

TRAPPED BETWEEN BORDERS: A PROPOSAL TO APPLY
INTERNATIONAL LEGAL PROTECTION TO PERSECUTED WOMEN AND
GIRLS WHO ARE UNABLE TO FLEE

*Sherizaan Minwalla **

ABSTRACT

Women and girls who face forced marriage, honor killing, female genital mutilation, and other forms of gender-based persecution can apply for refugee status and resettlement to a safe third country if they are able to cross an international border. Yet in countries like Iraq, where laws and traditions severely curtail women's rights and mobility, travel outside of the country on their own is near impossible. Women with potential refugee or asylum claims based on gender-based persecution face heightened barriers to accessing international legal protection due to domestic legal and cultural barriers, and the nature of gender-based violence where more often than not the perpetrators are those closest to them and well positioned to exert domination and control: members of their family, clan, or tribe.¹ Women's access to safety and justice in many countries remains elusive where States persistently deny women's demands for legal rights and resources to respond to violence against women, highlighting the importance of access to international protection for women facing persecution who are unable to flee across an international border.

States have a duty to protect their citizens, yet many fall short particularly when it comes to women and girls. Iraq is one such country that maintains harmful laws and practices that condone gender-based violence and discrimination, and although there has been some progress with legislative reform, it takes time to fully implement them, leaving individual women unable to benefit and at continued risk of persecution. In 2014 in an

* Sherizaan Minwalla is a U.S. lawyer who represented several hundred survivors of domestic violence and sexual assault in Chicago and has over a decade of experience working in Iraq. She is incredibly thankful to Jennifer Gong-Gershowitz, Adriana Ysern, Harun Ahmed, Shauna Harrison, William Pryor, Mara Revkin, Daniel Smith, Susan Carle, and Sherley Cruz for their invaluable insights and comments, and to research assistants Christina Moehrle, Brandon Gaskew, Benjamin Eddington, and Ridhi Shetty. This paper is dedicated to women and girls who struggle for freedom and survival against incredible odds.

¹ See VALERIA VILARDO & SARA BITTAR, GENDER PROFILE - IRAQ: A SITUATION ANALYSIS ON GENDER EQUALITY AND WOMEN'S EMPOWERMENT IN IRAQ, 42-44 (Oxfam Int'l 2018).

egregious case, the Iraqi government breached its duty to protect its citizens when it failed to prevent attacks by the Islamic State of Iraq and Syria (ISIS) against the religious minority Yazidi community, leaving women and girls exposed to sexual violence and trafficking as part of ISIS' genocide. Persecuted women and girls in Iraq and other countries are trapped, immobilized in their homes, shelters, camps, and jails while the perpetrators remain free; yet if they could cross an international border, they would qualify to apply for refugee protection and possible resettlement.

While still in their homeland, individual cases of persecuted women who are not part of displaced populations have few avenues for legal protection and services while still inside their country borders. They fall outside of the United Nations High Commissioner for Refugees' (UNHCR) categories of "persons of concern" that include people who have been forced to flee such as refugees, internally displaced persons, stateless persons, or returnees; the distinction ostensibly between those fleeing as part of larger population flows rather than as individuals. Individual women fleeing persecution, because they are generally excluded from humanitarian services and programs, are forced to rely on what, if anything, is provided by the State and local and international nongovernmental organizations. This is despite the fact that women who face gender-based persecution share similar characteristics to other recognized groups such as refugees and internally displaced persons who have suffered human rights violations and are in need of protection.

This Article provides a case study based on women's actual experiences in Iraq to illustrate the heightened barriers women experience due to discriminatory domestic laws and traditions as well as the nature of gender-based persecution that prevents them from fleeing across an international border. Furthermore, this paper highlights the need to bring individual women and girls fleeing persecution under the "persons of concern" umbrella as one way to address their needs while they pursue international protections inside their borders. In Central America, UNHCR piloted a program to provide safe access to international protection for individuals inside their country who were identified for safe resettlement, demonstrating there is acknowledgment that some individuals require, and would qualify, for protection but face additional hurdles to accessing legal protection.

I propose extending legal and humanitarian benefits to women and girls facing gender-based persecution while they are still inside their countries of origin and who cannot flee across an international border. At a minimum this approach would apply in States that fail significantly to respond to gender oppression and violence, restricting women's mobility, thereby putting additional barriers in front of women to access international protection. To achieve this, I recommend creating a new category of "persons of concern" to include "persecuted women and girls" (PWGs). This would pave the way for UNHCR to include individual women and girls stuck in shelters, jails, or other confined spaces to have access to services and protection similar to

other persons of concern. Once these individuals are clearly recognized as a protected group, it would open the door to extending in-country refugee protection and resettlement to safe countries to PWGs without requiring they cross an international border.

I.INTRODUCTION	102
A. Methodology.....	108
II.LACK OF STATE PROTECTION FOR PERSECUTED WOMEN AND GIRLS.....	109
A. Gender-Based Violence, Discrimination, and Persecution in Iraq.....	109
B. Restricted Mobility for Iraqi Women	117
C. Inadequate Government Shelter Protection for Women Fleeing Gender-Based Persecution.....	119
D. Inadequate Legal Protection Due to Harmful Laws and Practices.....	123
E. Legally Sanctioned Violence Against Women.....	126
F. Un- and Under-Enforced Laws that Guarantee Women Legal Rights.....	128
G. Perpetrating Gender-Based Violence Through Informal Justice Systems.....	129
III.LACK OF LEGAL RIGHTS AND HUMANITARIAN ASSISTANCE FOR PWGs WITHIN BORDERS.....	132
A. Refugees	134
B. Returnees	136
C. Internally Displaced Persons	136
D. UNHCR Response to Victims of Gender-Based Persecution..	137
IV.RECOMMENDATIONS TO ENHANCE ACCESS TO LEGAL RIGHTS AND HUMANITARIAN ASSISTANCE FOR PWGs TRAPPED WITHIN BORDERS	138
A. Extending Services and Programs Currently Available to Persons of Concern to Victims of Gender-Based Persecution	140
B. Durable Protection for PWGs Qualifying as Refugees.....	141
V.CONCLUSION	145

I. INTRODUCTION

Sara is from a village with a strong tribal culture in Iraq.² She describes her father not as a religious man, but as someone who is very conservative and cares deeply about his honor.³ In her family, the women stay home to cook and clean, while men and boys are free to go out without restrictions.⁴ At fifteen, Sara fell in love with her neighbor, and when her father suspected

² All names of individuals in this article have been changed to protect their identities. Additionally, details that could identify individuals, such as places of origin or unique facts about their cases, are omitted.

³ Interview with Sara, in Iraq (May 2007) (notes on file with author).

⁴ *Id.*

a romantic relationship, he beat her severely for tarnishing his reputation.⁵ Sara's father forced her to marry her cousin, and for nine years she endured a loveless marriage with an abusive father and brother-in-law. A college student met Sara and pursued her, buying her a telephone and phone cards. One day he insisted on visiting her home when her husband was away and they had a sexual encounter. Her brother-in-law visited the home and discovered the stranger in the house and contacted the local police and security forces. They arrested and interrogated Sara and charged her with committing adultery under Article 377 of the Iraqi Penal Code.⁶

Under Iraqi law, only Sara's husband had the right to press charges. Her father tried unsuccessfully to persuade her husband to reconcile with her, promising to "burn her" for dishonoring him and his family. Her husband refused to pursue charges, leaving the investigating judge with no option but to release her. Sara's father told the judge that he would kill her once she was released to reclaim his honor, yet the judge had no legal authority to charge him with a crime as threatening to kill her was not a crime. The judge knew Sara's family would be waiting for her on the day he released her, therefore, he arranged to place her in a women's shelter that was run by a local organization UN for her protection.

At 27-years old, Sara left one prison for another. The conditions in the shelter were intolerable; they had limited electricity, and the staff prohibited them from opening the windows for security reasons. Sara and other residents were not allowed to leave the building unless there was a serious medical emergency.⁷ Sara described life in the shelter as miserable, with nothing to do all day as she frequently contemplated suicide or returning to her family, which she knew would lead to her murder. Aside from this shelter, there was no other place where Sara could live without being discovered by her family; and because it is rare for Iraqi women and men to live alone separate from their families, Sara found herself trapped.

The 1951 Refugee Convention defines a refugee as:

[A] person 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...⁸

⁵ *Id.*

⁶ Interview with Social Worker handling Sara's case, in Kurdistan Region, Iraq (June 2007) (notes on file with author) [hereinafter Interview with Social Worker]; see also Penal Code Law No. 111 of 1969 (Iraq), translated in U.N. High Comm'r for Refugees [UNHCR], *Iraq: Penal Code*, <http://www.refworld.org/docid/452524304.html>.

⁷ Interview with Sara, *supra* note 3; see also Interview with Social Worker, *supra* note 6.

⁸ See United Nations Convention Relating to the Status of Refugees, art. 1, *opened for signature* July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137, [hereinafter 1951 Refugee

As discussed below, gender is not a recognized protected category, however today the United Nations High Commissioner for Refugees (UNHCR) and a number of countries recognize individuals filing claims gender-based persecution as legally qualifying for refugee or asylum protection.⁹ If Sara fled Iraq, she could have established that she was persecuted and had a well-founded fear of persecution, and that the Iraqi state was unable to protect her. UNHCR broadly defines persecution to include, “threats to life and freedom,”¹⁰ and over the years has been recognized to include other human rights violations such as forms of violence against women.¹¹ Furthermore, it is well recognized under refugee law that where the persecutor is a non-state actor, State failure to protect its citizens exists where the government is unable or unwilling to control such individuals or groups.¹²

If Sara manage to flee Iraq and attain refugee status in a neighboring country, she would have been a strong candidate for referral to a third country for resettlement, based on UN vulnerability criteria that includes unaccompanied woman who are at greater risk of harm in displacement.¹³ Sara wanted to leave Iraq, but she did not have the documents or financial resources, and she risked being returned to her family by security officials at one of many checkpoints in Iraq or at a border crossing. She could not obtain Iraqi identity or travel documents without her family registry (*Surat Qayd*) and the support of relatives.¹⁴ Furthermore, as a woman traveling alone, she

Convention]; *see also* Immigration and Nationality Act, 8 U.S.C. § 1101(a)(42)(2019).

⁹ *See* UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status Based on Sexual Orientation and/or Gender Identity Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, ¶¶ 40-47 U.N. Doc. HCR/GIP/12/09 (Oct. 23, 2012).

¹⁰ *See* UNHCR, *Handbook for Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection*, at 133 and 134 n.4, U.N. Doc. HCR/IP/4/ENG/REV. 4 (Oct. 23, 2012) [hereinafter *Handbook*] (incorporating “Guidelines on International Protection No. 1” regarding gender-related persecution); *see also* 1951 Refugee Convention, *supra* note 8, art. 33.

¹¹ *Handbook*, *supra* note 10, ¶ 51.

¹² *See id.* ¶ 65.

¹³ *See* UN Women, *Report on the Legal Rights of Women and Girl Asylum Seekers in the European Union*, 38 (UN Women 2017) [hereinafter *Legal Rights of Women and Girl Asylum Seekers*]; PATRICIA W. FAGEN, UNHCR POLICY ON REFUGEE WOMEN AND GUIDELINES ON THEIR PROTECTION: AN ASSESSMENT OF TEN YEARS OF IMPLEMENTATION, 21 (Women’s Comm’n for Refugee Women and Children 2002), <https://www.refworld.org/pdfid/48aa83220.pdf>.

