her sexuality or sexual practices. In many such cases, the claimant has refused to adhere to socially or culturally defined roles or expectations of behaviour attributed to his or her sex.” UNHCR, *Guidelines on International Protection, supra* note 28, at para. 16.

refugee because her husband would easily locate her if she were returned, and she would not receive adequate protection from the authorities. UNHCR concluded that because of the strong homophobic culture in her country of origin, she would face persecution if her sexual orientation was discovered, including facing barriers finding work and accommodation, and being exposed to family violence. UNHCR also found that HT could not avoid persecution by relocating elsewhere within the country. The Refugee Advisory Committee rejected her asylum claim arguing that her predicament stemmed from a “family situation” and domestic violence which are not grounds for refugee status. The rejection letter sent to HT simply stated:

Your case as explained and stated by you does not fall under the mandate of the 1951 Geneva Convention Relating to the Status of Refugees for the following reasons: You described acts of violence and threats from your husband due to your relations with another woman. After thorough review of your personal situation, it has been decided that your claim for asylum is in connection with **family problems**. Based on the above mentioned elements, your claim cannot be established in regard to the 1951 Refugee Convention and the 1967 Protocol. Therefore your refugee claim is rejected.⁵¹

PL (Morocco)

PL alleged he had been unable to conceal his sexual orientation due to his feminine demeanor, and that he was raped as a child by his brothers and later by co-workers. He claimed he had been unable to seek state protection because Moroccan law penalizes homosexual relations, and because gay men are often harassed, detained, and suffer harm at the hands of the police. UNHCR recommended that his claim be granted, but the Refugee Advisory Committee disagreed, and denied him protection. With the exception of the Chairperson, the three other members of the Committee found that the 1951 Convention does not apply to those fleeing persecution due to their sexual orientation:

The Ministry of the Interior: Our position is that sexual orientation is not protected by the Convention, and this is an unjustified expansion of the Convention. In his case it is appropriate that protection will be found for him in a third country with the assistance of the Ministry of Foreign Affairs....

⁵¹ Refugee Advisory Committee, Rejection Letter in the case of HT, March 3, 2010, trans. from Hebrew, [emphasis added] [Initials changed to protect the anonymity of the individual. Original on file with author.]

The Ministry of Justice: I am concerned. What is the solution? If he has a chance to file an application based on common law marriage, he should do so....

The Chairperson: The category of sexual orientation may be considered a persecuted group. I found in Attorney Ben-Dor's arguments that this is the jurisprudence in many countries in the world. For this reason I would not reject his application because of his sexual orientation. But I point out that he was not persecuted in Morocco, he suffered social harassment and not by the government. He worked and supported himself as usual. It is impossible for the Committee to solve such problems which exist all over the world. The Committee for Political Asylum [sic]⁵² is not the answer to all the social problems in the world....

The Ministry of Foreign Affairs: I understand that the traditional position is that the Refugee Convention does not apply to sexual orientation. In this case, his return to Morocco does not seem possible, therefore a solution should be found in Israel.

The Ministry of the Interior: There is an opposition here to sexual orientation as a particular social group.

Decision: According to the members of the Committee, excluding the Chairperson, the Refugee Convention does not apply to groups of various sexual orientations. According to the Chairperson, it is possible to interpret the Convention as applying to groups of people, and individuals among them, due to their various sexual orientations. However, the claimant did not suffer persecution while he was in Morocco. He did suffer harm in his childhood by his brothers, and when he was mature—by people who he thought were his friends and by passing people in the streets, but he lived and worked in a respectable occupation. Indeed the laws of Morocco prohibit homosexuality and there were incidents where policemen were sent to prevent conferences or meetings of gay men, but they did not persecute the applicant....⁵³

⁵² Committee for Political Asylum here is used to refer to the Refugee Advisory Committee.