¹⁴ Women are at a disadvantage for acquiring replacement documents. Each family has a Family Registry that includes the names and marital status of each person. This document is required in order to apply for the Civil Identity Card and Nationality Card, and both of these cards are required before applying for an Iraqi passport. In addition to documentation requirements, government officials would inquire about Sara’s husband and likely would request his presence, even if this was not official government policy. (Notes on file with author.)

faced a high risk of being sexually exploited and trafficked.¹⁵ The risks are significantly heightened for women in countries like Iraq with strong patriarchal institutions and traditions, affording women less independence and freedom of movement.¹⁶

After years of conflict and sanctions, UNHCR and other United Nations agencies had a strong presence in Iraq, responding to the humanitarian and protection needs of displaced people. Individual women fleeing gender-based violence and persecution like Sara are not explicitly categorized as “persons of concern” under the United Nations framework which applies to populations in need of humanitarian assistance.¹⁷ UNHCR categorizes certain groups of people as “persons of concern” which includes refugees, stateless people, internally displaced persons (IDPs), who as the term suggests are displaced inside the borders of their country, and returnees, those who fled across an international border and have returned.¹⁸ Persons of concern are guaranteed specific legal rights that vary by category, and if UNHCR becomes involved in a humanitarian crisis, the agency engages in protection activities.¹⁹ Individuals in each category are similarly situated to the extent they have suffered or face threats of human rights violations or persecution as part of mass population displacement; what distinguishes them is where they are situated geographically in relation to their place of origin and an international border.

The United Nations High Commissioner for Refugees (UNHCR) defines IDPs as:

[P]ersons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in

¹⁵ See also ANN KNAPP, HUMAN TRAFFICKING IN THE KURDISTAN REGION OF IRAQ, (SEED Found. 2018), https://www.seedkurdistan.org/Downloads/Trafficking/Anti_trafficking_report_EnglishSEED_2019_outlined_very_final_2132019.pdf. See generally, U.S. Dep’t of State, 2019 Trafficking in Persons Report: Iraq, (2019) [hereinafter TIP Report: Iraq], <https://www.state.gov/reports/2019-trafficking-in-persons-report-2/iraq/>.

¹⁶ VILARDO & BITTAR, *supra* note 1, at 53-55.

¹⁷ See UNHCR, *UNHCR and International Protection: A Protection Induction Programme*, 18 (2006) [hereinafter *Persons of Concern to UNHCR*] (stating that persons of concern include asylum seekers, refugees, stateless persons, internally displaced persons, and returnees).

¹⁸ See *id.*

¹⁹ See *id.* (referring to UNHCR’s legal basis for responding to internally displaced persons derived from the UN Statute Article 9, which requires the High Commissioner to “engage in additional activities, including repatriation and resettlement” where resources are available (found at <https://www.unhcr.org/4d944e589.pdf>), and from the UN General Assembly resolution 48/116 (1993) which sets forth criteria to inform when UNHCR should intervene on behalf of displaced persons. Once UNHCR intervenes, its mandate is to advocate on behalf of the internally displaced, mobilize support for them, provide assistance, and lead on protection activities.)

particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border.²⁰

The focus of UNHCR's mandate is on mass populations, not individuals, displaced by conflict or other disasters.²¹ As part of its protection activities, UNHCR responds to the problem of gender-based violence that arises among communities of persons of concern, yet individual women who are not a part of displaced populations who are fleeing gender-based persecution do not clearly fall within the scope of a humanitarian response.²²

A common feature of gender-based persecution is the lack mobility where perpetrators, often family members, limit women's travel; these women are essentially immobilized and displaced in place in their homes, women's shelters, or government-run detention centers. Displacement can be more broadly conceptualized here beyond mere physical relocation and loss of home, to include a "package of losses" that occurs when people are involuntarily immobilized in times of conflict and displacement.²³ The way in which persecuted women are involuntarily immobilized, displaced in place, applies to both the nature of the persecutory acts that literally confine women and restrict their mobility, as well as the wider oppressive government policies that support non-State agents of persecution and indicate the specific ways in which the government fails to protect female citizens.²⁴

In this Article, I suggest the articulation of a new category of "persons of concern:" "Persecuted Women and Girls" that includes women living in states that are significantly failing to respond to gender oppression and violence, leaving women unprotected trapped without adequate domestic options. These women are falling through the cracks, unable to obtain adequate protection from their own government, and denied protection under international law and humanitarian assistance programs. I argue that this "protection gap" is due to a historically biased international legal framework that still fails to account for the unique ways in which women experience harm

²⁰ See UNHCR, *Emergency Handbook: IDP Definition*, (4th ed., 2019), <https://emergency.unhcr.org/entry/67716/idp-definition> (Rationale for UNHCR intervention on behalf of IDPs displaced by, "persecution, situation of general violence, conflict or massive violations of human rights." UN Mandate found at <https://www.unhcr.org/en-us/excom/standcom/3ae68d150/internally-displaced-persons-role-united-nations-high-commissioner-refugees.html>).

²¹ *Id.*

²² Over the years I requested UNHCR assistance with several clients who fled gender-based violence and were living in shelters; on multiple occasions UNHCR officers responded that they could not assist as these cases fell outside their mandate. (Notes on file with author.)

²³ See Stephen C. Lubkemann, *Involuntary Immobility: On a Theoretical Invisibility in Forced Migration Studies*, 21 J. REFUGEE STUD. 455, 454-75 (2008).

²⁴ *See id.*

including persecution, and the gendered barriers they face in seeking protection. While the 1951 Refugee Convention has been criticized for not including “gender” as one of the qualifying grounds,²⁵ leaving victims of gender-based persecution either unprotected or having to develop complicated legal arguments for why they qualify for protection. There have also been significant developments in international law and policy and in many national asylum laws to extend refugee and asylum protection on the basis of gender-based persecution.²⁶ These protection gaps, legal and humanitarian, facing victims of gender-based persecution must be addressed in order to make these life-saving options truly accessible to women who are trapped in their own countries.

The purpose of this Article is to draw attention to the plight of women who suffer and are threatened with gender-based persecution and who are unable to avail themselves of refugee resettlement or asylum protection due to gender discrimination and the nature of gender-based persecution claims that prevent them from crossing an international border. These individuals would qualify for protection under international law²⁷ and the domestic asylum laws of many countries²⁸ if they were able to flee their country; instead

²⁵ See Alice Edwards, Int’l Secretariat, Amnesty Int’l, *Overview of International Standards and Policy on Gender Violence And Refugees: Progress, Gaps and Continuing Challenges for NGO Advocacy and Campaigning* 6 (July 26, 2006), <https://www.amnesty.org/download/Documents/80000/pol330042006en.pdf> (explaining recognition in the past decade of UNHCR’s mandate to recognize trafficked women as refugees under the 1951 Refugee Convention); See also UN Women, *UN Women Report Recommends Recognition of Gender-Based Violence as a Basis for Asylum* (May 3, 2017) [hereinafter *Gender-Based Violence as a Basis for Asylum*], <https://eca.unwomen.org/es/news/stories/2017/05/un-women-report-recommends-recognition-of-gender-based-violence-as-a-basis-for-asylum> (noting the effect of the absence of gender as a ground for asylum in the 1951 Refugee Convention).

²⁶ See *Gender-Based Violence as a Basis for Asylum*, *supra* note 25, at 5-6 (stating that a few states have taken steps to recognize gender-based persecution as a ground for asylum).

²⁷ See 1951 Refugee Convention, *supra* note 8.

²⁸ See, e.g., Immigration and Nationality Act, 8 U.S.C. 1101(a)(42); Heaven Crawley & Trine Lester, Evaluation and Policy Analysis Unit, UNHCR, *Comparative Analysis of Gender-Related Persecution in National Asylum Legislation and Practice in Europe*, ¶¶ 6, 8, 11, 13 (2004), <http://www.unhcr.org/40c071354.pdf> (addressing the existence of laws in European countries, including the UK, Germany, Lithuania, Croatia, Bosnia and Herzegovina, Macedonia, Serbia, Montenegro, and Albania, that recognize gender-based persecution); see also Amnesty Int’l Can. & Canadian Council for Refugees, *Contesting The Designation of the US as a Safe Third Country*, 8 (May 19, 2017), <https://ccrweb.ca/sites/ccrweb.ca/files/stca-submission-2017.pdf> (describing how the Safe Third Country agreement between the United States and Canada should no longer be applied due to the restrictive nature of United States asylum laws with respect to gender-based violence compared to Canada’s asylum laws); Australian Government: Australian Law Reform Commission, *Refugee Law in Australia* (last modified Dec. 19, 2011), <https://www.alrc.gov.au/publication/family-violence-and-commonwealth-laws-improving-legal-frameworks-alrc-report-117/22-refugee-law-2/refugee-law-in-australia-2/> (observing that Australian law interprets “serious harm” broadly so that gender-based persecution falls within

they languish for years in horrible conditions, and are often treated as criminals for transgressing patriarchal culture and laws.²⁹

This Article will examine Iraqi women's lived experiences as a case study³⁰ to illustrate the heightened barriers women face in fleeing persecution, providing a rationale for the recommendations that follow. These legal, cultural, and other factors are not unique to Iraq and exist in many countries that severely curtail women's rights and safety, and the recommendations in this Article are intended to apply globally. Part II will describe the difficult context that gives rise to gender-based persecution claims, illustrating how the Iraqi government is unwilling to respond to women's demands for equal rights and protection from violence. Following the most recent conflict with the Islamic State of Iraq and Syria (ISIS), the Iraqi government is has shown its inability to govern, particularly when it comes to the rule of law, leading to a resurgence of tribal power and customary justice that compromises women's safety even further. Part III will discuss the limits of protection for persecuted women under international refugee law and under the United Nations protection mandate, leaving women vulnerable to ongoing persecution when they cannot cross an international border. Part IV recommends extending legal and humanitarian protections to victims of gender-based persecution while they remain trapped inside their own country, with the ultimate goal of providing for long-term safety that would allow them the ability to resettle in another country safely as any other similarly situated refugee.

A. Methodology

Women's actual experiences that I reference in this article are from cases I have handled or supervised as part of my work in Iraq in which I designed and supervised legal protection programs for women and girls who experienced or were threatened with gender-based violence including human trafficking.³¹ These cases fell into three categories including women who filed civil cases in the Personal Status Courts, those who filed criminal cases against perpetrators, and women who were charged with crimes where there was a connection to gender-based violence. This gender-based violence legal protection program

its scope).

²⁹ Advocates working on gender violence have contacted and continue to reach out to me for assistance with difficult cases that could not be resolved domestically through negotiation or through the formal legal system. Additionally, I have worked with the Kurdistan Regional Government's Ministry of Labor and Social Affairs on a range of issues, including efforts to establish local operating procedures. (Notes on file with author.)

³⁰ I encountered these individuals through my work in Iraq, some as clients of legal protection programs I managed and others referred to me by local advocates seeking assistance. (Notes on file with author.)

³¹ See generally HEARTLAND ALLIANCE, <https://www.heartlandalliance.org/programs/justice/>.

expanded to include an anti-trafficking program³² that provided legal services as one component. For ethical and safety reasons I have not included identifying information about individuals due to continued risk of harm to them and the Iraqi lawyers and other service providers who worked with them. I obtained consent from clients whose cases are discussed in greater detail, and in all cases referred to, I have used pseudonyms, omitted facts such as location, place of origin, or other details about cases that could lead to identification of individuals.³³ Iraq organizations implemented the program, recruiting lawyers and social workers to deliver services in six provinces of Basra, Baghdad, Kirkuk, Sulaymaniyah, Erbil, and Dohuk.³⁴ Since 2007, I have also represented or advised on several cases of women and girls who experienced gender-based persecution including sex trafficking and who were threatened with honor killing and further sexual exploitation and abuse if they remained in Iraq.