⁵³ Refugee Advisory Committee, Decision in the case of PL, Feb. 2, 2010, trans. from Hebrew [initials changed to protect the anonymity of the individual; original on file with author].

XR (Sri Lanka)

XR landed at Tel Aviv Ben-Gurion Airport in September 2008. She was denied entry and was scheduled for immediate deportation despite her declaration that her deportation would expose her to danger. UNHCR interviewed her at the airport holding facility and determined that her fear of forced marriage and domestic violence in Sri Lanka merited further examination. Because MOI refused to further delay her deportation, the Refugee Rights Clinic and the Hotline for Migrant Workers filed an urgent appeal to the Tel Aviv Administrative Court to stay deportation pending a final resolution of her asylum claim. In its brief, responding to the petitioner’s request for an interim injunction, the State argued:

Shortly, due to the lack of time—and this is the place to emphasize that the State will expand in detail in its answer to the petition—the State will argue that **marital problems and even domestic violence, are not grounds for asylum, for to say otherwise will cause millions of miserable people from all over the world to move from country to country and request to register as refugees.**⁵⁴

After an injunction was granted, the petitioner was permitted to apply to the UNHCR, which granted a second interview (and ultimately recommended that her claim be rejected). The petitioner, who had already been in the airport holding facility for seven weeks, decided not to challenge this decision and was deported.

FW (Palestinian Authority)

Because Israel currently refuses to consider asylum claims filed by Palestinian claimants, the petitioners filed a request for a temporary residency for the Palestinian partner based on their partnership and argued that the danger he would face in the Palestinian Authority due to his sexual orientation is a “particular humanitarian circumstance” which obligates the state to provide protection.⁵⁵ The petition was rejected by a statutory “Professional Advisory

⁵⁴ HCJ 2595/08 *XR v. the Ministry of the Interior*, State’s response [2008], trans. from Hebrew [emphasis added; initials changed to protect the anonymity of the individual; original on file with author].

⁵⁵ The State’s analysis of claims for protection based on gender-based persecution was set forth in detail in its response to a petition filed by the Refugee Rights Clinic at the Israeli Supreme Court on behalf of two same-sex partners (men), an Israeli and a Palestinian. Although this is not an asylum case it raises similar questions—that is, whether a person who is in danger of persecution due to his sexual orientation is entitled to protection in Israel.

Committee,” and the refusal is currently being challenged at the Supreme Court. In its answer to the Court petition the State reasoned as follows:

We should assume that the percentage of gays in the Palestinian society is similar to the percentage of gays in other societies. There are societies which are more open than the Palestinian society in this matter—fortunately, Israeli society is mostly more open—and there are societies which are more conservative than Palestinian society on this issue. We may accept the proposition, and the special Humanitarian Committee has pointed to this in its decision which is challenged in this petition—that the conservatism of the Palestinian society did not make the life of the petitioner easy or comfortable. But this is the situation of many gays who live in the Palestinian Authority and **in other conservative societies.**

This fact does not trigger a legal obligation on Israel to accept to its territory any foreigner, whose society in which he lives is not tolerant to his lifestyle.⁵⁶

In the same submission, the State asserted this reasoning would also apply to claims for protection filed by Palestinian women fleeing honor killings or those perceived as having “inferior morality,” including prostitutes. According to the State, such claims for protection in Israel are attempts to force the Court to provide a legal solution to a problem that is mainly social and cultural. This decision delineates the State’s position that those fleeing persecution resulting from entrenched, violent discrimination against women or sexual minorities do not require international protection.

The case was filed under Article 3A1 to the 2003 Citizenship and Entry to Israel Law (interim law) which created a narrow humanitarian exception to the general prohibition on granting status to Palestinians in Israel. The provision allows Palestinians who have a family relative legally staying in Israel to file a request for a permit to stay in Israel, provided that there are “special humanitarian considerations.” However, the law specifically states that the fact that the Palestinian has an Israeli partner, or that they have mutual children, will not serve as a special humanitarian consideration. Such petitions are filed to the Professional Advisory Committee under Article 3A1 of the Citizenship and Entry to Israel Law (Interim order)—appointed by the Minister of the Interior—and are then decided by the Minister based on the Committee’s recommendation. See *Doe v. Ministry of the Interior*, *supra* note 18.