II. LACK OF STATE PROTECTION FOR PERSECUTED WOMEN AND GIRLS

A. *Gender-Based Violence, Discrimination, and Persecution in Iraq*³⁵

Gender-based violence and discrimination are major impediments to equality for Iraqi women and has been exacerbated by successive conflicts that have destabilized entire communities. Iraq is a fragile state with a population that exceeds 39 million people.³⁶ Out of 188 countries, Iraq ranks 123 on the United Nations Gender Inequality Index,³⁷ and 72 out of 167 countries on the Global Slavery Index.³⁸ Women underreport gender-based violence because they fear shame and retaliation,³⁹ and because they do not see much benefit where the government does little to guarantee legal rights and protection, therefore available statistics provide a limited information of the nature and scope of

³² See HEARTLAND ALLIANCE, FREEDOM FROM TRAFFICKING, <https://www.heartlandalliance.org/program/freedom-from-trafficking/>.

³³ See *id.*

³⁴ See *id.*

³⁵ This article presents limited data about practices that are prevalent in Iraq and does not provide a holistic or in-depth examination of the scope of discrimination and violence against Iraqi women. For more detailed background information, see U.N. Office for the Coordination of Humanitarian Affairs [OCHA], *2019 Iraq Humanitarian Response Plan* (Jan.–Dec. 2019), https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/iraq_2019_hrp_26_02_2019final_english.pdf.

³⁶ VILARDO & BITTAR, *supra* note 1, at 5.

³⁷ *Id.* The Gender Inequality Index is based on reproductive health, empowerment of women, and women's economic status.

³⁸ Walk Free Foundation, *Global Slavery Index 2018*, at 178-79 (2018), <https://www.globalslaveryindex.org/resources/downloads/>.

³⁹ See VILARDO & BITTAR, *supra* note 1, at 45; see also Miriam Puttick, *The Lost Women of Iraq: Family-Based Violence During Armed Conflict*, Ceasefire Ctr. for Civilian Rights and Minority Rights Grp. Int'l 27, (2015) [hereinafter *The Lost Women of Iraq*].

violence women actually confront in their daily lives.⁴⁰ Since 2003, an estimated 14,000 women have been killed, and 5,000 to 10,000 trafficked into sexual slavery.⁴¹

Iraq is deeply patriarchal society as expressed through traditions, laws, and attitudes and beliefs about gender roles that privilege men across all sectors. Attitudes of Iraqi men and women suggest high levels of acceptance and normalization of gender-based violence.⁴² Fifty-six percent of Iraqi men surveyed in 2012 said they believe they have to beat their wives who disobey them, and only 47% of women said they believed that this was a form of violence against women.⁴³ The majority of women who were surveyed did not believe that preventing women from political participation, controlling women's movements, and beating disobedient daughters constituted forms of violence against women.⁴⁴ As part of the same survey, women who reported domestic violence said the perpetrator was the husband in 73% of cases, followed by fathers (53%) and other relatives (43%).⁴⁵

The Iraqi government does not prioritize the systematic documentation of incidences of gender-based violence and there are large data gaps; without reliable data there is little evidence to pressure the government to take these issues seriously and respond. In 2017 the Iraqi High Judicial Council documented 200 crimes involving trafficking of women, however these only included cases where victims pressed charges against perpetrators.⁴⁶ The autonomous Kurdish Regional Government (KRG) does a better job of tracking cases involving gender-based violence through the Ministry of Interior's Directorates for Tracing Violence Against Women (DEVAW). In 2017 DEVAW recorded 7,010 domestic violence complaints, 220 cases of burning women, 74 suicides, 43 homicides, and 115 cases of sexual violence.⁴⁷ It is

⁴⁰ See VILARDO & BITTAR, *supra* note 1, at 37, 42.

⁴¹ See *id.* at 35-36.

⁴² See *id.*

⁴³ See *id.* at 36.

⁴⁴ See *id.* at 35-36. Women survey respondents said they believed violence against women to involve withholding money from women when it was available, preventing women from visiting their families, as well as interfering with completing their education or going to work. See also CENTRAL STATISTICS ORGANIZATION, MINISTRY OF PLANNING, IRAQ WOMEN INTEGRATED SOCIAL AND HEALTH SURVEY (I-WISH) 24-28, 46, 56-57, (2012), <https://reliefweb.int/sites/reliefweb.int/files/resources/I-WISH%20Report%20English.pdf>.

⁴⁵ See IRAQ WOMEN INTEGRATED SOCIAL AND HEALTH SURVEY (I-WISH), *supra* note 44, at 46.

⁴⁶ See VILARDO & BITTAR, *supra* note 1, at 45; see also U.N. Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict, *Iraq: Report of the Secretary-General to the Security Council* (Mar. 29, 2019), <https://www.un.org/sexualviolenceinconflict/countries/iraq/> (stating that sexual violence in Iraq is underreported due to fear of reprisal, security concerns, and mistrust toward Iraq's legal system).

⁴⁷ See VILARDO & BITTAR, *supra* note 1, at 36.

estimated that between 1991 and 2007, 12,000 Kurdish women in Iraq have been killed in so called “honor killings.”⁴⁸ Yet there are also limits to DEVAW data where local police and forensics examiners might not properly investigate or identify a crime.⁴⁹ “Burn” cases include suicides, but also homicides and coerced suicides both of which are illegal under the Iraqi Penal Code, and without proper investigation, men who burn women are likely to report the incident as a suicide to evade criminal prosecution.⁵⁰

Gender-based violence and persecution in Iraq manifest within complex family and tribal structures in which the individuals who make up these groups are often related in multiple ways through marriage. Traditionally, Iraqis relatives within extended family or tribal networks to maintain strong kinship ties with families they know and trust.⁵¹ These patterns of marriage can lead to complex relationships that can both provide protection, but can also lead to greater levels of control and oversight in cases of abuse. When a woman faces gender-based violence in her family, she is often abused or threatened by multiple perpetrators from both her natal family and the family of her in-laws, as well as her tribe if she belongs to one.⁵²

The concepts of “honor” and “shame” have deep roots in tribal culture,⁵³ and have been inculcated into Islamic culture by other religious and ethnic groups living in Iraq today.⁵⁴ Honor and shame are central concepts around which Iraqi society is organized, where gendered beliefs about maintaining honor have significant influence on women’s and men’s daily lives.⁵⁵ Generally across all ethnic and religious groups, men and women are expected to maintain

⁴⁸ *The Lost Women of Iraq*, *supra* note 39, at 28.

⁴⁹ See Miriam Puttick, *No Place to Turn: Violence Against Women in the Iraq Conflict*, Ceasefire Ctr. for Civilian Rights and Minority Rights Grp. Int’l 9-11, (2015), <https://minorityrights.org/wp-content/uploads/2015/10/ceasefire-report-no-place-to-turn.pdf>.

⁵⁰ See *The Lost Women of Iraq*, *supra* note 39, at 16.

⁵¹ See *id.* at 20. These traditional practices are changing among some segments of the population, as Iraqis marry outside their families to individuals they meet through school and work. These couples are usually from the same ethnic or religious group, which presents fewer complications. Indeed, many young people reject traditional marriage practices, which can lead to problems including forced marriage. See DANISH IMMIGRATION SERVICE, KURDISTAN REGION OF IRAQ (KRI): WOMEN AND MEN IN HONOR- RELATED CONFLICTS 13, 41 (2018), <https://www.justice.gov/eoir/page/file/1111526/download>.

⁵² See FINNISH IMMGR. SVCS., OVERVIEW OF THE STATUS OF WOMEN LIVING WITHOUT A SAFETY NET IN IRAQ, 21-22, (2018) (explaining that women may be denied food, necessities, or money and this denial could be used as leverage to force women to obey violent husband or prevent women from reporting).

⁵³ See PATRICIO ASFURA-HEIM, CNA CORP. STRAT. STUD., “NO SECURITY WITHOUT US”: TRIBES AND TRIBALISM IN AL ANBAR PROVINCE, IRAQ 9 (2014) (stating that behavior upholding honor and the avoidance of shame were thought to strengthen groups in Iraqi tribal society).

⁵⁴ See Dawn Perlmutter, *The Semiotics of Honor Killing & Ritual Murder*, 17 ANTHROPOETICS: J. GENERATIVE ANTHROPOLOGY, No. 1, 1-2 (2011).

⁵⁵ See *id.* at 3.

traditional gender roles, and behave in a way that does not violate community norms and standards, particularly when it comes to societal rules about intimate relationships.⁵⁶ Men achieve honor “by fulfilling traditional masculine virtues, from being a warrior to fathering children,” characterized by, “courage, bravery, heroism, power, virility, and strength.”⁵⁷ Women on the other hand must be modest, faithful, and bear children.⁵⁸ In a tribal, patriarchal system, the greatest violation of men’s honor is when women have sexual relations outside of marriage, as it triggers male insecurity about lineage and their biological offspring.⁵⁹ Women who violate norms including sexually rigid codes of honor bring shame to their family and undermine or threaten male honor (*sharaf*).⁶⁰ Upholding family and tribal honor is a pretext for restricting women’s lives in the way they dress, how they interact with outsiders, their sexuality, whether they work or attend school, who they marry, whether they can divorce and so on.⁶¹

In a high-profile case in 2007, Du’a, a 20-year old unmarried Yazidi woman fell in love with a Muslim student and was believed to have converted to Islam. In Iraq, extra-marital sexual relationships are forbidden, and the Yazidi community forbids marriage to non-Yazidis.⁶² After seeking protection from a Muslim cleric, Du’a returned home after learning that her parents forgave her. She never reached her family as she was stoned her to death for bringing shame to her extended family and community.⁶³

⁵⁶ See *id.*

⁵⁷ See *id.*

⁵⁸ See *id.*

⁵⁹ See *id.* at 5.

⁶⁰ See *id.* at 3-4.

⁶¹ See VILARDO & BITTAR, *supra* note 1, at 53; NGO Coalition of CEDAW Shadow Report, *Iraqi Women In Armed Conflict And Post Conflict Situation*, 8, 13-14 (2014) [hereinafter CEDAW Shadow Report]; Tanyel B. Taysi & Sherizaan Minwalla, *Structural Violence Against Women in Kurdistan, Iraq*, 15 KURDISH HUMAN RIGHTS PROJECT: LEGAL REV. 87, 87-90 (2009); U.S. Dep’t Of State, Bureau Of Democracy, H.R. And Lab., *Iraq 2013 Human Rights Report*, 47-51 (2014) [hereinafter Iraq 2013 Human Rights Report].

⁶² See Perlmutter, *supra* note 54, at 7-8. Yazidis have three castes and are expected to marry only within their caste, a challenge given the small size of the community, particularly after the ISIS assault in 2014 that displaced up to 400,000 Yazidis. See Cathy Otten, *How ISIS Changed the Yezidi Religion*, THE ATLANTIC, Dec. 22, 2017, <https://www.theatlantic.com/international/archive/2017/12/how-isis-changed-the-yezidi-religion/548651/>. See generally, Ali Abdul-Hassan & Hadi Mizban, *5 Years On, Yazidis Still Live with IS Massacre, Enslavement*, THE ASSOCIATED PRESS, Aug. 1, 2019, <https://www.apnews.com/fd782b04cf1046d69aca109828258501>.

⁶³ The killing of Dua was captured by a crowd of men who then circulated the video widely among Kurds. Not one man stepped in to prevent the killing, including the local police. See Patrick Cockburn, *The Death Sentence that Drags Dua Back into a Bloody Feud*, INDEPENDENT, Apr. 28, 2010, <https://www.independent.co.uk/news/world/middle-east/the-death-sentence-that-drags-dua-back-into-a-bloody-feud-1956187.html>. Shame affects a community and restoring purity or purifying the shame can also involve a community response as each person is expected to play his role in this process. See Perlmutter, *supra* note 54, at 3.

The Yazidi community was forced to confront questions of honor and shame in very painful ways in 2014, when ISIS attacked the Yazidi community in Sinjar town and surrounding villages and abducted and raped thousands of women, yet unlike the traditional response that would have perceived these women as having lost their honor, the Yazidi Spiritual leader Baba Sheikh issued a decree that the women would be welcomed back with their honor intact.⁶⁴ Without such a decree, the Yazidi community would have rejected the women, because rape is perceived to bring shame. The Spiritual Council's decision to accept the women back was unprecedented and transformed the community's conception of honor to one where many in the Yazidi community see survivors as warriors with "more honor" for having survived atrocities.⁶⁵ Yet culture and beliefs do not change overnight, and not everyone adopted the new conceptualization of honor; there are survivors who face verbal and other abuses.⁶⁶ During interviews I conducted in 2016, Yazidi men and women exhibited paradoxical views about the community's changed definition of honor, sometimes describing that survivors of ISIS had both maintained and lost their honor in the same interview.⁶⁷ For Yazidi women who gave birth as a result of being raped, the community refuses to accept their children, as they are considered Muslim under Iraqi law and "bastard" or ISIS children.⁶⁸

Once a woman's honor is compromised, either because of some perceived or actual transgression, she is at risk of honor based violence.⁶⁹ Honor based violence, socially and legally sanctioned under Iraqi code of honor and formal laws, is carried out for the purpose of restoring honor to the family or tribe.⁷⁰ The

⁶⁴ See Otten, *supra* note 62.

⁶⁵ Interviews with Yazidi men and women in camps in Dohuk and Sulaymaniyah (May 2016) (notes on file with author).

⁶⁶ See Leila Fadel, *For Yazidi Women, Escaping Isis Doesn't Mean the Ordeal is Over*, NPR (December 10, 2014, 2:43 PM), <https://www.npr.org/sections/parallels/2014/12/10/369636434/for-yazidi-women-escaping-isis-doesnt-mean-the-ordeal-is-over>.

⁶⁷ Interviews I conducted in camps for internally displaced Yazidis in the Sulaymaniyah and Dohuk Governorates, Kurdistan Region, Iraq (May 2016) (notes on file with author).

⁶⁸ See Christine Valbracht, *Northern Iraq: Mothers and Their Children Conceived During Rape by IS Fighters*, MEDICA MONDIALE (May 16, 2019), <https://www.medicamondiale.org/en/nc/latest/northern-iraq-mothers-and-their-children-conceived-during-rape-by-is-fighters.html>; Perlmutter, *supra* note 54, at 5 ("A bastard child represents evil and chaos and disrupts the integrity of the entire tribe").

⁶⁹ See generally Gill M. Hague et al., 'Honour'-based Violence in Kurdish Communities, 35 WOMEN'S STUD. INT'L F. 75, 76 (2012) (describing the compromising of female chastity—"a family's symbolic capital"—as the most shameful act resulting in violent punishment); Nazand Begikhani & Najat M. Faraj, *Legal Treatment of Honour Crimes: Comparison Between Iraqi National and the Kurdistan Region's Laws*, 3 MAASTRICHT J. EUR. AND COMP. LAW 130 (2016); Taysi & Minwalla, *supra* note 61, at 90.

⁷⁰ See Hague et al., *supra* note 69, at 81 (explaining that women cannot acquire or achieve, but rather can only maintain or injure their honor by remaining or not remaining chaste and "pure" until marriage).

decision to carry out honor violence is often premeditated and involves group decision-making by male relatives and tribal members.⁷¹ Honor based violence takes different forms such as beating, confinement, coerced suicide, forced marriage,⁷² sexual violence,⁷³ torture, and at its most extreme, killing.⁷⁴ Another highly publicized case was of the killing of an Iraqi Kurdish woman in the United Kingdom, Banaz Mahmoud's, was an Iraqi Kurdish girl, who was seen as bringing them shame for having a boyfriend. Her father and uncle arranged with three other men to have her sexually assaulted and killed.⁷⁵

Sara, the Iraqi woman introduced at the beginning of this Article, also faced various forms of honor based violence for perceived transgressions. Her father and other male relatives also beat her when he suspected her of having a relationship with a neighbor, forced her to marry her cousin, and attempted to kill her when she was accused of adultery, a grave violation of the code of honor that leads to the most extreme form of violence.⁷⁶ As a young girl, Sara's father did not allow her to have the same freedom as her brothers, and he did not allow her to go out alone, to dance at picnics, or to finish her education.⁷⁷ When Sara's brother-in-law accused her of committing adultery, Sara's father first deferred to her husband to take her back to the home, offering to then kill her.⁷⁸ Once Sara's husband divorced her and abdicated his responsibility to restore their family's honor, her father asserted his responsibility to find his daughter to kill her by burning to purify the shame.⁷⁹ Sara's father told the investigating judge that he would risk losing his freedom and all of his land and businesses, but he would not compromise his honor by allowing her to live.⁸⁰ The importance of honor is reflected in the language and culture of Iraqis, and the gendered nature of females

⁷¹ See AYSE ONAL, HONOUR KILLING: STORIES OF MEN WHO KILLED 19-48 (Saqi 2008); See also 'Honour Killing' Pair Jailed for Life, INDEPENDENT (Nov. 19, 2010, 6:13 PM), <https://www.independent.co.uk/news/uk/crime/honour-killing-pair-jailed-for-life-2130388.html> (stating that one of Banaz Mahmud's killers who perpetrated the honor killing on behalf of Mahmud's father and uncle had come under her influential uncle's sway and believed tribal elders would support the killer's alibi).

⁷² Interview with woman Kurdistan Region, Iraq (2015) (notes on file with author).

⁷³ See Karen McVeigh, 'Honour' Killer Boasted of Stamping on Woman's Neck, GUARDIAN (Jul. 19, 2007, 8:50 PM), <https://www.theguardian.com/uk/2007/jul/20/ukcrime.uknews4> (describing how Banaz Mahmud was subjected to degrading acts of sexual violence over more than two hours in her home before killing her).

⁷⁴ See Iraq 2013 Human Rights Report, *supra* note 61, at 49; CEDAW Shadow Report, *supra* note 61, at 8; Taysi & Minwalla, *supra* note 61, at 90.

⁷⁵ See McVeigh, *supra* note 73.

⁷⁶ Interview with Sara in a women's shelter, Iraq (May 2007) (notes on file with author).

⁷⁷ *Id.*

⁷⁸ Interview with social workers (names withheld for safety issues) working on Sara's case, Iraq (July 2007) (notes on file with author).

⁷⁹ Interview with Sara, Iraq (May 2007) (notes on file with author).

⁸⁰ Interview with Judge Himdad Majeed Ali, Iraq (July 2007) (notes on file with author).

upholding male honor is evident in how girls are raised to behave, and how men are empowered to enforce codes of honor.

There are many abuses perpetrated against Iraqi women in the context of marriage. Although the minimum legal age of marriage in Iraq is 18-years old,⁸¹ with exceptions to allow individuals to marry as young as 15-years old with parental consent and/or judicial approval,⁸² many girls are forced to marry by their families in religious marriages that are not legally recognized.⁸³ It is estimated that 25% of Iraqi girls are married before 18-years old, and six percent before they are 15-years old.⁸⁴ *Fasliya* marriages are also forced marriages in which one clan or tribe forces one or more women to marry into an enemy clan or tribe in order to resolve a dispute or conflict.⁸⁵ Women are also exchanged in marriage between families to resolve conflict, making both marriages dependent on one another.⁸⁶ Therefore if one marriage fails, the families might force the other couple to divorce even if they have children.⁸⁷ Temporary or pleasure (*mut'ah*) marriages, banned under Saddam's regime, are now common among Iraqi Shia Muslims. In a *mut'ah* marriage a man and woman can agree to enter a marriage for a fixed period of time ranging from several hours to several years. This too has been used as a mechanism through which to perpetrate abuses and to exploit women, particularly indigent women.⁸⁸ These abusive marriages are

⁸¹ See Personal Status Law, No. 188 of 1959, art. 7 (Iraq), translated in UNHCR, *Iraq Personal Status Laws and its Amendments (1959)*, <https://www.refworld.org/docid/5c7664947.html> (stating that full capacity for marriage requires a sound mind and eighteen years of age).

⁸² See *id.* art. 8 (stating that marriage is permissible at the age of fifteen with a legal guardian's consent subject to a judge's discretion to allow the marriage regardless of guardian's approval).

⁸³ See VILARDO & BITTAR, *supra* note 1, at 43 (explaining that marriages that are not legally recognized are thus not regulated and leave women and girls vulnerable).

⁸⁴ *Id.* at 41. These marriages are typically not recorded until later, when the woman is older and has children who cannot be properly registered under Iraqi law. See also Caitlyn Vito, *The Forgotten Women and Children of Iraq*, THOMSON REUTERS FOUNDATION NEWS (Dec. 4, 2015, 1:50 PM), <http://news.trust.org/item/20151204135003-365mb/>.

⁸⁵ See *id.* at 42. In a high-profile case in Basra in 2015, a tribe married off fifty of their women to another tribe to solve a conflict. The woman's value in a *Fasliya* marriage is decreased by half if she was previously married and is widowed or divorced. *Id.* at 43.

⁸⁶ See UNHCR, *International Protection Considerations With Regard To People Fleeing The Republic Of Iraq*, at 93, U.N. Doc. HCR/PC/IRQ/2019/05_Rev.1 (2019) The practice of exchanging woman for woman or *zhn ba zhn* in Kurdish was especially common during times of economic crises such as in the 1990s in the KRI when men could not afford to pay a dowry. The implications of these marriages are ongoing, and to the extent they are still practiced they are neither legal nor are they publicized. See FINNISH IMMGR. SVCS., *supra* note 52, at 32.

⁸⁷ See Khalat Salh, *Exchange Marriage in Iraqi-Kurdistan*, WADI (Nov. 22, 2017), <https://wadi-online.org/2017/11/22/exchange-marriage-in-kurdistan/> (sharing the testimony of a woman whose in-laws sent her back to her parents' home due to problems in the marriage for which her own marriage had been exchanged).