⁵⁶ *Ibid.*

QL (Guinea Conakry)

At 16, QL's father told her that she was to become the second wife of a much older man in her village. QL refused and was severely beaten. Her father then threatened to kill her if she continued to refuse the marriage so she fled her country and traveled through the Sinai Desert to Israel. On the way, she was repeatedly raped, often gang raped, by her Bedouin smugglers. She arrived in Israel in September 2006 and with the assistance of the Refugee Rights Clinic, she filed an asylum application. QL's asylum claim was rejected by the Refugee Advisory Committee in a brief decision:

The difficult circumstances of the case reveal various types of abuse suffered by the claimant. However, our position is that the claimant does not meet the criteria for receiving asylum in Israel according to the Refugee Convention. The Committee recommends transferring the claimant's case to the Inter-Ministerial Committee for Humanitarian Affairs in the Population Registry⁵⁷ to examine the possibility of providing the claimant humanitarian status (the position of the Ministry of Foreign Affairs is that there is a question regarding the applicability of the Convention in her case).⁵⁸

EB (Ethiopia)

EB was born into domestic servitude. She fled her country after her owner decided to marry her to an older man. The Refugee Advisory Committee rejected her claim, reasoning that while the claimant was a victim of terrible social conditions, these conditions did not constitute persecution under the 1951 Convention. In stark language, the Chairperson noted:

⁵⁷ The Inter-Ministerial Committee for Humanitarian Affairs was established by MOI to provide recommendations on cases which would not otherwise qualify for status in Israel. Procedure No. 5.2.0022, *Procedure Regulating the Work of the Inter-Ministerial Advisory Committee for the Determination and Granting Status in Israel on Humanitarian Grounds*, available at <http://piba.gov.il/Regulations/82.pdf> (last visited Jan. 11, 2011) (providing general guidance to the Committee, without a detailed account of the considerations that should be observed or the type of status that should be granted in varying circumstances).

⁵⁸ Refugee Advisory Committee, Decision in the case of QL, Nov. 13, 2008, trans. from Hebrew [initials changed to protect the anonymity of the individual; original on file with author].

We should support women's liberation in the world, but the question is whether it is our role as a committee to recognize as refugees those people who want to be free of that cultural norm.⁵⁹

EB's appeal was submitted by the Refugee Rights Clinic and is still pending. The appeal, supported by an expert opinion submitted by a leading Israeli social scientist and an African Studies scholar, argues that even if EB was not returned to her former owner, her gender, her young age, and her former status as a slave, would place her in serious danger of being trafficked for sex or severely socially ostracized. Thus, her only mode of sustenance would be sex work.

DK (West Africa)

DK, a married woman, refused to convert to her husband's religion. As a result, her husband beat her repeatedly, causing her to be hospitalized. When DK tried to leave her husband by going to her parents' house, he followed her there and took her to the police, who, in turn, incarcerated her. She eventually fled West Africa, arriving in Israel via Egypt. UNHCR recommended that DK be recognized as a refugee. The Refugee Advisory Committee disagreed, finding that the case did not fall under the 1951 Convention, as it was a matter of "domestic dispute." The Committee subsequently referred the case to the Inter-Ministerial Committee for Humanitarian Affairs without notifying DK or her counsel. Unaware of the referral, the Refugee Rights Clinic petitioned the Jerusalem Administrative Court, requesting review of the Refugee Advisory Committee's decision. Shortly after filing this petition, MOI announced that DK would receive a one-year work permit on a humanitarian basis. While DK has the right to request an extension of the work permit, it is a highly discretionary status.