⁸⁸ To be religiously valid, the terms of a *mut'ah* marriage must be agreed upon in advance

possible because of the central role that religious clerics play in facilitating marriages among families that care less about Iraqi law and more about religious tradition and Sharia law, yet the Iraqi government is weak relative to religious institutions and there is no accountability for religious leaders who perform illegal marriages instead it is the Iraqis who must pay fees when they later register a marriage after the fact.⁸⁹

For decades Iraq has been involved in recurring conflicts, leading to an escalation of violence against women who have been displaced, losing social protective relationships and structures and leading to an increase in rape, human trafficking,⁹⁰ early marriage, and domestic violence.⁹¹ In 2014 when ISIS captured one third of Iraq, militants systematically abducted an estimated 6,000 women, and children as well as men from the Yazidi community and perpetrated extreme sexual violence against women and girls, some as young as seven years-old.⁹² ISIS also inflicted sexual and other forms of gender-based violence against other minority women and Sunni Arab women who were unable to escape.⁹³ Militants, including ISIS and Shia militias, have also targeted individuals,

and documented in an agreement in the presence of a cleric. Men can void the agreement at any time, a privilege not available to women. Furthermore, a woman is not supposed to get pregnant during a *mut'ah* marriage and if she does, she can obtain an abortion and must pay a fine to the cleric. See VILARDO & BITTAR, *supra* note 1, at 43. Historically, *mut'ah* or pleasure marriages were intended to provide income to widows. They are temporary in nature and the duration is supposed to be determined at the outset. Critics including Iraqi women's rights advocates point to widespread exploitation of poor women in particular who are widowed or divorced, have few livelihood opportunities, and are pressured to enter into these marriages as a survival mechanism. Some have described the practice in Iraq today as akin to prostitution. See also Kelly McEvers, *Abuse of Temporary Marriages Flourishes in Iraq*, NATIONAL PUBLIC RADIO (Oct. 19, 2010, 3:42 PM), <https://www.npr.org/templates/story/story.php?storyId=130350678>.

⁸⁹ See VILARDO & BITTAR, *supra* note 1, at 45.

⁹⁰ See TIP Report: Iraq, *supra* note 15. Human trafficking especially in the form of sex trafficking, made worse due to conflict and instability, is perpetrated by many different kinds of actors, ranging from armed groups such as ISIS and other militia groups operating in the country, to criminal gangs, public officials, police and security officers, taxi drivers, salon owners, family members, and even staff at women's shelters.

⁹¹ See Human Rights Council, Rep. of the Special Rapporteur on the Human Rights of Internally Displaced Persons on His Mission to Iraq 14, U.N. Doc. A/HRC/32/35/Add.1 (2016).

⁹² See CEDAW Shadow Report, *supra* note 61; HUMAN RIGHTS WATCH, WORLD REPORT 2017: IRAQ, EVENTS OF 2016 (2017) [hereinafter WORLD REPORT 2017: IRAQ], <https://www.hrw.org/world-report/2017/country-chapters/iraq>; Amnesty Int'l, *Escape from hell: torture and sexual slavery in Islamic state captivity in Iraq* (Dec. 2014), https://www.amnesty.org.uk/files/escape_from_hell_torture_and_sexual_slavery_in_islamic_state_captivity_in_iraq_-_english_2.pdf; Jane Arraf, *Freed from ISIS, Few Yazidis Return to Suffering Families, Many Remain Missing*, NATIONAL PUBLIC RADIO (Mar. 14, 2019, 2:42 PM), <https://www.npr.org/2019/03/14/702650912/freed-from-isis-few-yazidis-return-to-suffering-families-many-remain-missing>.

⁹³ See Ceasefire Ctr. for Civilian Rights and Minority Rights Grp. Int'l, *No Way Home: Iraq's Minorities on the Verge of Disappearance* 15 (2016), https://minorityrights.org/wp-content/uploads/2016/07/MRG_CFRRep_Iraq_Aug16_UPD-2.pdf.

including men and boys, who are perceived to be lesbian, gay, bisexual, transgender, and intersex (LGBTI). LGBTI individuals face various forms of honor based violence in Iraq where homosexuality is forbidden.⁹⁴

B. Restricted Mobility for Iraqi Women

Iraqi women's mobility laws and cultural practices that empower men to decide whether and where women can travel including outside their home, and by a highly securitized state. In some parts of Iraq women have more freedom to go out in public without being accompanied by a male, however in other regions they would only go out with their families. The extent to which women have freedom of movement is usually determined first by their fathers and husbands, but also brothers, uncles, cousins and female relatives. Even when family members do not directly regulate movement, women self-regulate because they are indoctrinated from a young age about how to behave, and once a girl reaches puberty her family will most likely impose greater restrictions on her. In practice many women stay close to home and avoid working outside the house. For those who go out of the home for work and school, they should account for their whereabouts and are often expected to be home before dark. Families may prevent women from leaving the home alone to prevent them from being harassed, kidnapped, or meeting male friends or contacts.⁹⁵ A common complaint by women in abusive marriages is that their husbands prevent them from visiting their families.

Iraqis traveling by car must pass through security checkpoints that exist throughout the country, sometimes internally in cities like Baghdad where insecurity has been a chronic problem, and at entry and exit points in cities and provinces. Checkpoints are manned by different security actors throughout the country; in the Kurdish Region they are operated by the Kurdish security forces (*Asaysh*), whereas in other parts of Iraq one finds many different security actors including Iraqi Security Forces (ISF) and a myriad of different militias operating under the umbrella of the Popular Mobilization Forces (PMF). Checkpoint officials screen for security risks; they also screen for violations of law and morality. If men and women are traveling together in a car, the security officers may inquire about whether they are related, and they may ask for documentation as proof, and conduct further questioning if they suspect that a mixed gender group are unrelated.⁹⁶ If security officers and police find that a male and female

⁹⁴ Interview with two Iraqi refugees, in Amman, Jordan (Sept. 2015) (notes on file with author). See also VILARDO & BITTAR, *supra* note 1, at 40.

⁹⁵ See Iraq Penal Code art. 41(1) (permitting “the punishment of a wife by her husband, the disciplining by parents and teachers of children under their authority within certain limits prescribed by law or by custom”).

⁹⁶ Pursuant to art. 401, “[a]ny person who commits an immodest act in public is punishable by a period of detention not exceeding six months plus a fine not exceeding fifty dinars or by one of those penalties.” Penal Code, Law No. 111/1969 art. 401 (Iraq). What is considered to

are traveling together and are not close relatives (*maharam*), they can arrest them⁹⁷ or return them to their families.

The Iraqi government also creates legal impediments to movement and travel for women.⁹⁸ People traveling by car should be prepared to show identification at a checkpoint, such as their Civil Identification or Nationality Identification.⁹⁹ To obtain these documents requires access to the Family Registry, which is unlikely for women living in an abusive household.¹⁰⁰ A woman is included in her father's registry while she is single, and when she marries is moved to a new registry with her husband that will include their children.¹⁰¹ It is a difficult and very bureaucratic and sometimes expensive process to obtain or replace these documents.¹⁰² For a woman on her own without family support, it is nearly impossible to visit a government office where staff would ask many questions including the whereabouts of her male relatives, her family registry, and would likely instruct her to return with the required documents and her relative, even if that is not legally required.¹⁰³ For international travel, although the government no longer requires consent from a male relative for women to obtain a passport,¹⁰⁴ practically speaking women cannot apply for identity documentations without first having their family's civil and nationality identity documents. There is a massive documentation crisis in Iraq after more than a decade of war and displacement, and the Iraqi government does little to relieve the administrative burden on its citizens.¹⁰⁵ For women attempting to flee persecution, the challenges to obtaining the documents necessary for travel are significant and trap women in ways that other potential refugees might not encounter, since many individuals would benefit from the support of their families in obtaining documentation to allow them to flee.

constitute "immodest behavior" is not defined, giving police and investigating judge's broad discretion to interpret this law. See Taysi & Minwalla, *supra* note 61, at 106.

⁹⁷ See Iraq Penal Code 394.

⁹⁸ See European Asylum Support Office, *Country of Origin Information Report: Iraq Internal Mobility* 49-50 (Feb. 2019).

⁹⁹ See *id.* at 17.

¹⁰⁰ See *id.* at 20.

¹⁰¹ See LANDINFO - COUNTRY OF ORIGIN INFO. CTR., IRAQ: TRAVEL DOCUMENTS AND OTHER IDENTITY DOCUMENTS 15 (Dec. 15, 2015), <https://www.justice.gov/eoir/page/file/989501/download>.

¹⁰² See European Asylum Support Office, *supra* note 98, at 22.

¹⁰³ See *id.* at 49-50.

¹⁰⁴ See LANDINFO - COUNTRY OF ORIGIN INFO. CTR., IRAQ: TRAVEL DOCUMENTS AND OTHER IDENTITY DOCUMENTS 8-9 (Jan. 23, 2014), <http://www.refworld.org/pdfid/5385bba1af4.pdf>; IMMIGR. AND REFUGEE BD. OF CAN., OBTAINING A PASSPORT FROM WITHIN IRAQ 3 (Dec. 23, 2011), <https://www.justice.gov/sites/default/files/eoir/legacy/2014/02/04/IRQ103919.E.pdf>.

¹⁰⁵ See CENTER FOR CIVILIANS IN CONFLICT, MOSUL: CIVILIAN PROTECTION CHALLENGES POST-ISIS 8 (May 2018), https://civiliansinconflict.org/wp-content/uploads/2018/05/FINAL_MosulCIVProtectChallengesMay2018-1.pdf.

Iraqi women who leave their homes to escape gender-based violence and threats of honor killing and are without family protection are highly vulnerable to sexual exploitation and trafficking.¹⁰⁶ There are numerous cases of women fleeing domestic violence, forced prostitution, and forced marriage, who are then identified as alone and are soon trafficked into sexual exploitation.¹⁰⁷ Adolescent girls and young women are put at risk of trafficking by men persuading them into intimate relationships, often promising marriage, and then abandoning them, leaving them at risk of honor killing.¹⁰⁸ In one case handled by our program, a 14-year old girl ran away from her father when he accused her of having a boyfriend; her father beat her up and threatened to kill her.¹⁰⁹ She did in fact have a relationship with her neighbor, an 18-year old police officer who pressured her to have sex by promising to marry her.¹¹⁰ She fled from her father and took a taxi to find a friend's house, however she never made it because the taxi driver dropped her off at a brothel where she was forced into prostitution.¹¹¹ Six months later the police arrested and detained her; she was pregnant and an investigation judge charged her with prostitution.¹¹²

C. Inadequate Government Shelter Protection for Women Fleeing Gender-Based Persecution

When women's safety is threatened, there are few shelters where they can obtain protection, and given the difficult living conditions the longer a woman must remain protected, the more untenable her situation. The overall shelter services, operations, and restrictions imposed on women create a situation in Iraq that is abysmal.¹¹³ In Federal Iraq, the government's Ministry of Labor and

¹⁰⁶ See Taysi & Minwalla, *supra* note 61, at 116 (describing the case of an Iraqi woman who was persuaded to leave a women's shelter, was subsequently raped and forced into prostitution, and was found guilty of prostitution).

¹⁰⁷ See KNAPP, *supra* note 15, at 16.

¹⁰⁸ See *id.*

¹⁰⁹ See Sherizaan Minwalla, *The Role of Honor Related Violence in Sex Trafficking*, USAID IMPACT BLOG (Sept. 16, 2011) [hereinafter *Honor Related Violence*], <https://blog.usaid.gov/2011/09/the-role-of-honor-related-violence-in-sex-trafficking/>.

¹¹⁰ Under Iraqi law, "any person who, outside of marriage, has sexual intercourse with a woman with her consent, or commits buggery with a person with their consent, is punishable by a period of imprisonment not exceeding 7 years if the victim is between the ages of 15 and 18. If the victim was under the age of 15, the offender is punishable by a period of imprisonment not exceeding 10 years." Penal Code, Law No. 111 of 1969, art. 394 (Iraq). It is also illegal to induce a woman over the age of eighteen to have sexual relations under the false pretense of marriage. Penal Code, Law No. 111 of 1969, art. 395 (Iraq).

¹¹¹ See *Honor Related Violence*, *supra* note 109.