A recurring theme in Refugee Advisory Committee decisions is that survivors of gender-based persecution are not refugees, but individuals who may be provided humanitarian protection. This approach is unsustainable: asylum seekers who fulfill the refugee definition have a right to receive protection, while humanitarian protection remedies are always subject to broad government discretion.

⁵⁹ Refugee Advisory Committee, Decision in the case of EB, Jan. 5, 2010, trans. from Hebrew [initials changed to protect the anonymity of the individual; original on file with author].

JM (Eastern Europe)

JM was trafficked into Israel as a sex worker and was held in slavery-like conditions for six months. In September 2004, she was arrested when the police raided the place she was being held. After her release, JM agreed to testify against her traffickers. Based on her testimony, the traffickers were sentenced in November 2004 to several years in prison. JM subsequently claimed that, as a result of her cooperation with the State, her family in Eastern Europe was threatened that she would be harmed upon her return. Her attorney filed a request for protection as a trafficking victim, but this petition was rejected.⁶⁰ Subsequently, the Refugee Rights Clinic filed an asylum application on her behalf. The Refugee Advisory Committee convened several hearings, during which Committee members expressed doubts about the applicability of the 1951 Convention to human trafficking victims. It further reasoned, after consulting the police in the country of origin, that the claimant would not face persecution in her country. The Refugee Advisory Committee concluded that JM could instead seek protection as a victim of trafficking who testified against her traffickers despite the fact that she had already applied and been rejected by that body.

6. LIMITED COMPLEMENTARY FORMS OF PROTECTION FOR REFUGEES IN ISRAEL FLEEING GENDER-BASED PERSECUTION

A recurring theme in Refugee Advisory Committee decisions is that survivors of gender-based persecution are not refugees, but individuals who may be provided humanitarian protection. This approach is unsustainable: asylum seekers who fulfill the refugee definition have a right to receive protection, while humanitarian protection remedies are always subject to the broad government discretion. In fact, humanitarian status is seldom granted. Of all the aforementioned cases, only one claimant, DK, received humanitarian status.

Moreover, the temporary residency granted to a recognized refugee imparts social rights equal to that of residents (including medical insurance, the right to family unification, and the right to

⁶⁰ Ministry of the Interior, Procedure No. 6.3.0008, available at <http://piba.gov.il/Regulations/165.pdf> (last visited Jan. 19, 2011) (noting that in providing status to victims of slavery, human trafficking, and forced labor, a victim may be eligible for a one-year rehabilitation working visa. At the end of the year, the victim is normally expected to leave Israel unless there is special justification to extend the permit).

an Israeli travel document). The State typically provides “humanitarian” cases with one-year work permits; however, medical coverage and other necessary benefits are not provided.

Further, humanitarian status is far more precarious than refugee status. Once a person is recognized as a refugee, cessation of her status is subject to the criteria enumerated in Article 1C of the 1951 Convention.⁶¹ By contrast, humanitarian status is granted at the discretion of the Interior Minister and may be terminated at his discretion. When the status is withdrawn, an individual falls out of legal status and is deportable. In the case of refugees, this means being returned to a country where one’s life or liberty is put at risk; in other words, *refoulement*.

An asylum seeker who withdraws her refugee claim in the hope of gaining status through her partner may at a later stage find herself returned to a country where she will face persecution.

7. CONDITIONING OTHER STATUS AND BENEFITS ON WAIVER OF ASYLUM CLAIM

The Ministry of Interior’s general policy—unsupported by any of its published procedures—is that a person may not utilize two different venues to legalize his or her stay in Israel simultaneously. Thus, for example, when an asylum seeker forms a partnership with an Israeli citizen and submits a request for partnership-based status, she is required to withdraw her asylum application. Since partnership-based status requires couples to remain together for a five-year period, if the couple separates before the completion of the procedure, the foreign partner will face deportation proceedings. In this way, an asylum seeker who withdraws her refugee claim in the hopes of gaining status through her partner may, at a later stage, find herself returned to a country where she will face persecution.⁶²

The same problem arises in the context of trafficking victims who are forced to choose between filing an asylum claim and applying for a one-year rehabilitation visa. This violates Article 14(1) of the *Palermo Protocol* which explicitly states that the rights of victims of trafficking under the

⁶¹ See U.N. Refugee Convention, *supra* note 1, at Art. 1(c).

⁶² Art. 1(c) of the new asylum regulations further complicates the situation by requiring asylum seekers to submit applications for refugee status within one year of their date of entry into Israel. See Israel Asylum Regulations, *supra* note 2, at Art. 1(c).

protocol will not affect the rights, obligations, and responsibilities of States and individuals under international law and in particular the 1951 Convention.⁶³ Victims of trafficking, slavery, and forced labor often arrive in Israel in such traumatized states that they are unable to endure the rigorous refugee status determination process. Under such circumstances, there is a risk that victims of trafficking or slavery may opt for a rehabilitation visa without understanding MOI's requirement that they are thereby waiving their claims for refugee status. This means that at the end of the visa period, some of the most vulnerable refugees are left without protection and shut out of the asylum system altogether.

8. EMPLOYMENT RESTRICTIONS AND LACK OF SOCIAL SUPPORT: DETRIMENTAL IMPACT ON VULNERABLE WOMEN REFUGEES

Most asylum seekers who are currently in Israel are prohibited from working. They are issued a "conditional release" visa,⁶⁴ which, according to MOI, does not allow them to work. Sudanese and Eritrean asylum seekers, who do not undergo RSD procedures and are given a form of withholding of deportation,⁶⁵ are also issued this visa, despite the fact that they may spend several years in Israel.

There are no state-run shelters. Access to medical services is limited to emergency life-saving treatment. Without the right to work legally, asylum seekers and migrants must resort to any way possible to support themselves.

Asylum seekers and others who are given "deferred deportation" or "temporary protected" status are not entitled to any state-sponsored social benefits. There are no state-run shelters. They are not provided living allowances. Access to medical services is limited to emergency life-saving treatment. Without the right to work legally, asylum seekers and migrants must resort to any must resort to any means possible in order to support themselves. As noted by Avital

⁶³ See U.N. General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime*, Art. 14(1), opened for signature Nov. 15, 2000, available at <http://www.unhcr.org/refworld/docid/4720706c0-.html> (last visited Jan. 5, 2011).

⁶⁴ Entry to Israel Law, 5712-1952, Art. 2(a)(5) (containing the provisions on conditional release visas).

⁶⁵ Sudanese and Eritrean nationals currently receive temporary protection in Israel and therefore do not undergo RSD procedures. See, e.g., AD 31808/10 *Hijab v. Ministry of the Interior* [2010] (Isr.); AD 35858/10 *Sayko v. Ministry of the Interior* [2010] (Isr.).

Sternberg, a senior legal advisor at the Ministry of Justice, in a debate in the Knesset's Committee for the Examination of the Problem of Migrant Workers:

As long as we are talking about a population that cannot be deported — and one of the things that has not been mentioned here is that currently we are unable to deport people to Sudan and to Eritrea—if you do not allow [refugees] to work, you are forcing them to make their own living, [and] I am not sure exactly how [they will do so]. But you cannot leave them in the streets to starve. It is important to say this. I am saying we have to find a solution. The [current] solution of totally prohibiting employment is very, very difficult, both morally and legally.⁶⁶

The tension between the State's aim to deter future asylum seekers from arriving in Israel by prohibiting employment, on the one hand, and the understanding that prohibiting them from working will cause a serious humanitarian crisis, on the other hand, leads to a distorted policy, according to which asylum seekers are not allowed to work, but their employers are not penalized for employing them.⁶⁷