¹¹² See *id.*

¹¹³ See Iraq 2013 Human Rights Report, *supra* note 61, at 33 (stating that lack of shelter, along with unemployment and an unstable political environment created significant challenges); Interview with Sara, Iraq (2012) (notes on file with author). This information is also supported by my visits to shelters to meet with staff or clients from 2007-2011 and 2015-2016 (notes on

Social Affairs authorized the operation of only a government-run facility in Baghdad,¹¹⁴ while refusing to license shelters run by local organizations that operated illegally and risked being fined and closed.¹¹⁵ There are no protective shelters in the remaining fourteen provinces under federal Iraq authority; instead jails and detention centers provide the only protection available to women who flee abuse.¹¹⁶ The Iraqi Ministry of Interior operates sixteen Family Protection Units throughout the country to respond to women fleeing gender-based violence, however the primary response to abused women is to encourage them to reconcile with the perpetrators.¹¹⁷ The shelter run by the Ministry of Labor and Social Affairs in Baghdad has no operational budget or appropriate services for residents.¹¹⁸

In 2007, the Kurdistan Region created the Directorates for Combatting Violence Against Women (DEVAW) under the Ministry of Interior in order to document and respond to gender-based violence. Soon after, the Ministry of Labor & Social Affairs opened shelters in each of the three provinces.¹¹⁹ When a woman's safety is threatened and she requires shelter, she must go through a multi-agency process that involves a court, the police investigators in DEVAW, and Ministry of Labor and Social Affairs that is responsible for daily operation of shelters.¹²⁰ This process is far from survivor-centered, as women are required to repeat their story multiple times and must pursue or at least file a legal case

file with author). During these visits I observed male guards intervening, multiple times, when women fought with one another in the shelters. Women were confined to the shelter building and were not permitted to go outside. There were no regularly provided services including counseling, health care, or opportunities for educational or recreational activities. Residents described feeling hopeless about their situation and their future.

¹¹⁴ See U.S. Dep't of State, Bureau of Civilian Security, Democracy, and H.R., *Trafficking in Persons Report 248* (2019) [hereinafter *TIP Report*], <https://www.state.gov/wp-content/uploads/2019/06/2019-TIP-Report-Narratives-D-I.pdf> (describing how the Baghdad trafficking shelter run by the Ministry of Labor and Social Affairs lacked dedicated funding and relied on donations to operate).

¹¹⁵ See *id.* (stating that NGOs were not allowed to legally operate shelters and that they provided victim care without receiving funding or in-kind assistance from the Iraqi government).

¹¹⁶ See HUMAN RIGHTS WATCH, *COMMENTARY ON THE DRAFT LAW ON ANTI-DOMESTIC VIOLENCE IN IRAQ*, 19 (2017) [hereinafter *COMMENTARY ON THE DRAFT LAW*], https://www.hrw.org/sites/default/files/supporting_resources/iraq_dv_formatted_memorandum_final_english.pdf (quoting the UNAMI Human Rights Office's August 2014 report that stated that due to the few functioning protective shelters for women fleeing domestic violence, they are often sent instead to female prisons); *The Lost Women of Iraq*, *supra* note 39, at 17.

¹¹⁷ See Iraq 2013 Human Rights Report, *supra* note 61, at 48.

¹¹⁸ See *TIP Report*, *supra* note 114, at 248 (the government relies on donations from civil society organizations to operate the shelter).

¹¹⁹ See VILARDO & BITTAR, *supra* note 1, at 53; MADRE & ORGANIZATION OF WOMEN'S FREEDOM IN IRAQ, *VIOLENCE AND DISCRIMINATION AGAINST WOMEN IN IRAQ* 9 (Madre 2014), <https://www.madre.org/sites/default/files/PDFs/Violence%20and%20Discrimination%20Against%20Women%20in%20Iraq.pdf>.

¹²⁰ See VILARDO & BITTAR, *supra* note 1, at 16-17.

which could escalate the risk of retaliation.¹²¹ The government's approach is paternalistic and determines whether women can enter and depart the shelter through a court order, rather than supporting her to make informed decisions about her own life.¹²² Although it is easier to enter and exit shelters run by NGOs, women have faced other problems including monotony, conflicts between residents, feelings of hopelessness, depression and post-traumatic stress disorder (PTSD), and even abuse and trafficking.

There have been cases where shelter employees created the conditions that led to women being trafficked, or have been involved directly in the trafficking of women into prostitution.¹²³ One of the first shelters opened in Erbil by an NGO and later handed over to the Kurdish authorities was later closed after a woman was arrested for prostitution and disclosed that she was trafficked by the shelter director.¹²⁴ In another case, a 14-year old girl was sent to a shelter run by an NGO by her step-mother after her brother sexually molested her, and while in the shelter one of the staff recruited her into being trafficked.¹²⁵ The night monitor encouraged her to run away promising that her parents would take care of her, only to hand her over to a man who raped and trafficked her to a brothel.¹²⁶ Eventually she was arrested when she ran away and sought help from a family who called the police for help. The juvenile court judge charged and convicted the 16-year old girl of prostitution, finding that she "received payment" for services in the form of indirect benefits such as food and clothing.¹²⁷ Neither the shelter employee nor the shelter director was known to be investigated.¹²⁸

¹²¹ Based on my experience working with clients who required shelter protection or needed to leave in order to travel outside the country for safety (notes on file with author).

¹²² See VILARDO & BITTAR, *supra* note 1, at 40.

¹²³ See Thomas von der Osten-Sacken, "Concealment and Neglect" *A Report Criticizes the Poor State of Iraqi-Kurdistan's Women's Shelters*, EKURD DAILY (June 7, 2010), <https://ekurd.net/mismas/articles/misc2010/6/state3934.htm>. This information is also based on clients our program from 2007 through 2010 through several State Department grants to the Heartland Alliance.

¹²⁴ See NAZAND BEGIKHANI ET AL., HONOUR-BASED VIOLENCE: EXPERIENCES AND COUNTER-STRATEGIES IN IRAQI KURDISTAN AND THE UK DIASPORA 71 n.12 (Routledge, 2016). The shelter, Mali Khanzad, was closed after an investigation that revealed abuses at the shelter; *see also*, DANISH IMMIGRATION SERVICE, *supra* note 51, at 55 (explaining scandals involving the Khanzad shelter, including trafficking by shelter employees of women to government officials and transportation of a girl out of Khanzad to another shelter that then sent her to a hospital for care without protection).

¹²⁵ Interview with detained minor Iraq (2010) (notes on file with author).

¹²⁶ *See id.*

¹²⁷ Client represented by Heartland Alliance's anti-trafficking program in 2010 (notes on file with author). The juvenile court judge did not believe that the minor was trafficked because she did not report it when she passed through security checkpoints with her traffickers. Furthermore, the judge believed that she benefitted from prostitution, because even though she did not receive any money in exchange for sexual services, "she received indirect benefits like food and clothing" (notes on file with author).

¹²⁸ Interview with lawyer and program client in juvenile detention facility and trial hearing

The conditions and services in both governmental and nongovernmental shelters are lacking; many advocates and government staff recognize they are unsuitable and akin to being in a prison.¹²⁹ I have worked with and represented women who are locked up in these shelters twenty-four hours a day unless they have a serious medical emergency. Detention centers have better access to outdoor space and activities, and in one of our cases, a client and several residents escaped the shelter to request permission to stay in the juvenile reformatory where they were previously detained.¹³⁰ The government and NGOs fail to provide adequate resources to regularly run educational or recreational programs inside the shelters, and women pass endless hours sitting around, watching television, and thinking about their problems.¹³¹ Also, despite the health and psychological treatment needs of residents, the government and shelters provide limited care.¹³² Women often report feeling suicidal, particularly when they see no way out of the shelter, and in 2018 a woman committed suicide in the government run shelter in Sulaymaniyah.¹³³

It is important that these shelters exist, these shelters have saved the lives of many woman who are in crisis when they flee gender-based violence and persecution; however, as they currently function, they are inadequate safe spaces for those fleeing persecution who can never safely reintegrate into their families

in Juvenile Court (2010) (notes on file with author). Ultimately Heartland Alliance evacuated this client, and UNHCR assisted with refugee protection and resettlement to a safe third country.

¹²⁹ See Von der Osten-Sacken, *supra* note 123 (describing the shelters as having small layouts with low capacity, insufficiently skilled staff, and internal hierarchies allowing for corruption); Interview with Director of Directorate of Social Affairs, in Sulaymaniyah, Kurdistan Region of Iraq (2015) (notes on file with author); Interview with representative of Kurdish Women's High Council (2015) (notes on file with author).

¹³⁰ I visited and personally observed several detention centers and all of the shelters in the Kurdistan Region and represented clients who lived in these shelters and reported on their situation (2007–2011, 2015, 2018) (notes on file with author).

¹³¹ See TIP Report, *supra* note 114, at 248 (observing that the federal government did not allocate funding in its budget for operation, so no vocational training was offered, and women could neither freely enter and exit the shelter nor communicate with anyone outside the shelter). I also observed this situation through several clients in shelters throughout the Kurdistan Region (2007, 2015, 2017–18) (notes on file with author). See also workshop conducted with the KRG Ministry of Labor and Social Affairs and their shelter staff, in Erbil, Iraq (2011).

¹³² See TIP Report, *supra* note 114, at 248 (noting poor services in government-operated shelters that provide inadequate psychosocial and medical care). Women, especially those who are held in shelters indefinitely, report about the difficulties of being confined without anything to do to pass the time. See also Interview with Sara, in United States (2012) (notes on file with author). Sara said they did not have electricity regularly and could not open the windows because they would have to avoid attracting attention from neighbors. The shelter staff forbade the women from wearing makeup, and there was nothing to do all day. Sometimes there were more women than there was space for, and it was very crowded.

¹³³ Skype interview with client (name withheld for safety reasons) (July 2018) (notes on file with author); *Le Sheltery Zhnan Le Sulaimani, Zhneik Kotayee Be Zhiany Khoy Hena [In the Sulaimaniya Shelter a Woman Ended Her Life]*, KURDISTAN 24 (June 24, 2018, 9:59 PM), <http://www.kurdistan24.net/so/news/d2f27d3d-a8df-4a80-b4ad-cba506ae0eba.sa>.

and communities.¹³⁴ The government does not allocate a sufficient budget to cover holistic services for women, which leads to acute mental distress and suicidal ideation over the long term.¹³⁵

D. Inadequate Legal Protection Due to Harmful Laws and Practices

Iraq has ratified important international treaties that obligate the country to make concrete changes to strengthen rule of law, improve the status of women by guaranteeing women's¹³⁶ and children's rights,¹³⁷ prevent torture¹³⁸ and trafficking in persons.¹³⁹

Iraq's Constitution and domestic laws include provisions that both align with yet also contravene international legal obligations. For example Article 14 of the Constitution guarantees women equality under the law¹⁴⁰ and Article 44 guarantees freedom of movement for all Iraqis to travel internally and internationally.¹⁴¹ The Constitution also prohibits torture¹⁴² and human trafficking,¹⁴³ and guarantees criminal defendants the presumption of

¹³⁴ See DANISH IMMIGRATION SERVICE, *supra* note 51, at 55 (stating that women can be unsafe in shelters such as the Khanzad shelter because NGO employees have been found to help traffic women to government officials, resulting in such cases being closed due to the government involvement).

¹³⁵ See VILARDO & BITTAR, *supra* note 1, at 49 (explaining the shortage of mental health resources due to ISIS crimes and budget restraints as the need for such resources continues to grow). Women, especially those who are held in shelters indefinitely, report about the difficulties of being confined without anything to do to pass the time. See Interview with Sara, (location withheld) (2012) (notes on file with author).

¹³⁶ See generally Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

¹³⁷ See generally Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

¹³⁸ See generally Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, U.S., 1465 U.N.T.S. 85.

¹³⁹ See generally Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, 2237 U.N.T.S. 319 [hereinafter Palermo Protocol].

¹⁴⁰ See *Dustūr Jumhūrīyat al-‘Irāq* [The Constitution of the Republic of Iraq] of 2005 art. 14, translated in United Nations Assistance Mission for Iraq, *Constitution of the Republic of Iraq*, <https://www.refworld.org/docid/454f50804.html>.

¹⁴¹ See *id.* art. 14, § 1.

¹⁴² See *id.* art. 37, § 1(C). Torture is also prohibited under the Iraqi Penal Code, art. 333, which also prohibits the use of confessions obtained through coercive and illegal methods. See Penal Code No. 111 of 1969, art. 333 (Iraq); see also Criminal Procedure Code, No. 23 of 1971, art. 127 (Iraq).

¹⁴³ See *Dustūr Jumhūrīyat al-‘Irāq* [The Constitution of the Republic of Iraq] of 2005 art. 37, § 3. (“Forced labor, slavery, slave trade, trafficking in women or children, and sex trade shall be prohibited.”)

innocence¹⁴⁴ and the right to legal counsel.¹⁴⁵

The most relevant treaty to the situation of women's status and rights ratified by Iraq in 1986 is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). However Iraq maintained reservations to CEDAW to avoid amending laws that discriminate against women, including Article 2(f) and (g) which call on states to abolish domestic laws including penal provisions that discriminate against women; Article 9 relating to the ability of women to pass on nationality to their children;¹⁴⁶ and Article 16 that requires eliminating discriminatory family laws.¹⁴⁷ Furthermore Iraq has not ratified the Optional Protocol to CEDAW which would establish a complaints mechanism for Iraqi women who allege "grave and systematic" violations.¹⁴⁸

Iraq's legal system includes both a formal legal system to address civil, criminal, and family law matters, and an informal or customary justice system that also responds to many of these same issues but with traditional arbiters applying tribal and religious laws and customs. The power of the customary justice system has expanded since 2003, and especially since ISIS captured one third of Iraq's territory replacing Iraqi courts with its own brutal system of justice.¹⁴⁹ Tribal justice has filled the gap since the defeat of ISIS as Iraq slowly re-establishes the formal legal system.¹⁵⁰

The Iraqi government's legal and political system condones gender-based violence in the following critical ways: 1) laws that discriminate against women; 2) failure to fully implement existing international and domestic laws that

¹⁴⁴ See *id.* art. 19, § 5. Iraqi courts struggle to apply this provision, particularly when overburdened with massive numbers of trials against suspected terrorists. See HUMAN RIGHTS WATCH, IRAQ: APPEALS COURTS IGNORING TORTURE CLAIMS (Sept. 25, 2019, 12:00 AM), <https://www.hrw.org/news/2019/09/25/iraq-appeals-courts-ignoring-torture-claims>; SHERIZAN MINWALLA, INSTITUTIONALIZED VIOLENCE AGAINST WOMEN: LAWS AND PRACTICES IN IRAQ 18-19 (2011) [hereinafter INSTITUTIONALIZED VIOLENCE], <https://www.heartlandalliance.org/international/wp-content/uploads/sites/15/2017/02/Institutionalized-Violence-Against-Women-and-Girls-in-Iraq-Laws-and-Practices-January-2011.pdf>.

¹⁴⁵ See *Dustūr Jumhūrīyat al-'Irāq* [The Constitution of the Republic of Iraq] of 2005 art. 19, § 4.

¹⁴⁶ See *Declarations and Reservations: Convention on the Elimination of All Forms of Discrimination Against Women*, n.74. Dec. 18, 1979, 1249 U.N.T.S. 13. This is no longer an issue and Iraqi women have the right to pass on nationality to their children. See *id.* (stating that the Iraqi government withdrew its reservation to Article 9 on Feb. 18, 2014).

¹⁴⁷ See *id.*; CEDAW, *supra* note 136, art. 16.

¹⁴⁸ See *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, art. 8(1), Dec. 20, 2000, 2123 U.N.T.S. 83.

¹⁴⁹ See UNHCR, *Tribal Conflict Resolution in Iraq* 3-4 (Jan. 15, 2018) [hereinafter *Tribal Conflict Resolution in Iraq*], <https://www.refworld.org/docid/5a66f84f4.html>; see also https://www.brookings.edu/wp-content/uploads/2016/07/Brookings-Analysis-Paper_Mara-Revkin_Web.pdf.

¹⁵⁰ See *Tribal Conflict Resolution in Iraq*, *supra* note 149.

guarantee women legal rights and protections; and 3) gaps in legislation to assure women's legal rights; and 4) failing to hold perpetrators of gender-based violence accountable.¹⁵¹

There are two domestic laws and legal systems that impact women's rights and safety, one that covers 15 provinces in Federal Iraq and 4 provinces that fall under the authority of the autonomous KRI.¹⁵² Because the Kurdistan Parliament of Iraq is constitutionally authorized to pass its own domestic laws, amend Iraqi laws, and disregard newly passed Iraqi laws, there are different criminal, family, and other civil laws that apply in the KRI and Federal Iraq. There are some key differences that are worth mentioning, for example in 2008, the Kurdistan Parliament amended the Iraqi Personal Status Law No. 188 of 1959 that, among other things further restricted men's legal right to marry multiple wives.¹⁵³

Also, the Iraqi government passed the Anti-Trafficking Law No. 28 of 2012,¹⁵⁴ that was not adopted until six years later by the Kurdistan Parliament in 2018.¹⁵⁵ The Kurdistan Parliament was the first to pass a Family Violence Law

¹⁵¹ See INSTITUTIONALIZED VIOLENCE, *supra* note 144, at 6, 11, 25; Taysi & Minwalla, *supra* note 61, at 105, 118; KELLY FLECK ET AL., IRAQ DEVELOPMENT LEGAL PROJECT, THE STATUS OF WOMEN IN IRAQ: AN ASSESSMENT OF IRAQ'S DE JURE AND DE FACTO COMPLIANCE WITH INTERNATIONAL LEGAL STANDARDS, at 71, 85, 102-03 (American Bar Association, 2005), https://www.peacewomen.org/sites/default/files/hr_statusofwomeniniraq_aba_july2005_0.pdf.

¹⁵² See *Dustūr Jumhūriyat al-‘Irāq* [The Constitution of the Republic of Iraq] of 2005 art. 30, § 1 and art. 37, § 3. The 2005 Iraq Constitution allows the Kurdistan Regional Government to amend domestic legislation according to Article 141. See *id.* art. 141 (“Legislation enacted in the region of Kurdistan since 1992 shall remain in force, and...shall be considered valid unless they are amended or annulled pursuant to the laws of the region of Kurdistan by the competent entity in the region, provided that they do not contradict with the Constitution”); see also Kurdistan Parliament, Law No. 1, art. 56 (1992).

¹⁵³ Islamic Sharia law has historically influenced Iraqi law and the 2005 Constitution specifically states that Sharia law is a main source of legislation. See *id.* art. 2. In Iraq, men do not have an unfettered right to marry more than one wife and must legally justify a polygamous marriage through the court for it to be legally recognized. See Personal Status Law No. 188 of 1959 art. 3(4-7) (Iraq), *translated in* UNHCR, Iraq: Personal Status Law and Its Amendments (1959), <https://www.refworld.org/docid/5c7664947.html>. The 2008 amendments in Kurdistan require authorization by a judge to meet the following conditions: the first wife must agree to the husband's second marriage, the first wife must be certifiably infertile or have a proven chronic incurable disease, and the first wife must not have set a condition in the marriage contract prohibiting a second wife. See Personal Status Law Act No. 15 of 2008 (Kurdistan Region, Iraq), *translated in* Global Justice Project Iraq, S.J. Quinney School of Law, <http://gjpi.org/wp-content/uploads/krq-personal-status-amendment-law-final.doc>.

¹⁵⁴ See Law No. 28 of 2012 Combating Trafficking in Persons (Iraq), *translated in* International Labor Organization, http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=94253&p_country=IRQ&p_count=232&p_classification=04&p_classcount=6.

¹⁵⁵ See TIP Report: Iraq, *supra* note 15 (stating that KRG adopted the 2012 Iraqi anti-trafficking law but had not developed the framework for implementation); *KRG to US: ‘Crises’ Prevent Better Protection Laws for Women, Trafficked Persons*, RUDAW (Aug. 21, 2018), <https://www.rudaw.net/english/kurdistan/210820184> (quoting a KRG statement saying that

No. 8 in 2011¹⁵⁶ while the Iraqi Parliament continues to delay the passage of a comparable draft law. Another notable change to the Iraqi Penal Code in the Kurdistan Region is the amendment to provisions that justify or excuse killings committed under the pretext of preserving one's honor, although this law is not fully implemented in the KRI.¹⁵⁷

E. *Legally Sanctioned Violence Against Women*

Several key Iraqi laws encourage gender-based violence. For example, Iraqi law treats honor killing of women leniently by allowing the accused to claim that they killed for honorable motives as a legal defense in cases of adultery or premarital sex.¹⁵⁸ In the KRI, honor killing is no longer a legal defense in adultery cases,¹⁵⁹ however in these and other cases involving gender-based violence courts continue to hand down lower prison sentences, or men are released after serving just a portion of a longer sentence.¹⁶⁰ One of the challenges as described below is the traditional practice of reconciliation between families and tribes that takes place outside of court, but can impact judges' decisions to reduce sentence even for serious crimes such as homicide.¹⁶¹

Iraqi law also sanctions rape by encouraging perpetrators to avoid criminal responsibility by marrying victims.¹⁶² Article 398 of the Iraqi Penal Code permits a judge to drop criminal proceedings against a suspected rapist if he agrees to

Iraqi Penal Code No. 111 of 1969 was implemented for the Kurdistan Region for human trafficking, while Law No. 28 of 2012 was implemented for the Kurdish areas outside KRG administration).

¹⁵⁶ See SHAIMA AHMED & ATA KHALID, HUMAN RIGHTS MONITORING PROJECT, MONITORING REPORT ON THE IMPLEMENTATION OF DOMESTIC VIOLENCE LAW IN KURDISTAN REGION 4 (IRAQI CIVIL SOCIETY SOLIDARITY INITIATIVE, 2013), <https://www.iraqicivilsociety.org/wp-content/uploads/2014/01/Law-8-English-Final.pdf> (discussing Law of Combating Domestic Violence in Kurdistan Region, Iraq).

¹⁵⁷ See Fazel Hawramy, *Buried Alive by Her Family, Iraqi Woman Fears for Her Life as Murders Go Unpunished*, REUTERS (July 12, 2017, 3:00 PM), <https://www.reuters.com/article/us-iraq-women-murder/buried-alive-by-her-family-iraqi-woman-fears-for-her-life-as-murders-go-unpunished-idUSKBN19X2MN> (stating that unlike the federal government, KRI repealed section of the Penal Code that recognize honor as a mitigating factor for violent crimes against family members).

¹⁵⁸ See Penal Code Law No. 111 of 1969 arts. 128(1) and 409 (Iraq), *translated in U.N. High Comm'r for Refugees [UNHCR], Iraq: Penal Code*, <http://www.refworld.org/docid/452524304.html>.