A recent judgment by Judge Amir of the Merkaz Administrative Court⁶⁸ criticized the underlying assumptions of this policy and ruled that people who are provided temporary protection should be allowed to work. According to Judge Amir:

I do not view it as either possible or reasonable to allow the stay of temporary protected persons without the ability to work for their basic subsistence. We are not dealing here with a tourist who arrives, and it may be assumed that he will arrive, with enough cash to fund his stay here. We are dealing with a person who fled an impoverished country, and arrived with nothing. Once the state believes—and this is its position as long as the collective protection is in place—that a protected person should not be detained and should not be deported, it is obligated also to provide a solution to the possibility of basic human subsistence of the petitioner, as long as the temporary protection continues. It is

⁶⁶ The Knesset Committee for the Examination of the Problem of Migrant Workers, hearing held on March 2, 2010, p. 6, translation from Hebrew.

⁶⁷ Migrant Workers Law, 5751-1991, Art. 2.

⁶⁸ AD 35858/10 *Sayko v. Ministry of the Interior* [2010] (Isr.), 3.

inconceivable that a person will be hungry for bread in Israel, regardless of his visa. It is inconceivable that the state will place a person in a situation in which he would be forced to commit crimes to subsist in the most basic sense of feeding himself and finding a roof over his head. I also do not believe that we should “shut our eyes” and say that such a person is prohibited from working, while at the same time we assume that he will work illegally, to support himself.

The prohibition on work and the lack of social assistance gravely affects the situation of women asylum seekers. Single women with young children are the most vulnerable.

In November 2010, when it became clear that the numbers of new arrivals were not declining, a new phrase was added in bold letters to the “conditional release” visas issued to asylum seekers and people under temporary protection, stating, “This permit is not a work permit.” The addition of this sentence has already caused many asylum seekers to lose their jobs and, as a result, their housing and subsistence.

The prohibition on work and the lack of social assistance gravely affects the situation of women asylum seekers. Single women with young children are the most vulnerable. A few receive temporary housing in NGO-run shelters, but there are only a few shelters, each with limited space.

The Refugee Rights Clinic recently interviewed GR, a female Ethiopian asylum seeker who, for lack of shelter or means of support, was forced to agree to sexual relations with an Israeli man. She moved in with him and as of January 2011, was seven months’ pregnant. She expressed her desire to leave this exploitative relationship but said she felt compelled to stay because she cannot support herself without a work permit.

On November 28, 2010, the Israeli government approved a new plan to build a reception center in southern Israel where asylum seekers will be obligated to reside during the processing of their claims. This center will provide for essential needs such as food and shelter. At the same time, the government noted that until the reception center opens, the prohibition on employment for asylum seekers will not be enforced. However, because the center is planned to house 8,000 asylum seekers, and there are over 30,000 asylum seekers in the country, it is not clear how the asylum seekers who are not housed in the reception center will support themselves when the employment bar is reintroduced.

9. CONCLUSION

To meet its international obligations under the 1951 Refugee Convention and CEDAW Articles 1, 2, 11, and 15, the State of Israel should:

1. Recognize gender-based violence as a legitimate ground for asylum under the 1951 Convention;
2. Recognize persecutory acts performed by non-state actors as “persecution” for the purposes of the 1951 Convention when the state of nationality or habitual residence is unwilling or unable to provide protection;
3. Add guidelines recognizing gender-based persecution to existing asylum regulations;
4. Train all RSD officers, interpreters, and any other officials who handle asylum seekers’ claims (including Detention Review Tribunal adjudicators) in gender-sensitive procedures and interviewing techniques;
5. Refrain from conditioning rehabilitation visas or any other status (*e.g.*, partnership-based status) on the waiver of an asylum application;
6. Allow trafficking victims a year of rehabilitation before being required to undergo the refugee status determination procedure; and
7. Recognize the right of asylum seekers to work, thereby enabling them to subsist with dignity.

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