¹⁵⁹ See *The Lost Women of Iraq*, *supra* note 39, at 28 (stating that Kurdistan repealed provisions in the Iraqi Penal Code allowing mitigated sentences for honor killings when the region gained independence).

¹⁶⁰ See *id.* (stating that UN sources estimate approximately fifty honor killings monthly in the Kurdistan region).

¹⁶¹ See COMMENTARY ON THE DRAFT LAW, *supra* note 116, at 7.

¹⁶² See Penal Code Law No. 111 of 1969 art. 398 (Iraq), *translated in U.N. High Comm'r for Refugees [UNHCR], Iraq: Penal Code*, <http://www.refworld.org/docid/452524304.html>.

marry his victim and remains married for at least three years; early separation could again trigger criminal prosecution.¹⁶³ Victims often “agree” under family pressure to hide the shame, since victims who refuse could be killed or pressured to commit suicide.¹⁶⁴ Article 398 of the Iraqi Penal Code puts women at risk of ongoing rape in a court-sanctioned marriage, and is a law that activists have tried unsuccessfully to overturn.¹⁶⁵ Article 398 exemplifies the communal and honor based structure of Iraqi society in which individual rights are legitimately sacrificed for the interests of the group in the interest of maintaining honor.¹⁶⁶

Since 2003, Iraqi lawmakers have attempted multiple times to pass legislation that would further curtail the rights and safety of girls.¹⁶⁷ In 2003, after the fall of Saddam Hussein's regime, the Iraqi Governing Council issued “Decree 137” and cancelled the entire Personal Status Law in an attempt to replace it with sectarian-based religious laws that would govern family law matters of marriage, divorce, child custody, and inheritance.¹⁶⁸ Later, the proposed Jaafari law would have permitted religious clerics in Sunni and Shia Endowments to determine whether the civil law conflicted with Islamic law, and in the case of a conflict, Islamic law would prevail.¹⁶⁹ The most recent attempt

¹⁶³ *See id.*

¹⁶⁴ *See* INSTITUTIONALIZED VIOLENCE, *supra* note 144, at 36-37 (explaining that victims of gender-based violence are condemned by their communities and may face threats from their families for bringing shame).

¹⁶⁵ *See* Equality Now, *Campaigners Demand End to ‘Marry your Rapist’ Law in Iraq*, CISION PR NEWSWIRE (May 3, 2018, 8:45 AM), <https://www.prnewswire.com/news-releases/campaigners-demand-end-to-marry-your-rapist-law-in-iraq-300641871.html>. *See also* HUMAN RIGHTS WATCH, SUBMISSION TO THE COMMITTEE ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN ON IRAQ 2019, <https://www.hrw.org/news/2019/10/07/submission-committee-elimination-all-forms-discrimination-against-women-iraq#> (presented to the CEDAW Committee at the 74th Session); GLOBAL JUSTICE CENTER, IRAQ’S CRIMINAL LAWS PRECLUDE JUSTICE FOR WOMEN AND GIRLS 4 (Mar. 2018), <http://globaljusticecenter.net/files/IraqiLawAnalysis.4.6.2018.pdf>.

¹⁶⁶ *See* INSTITUTIONALIZED VIOLENCE, *supra* note 144, at 26-27 (describing Article 398 of the Iraqi Penal Code allowing rapists to avoid criminal liability by marrying their victims and staying married to them for at least three years, which is seen as protecting the honor of victims and their families).

¹⁶⁷ *See* Bethan McKernan, *Iraqi Politicians Propose Law to Let Girls as Young as Nine Marry*, INDEPENDENT (Nov. 14, 2017, 5:03 PM), <https://www.independent.co.uk/news/world/middle-east/iraq-law-nine-year-old-girl-marry-child-marriage-women-group-a8054111.html>.

¹⁶⁸ Following massive protests by women’s groups and civil society, Paul Bremer, the top U.S. civilian administrator of the Coalition Provisional Authority, allowed the amendment to lapse and become void. *See* Amal Rassam, *Women’s Rights in the Middle East and North Africa – Iraq*, FREEDOM HOUSE (Oct. 14, 2005), <https://www.refworld.org/docid/47387b6b16.html>.

¹⁶⁹ *See id.* This concern about legitimizing marriage of young girls became the rallying cry that ultimately prevented the law from reaching the floor of Parliament; however, less discussed was the more sinister implication which was that Sunni and Shia Muslim religious endowments could have ultimately undermined the Personal Status Laws relating to marriage. “Catastrophic’ Iraqi law could legalize marriage for children as young as nine.”,

to quash this proposed law was in 2017, while ISIS was in power committing rape against girls as young as nine years old.¹⁷⁰

F. Un- and Under-Enforced Laws that Guarantee Women Legal Rights

There are domestic Iraqi laws that afford women important legal rights; yet, there are many challenges with enforcement.¹⁷¹ For example, Iraqi law requires that both parties consent to a marriage,¹⁷² sets 18-years old as the minimum marriage age (with exceptions),¹⁷³ and criminally sanctions men who marry and fail to legally register the marriage contract.¹⁷⁴ Still, child and forced marriage is a massive problem that the government does little to address, putting the burden on the victim to come forward and report the coercion despite the obvious risks of retaliation.¹⁷⁵ For women who are forced to marry, Iraqi law legalizes the marriage once it is consummated, again in the interest of protecting honor.¹⁷⁶ This is yet another way in which rather than protecting women, the law sanctions gender-based violence by recognizing the act of rape that transforms an unlawful marriage into one that is legally recognized.¹⁷⁷

As stated above, there are laws that prohibit forms of gender-based violence and persecution such as domestic violence, female genital mutilation (FGM), and human trafficking in the KRI and/or the rest of Iraq. Here too there are concerns. Women who experience severe domestic violence find it difficult to secure legal

<https://www.theguardian.com/global-development/2017/nov/14/catastrophic-iraq-law-could-legalise-marriage-for-children-as-young-as-nine> (Belkis Wille, Iraq and Qatar researcher at Human Rights Watch, said: “It fundamentally undermines international law and also Iraqi law. Some religious sects do not allow equal rights—in terms of marriage and in terms of inheritance. If you read the amendment it says very little. What it does say is religious leaders from individual sects and religious tenets will govern marriage contracts.”).

¹⁷⁰ See HUMAN RIGHTS WATCH, IRAQ: PARLIAMENT REJECTS MARRIAGE FOR 8-YEAR-OLD GIRLS (Dec. 17, 2017, 12:01 AM), <https://www.hrw.org/news/2017/12/17/iraq-parliament-rejects-marriage-8-year-old-girls>.

¹⁷¹ See, e.g., Hardy Mahmood, U.N. Population Fund, Child Marriage in the Kurdistan Region- Iraq 5 (2016), <https://iraq.unfpa.org/sites/default/files/pub-pdf/Child%20Marriage%20Broucher%20English%20Final%20covers%206.pdf>. A major problem is that religious authorities lend legitimacy to contravening the law as they push to gain primacy and advocate for the application of religious laws and principles.

¹⁷² See Personal Status Law, No. 188 of 1959, art. 4(2) (Iraq), translated in UNHCR, *Iraq Personal Status Laws and its Amendments (1959)*, <https://www.refworld.org/docid/5c7664947.html>.

¹⁷³ See *id.* art. 7(1).

¹⁷⁴ See *id.* art. 10(5).

¹⁷⁵ See INSTITUTIONALIZED VIOLENCE, *supra* note 144, at 15 (explaining that shelters often do not provide adequate protection from serious threats, resulting in women and girls being placed in detention instead).

¹⁷⁶ See Personal Status Law, No. 188 of 1959, art. 9(2).

¹⁷⁷ See *id.*

rights and protection in Iraqi criminal courts.¹⁷⁸ In the absence of a law criminalizing domestic and intimate partner violence, Iraqi women are limited to pursuing cases under regular assault and battery provisions of the Iraqi Penal Code.¹⁷⁹ In the KRI, women who file complaints of domestic violence must, according to the Family Violence Bill, go through mandatory mediation.¹⁸⁰ This undermines the safety of victims who are forced to go through a mediation process with perpetrators who have more power and status and resources that can be deployed to coerce victims to reconcile.¹⁸¹ The Kurdistan Parliament incorporated traditional practices of mediation and reconciliation into the Family Violence Law, thereby legitimating and legalizing harmful traditional practices. Thus if a woman does not want to go through mediation, she cannot pursue other legal rights, however if she goes through mediation and it fails, she can pursue a claim against her abusive spouse.¹⁸²

The challenges that women encounter if they need to enforce their rights, under the Iraqi legal system are further compounded by the existence and expansion of the informal justice system.¹⁸³ The informal justice system both intersects with the formal legal system in different ways and operates entirely in parallel in others. The decision makers are men with power in the community, such as tribal and religious leaders, who adjudicate and resolve matters in their communities, sometimes taking the law into account and other times completely disregarding Iraqi law.¹⁸⁴

G. Perpetrating Gender-Based Violence Through Informal Justice Systems

Tribal justice has negative implications for both males and females; yet women are less able to influence outcomes due to their reduced social status and power relative to men. One way in which women suffer greater consequences in the informal justice system is when they are used as bargaining chips to resolve disputes.¹⁸⁵ Women are more likely to suffer abuse as a consequence of other

¹⁷⁸ See GLOBAL JUSTICE CENTER, *supra* note 165, at 7 (stating that personal status courts and women themselves are not equipped to make referrals for issues such as forced marriage to the criminal justice system due to societal and patriarchal norms as well as fear of reprisal).

¹⁷⁹ See INSTITUTIONALIZED VIOLENCE, *supra* note 144, at 28.

¹⁸⁰ See AHMED & KHALID, *supra* note 156, at 7 (quoting Article 5 of the domestic violence law that states that the court shall refer plaintiff to a committee for reconciliation before the case is referred to court).

¹⁸¹ See COMMENTARY ON THE DRAFT LAW, *supra* note 116, at 7.

¹⁸² See AHMED & KHALID, *supra* note 156, at 31 (referring to concerns from activists that reconciliation committees may resemble social committees used to impose tribal and social practices at the expense of women's rights).

¹⁸³ See generally *Tribal Conflict Resolution in Iraq*, *supra* note 149.

¹⁸⁴ See INSTITUTIONALIZED VIOLENCE, *supra* note 144, at 40.

¹⁸⁵ See *Tribal Conflict Resolution in Iraq*, *supra* note 149, at 3 (explaining that unresolved disputes commonly escalate to blood feuds lasting for days, which in turn result in cycles violent retaliation spanning generations).

people's actions and decisions by being forced to marry into another family or tribe to settle a dispute. Also, many religious leaders flout the law with impunity, for example by performing illegal religious marriages involving underage girls without any legal consequences.¹⁸⁶

Traditional justice in Iraq and the region pre-dates Islam, and reconciliation or *Al-Sulih* has long been a method of resolving disputes within the society.¹⁸⁷ Tribal leaders or sheikhs administer justice by relying on custom, religion, and written and oral laws.¹⁸⁸ The Ottomans established the first formal courts in Iraq in 1880, expanding access to *Al-Sulih* reconciliation courts at the village level in 1913.¹⁸⁹ Since that time, Iraq's legal system has undergone many transitions under the British Mandate, the monarchy period, Baathist rule, and now the post-Saddam era.¹⁹⁰ Reconciliation courts no longer exist, but the practice, with deep roots in Iraq, continues to be applied by tribal *sheikhs*, even more so now with a weakened Iraqi legal system, particularly in areas retaken from ISIS.¹⁹¹

The traditional approach to reconciliation is harmful to women, and is institutionalized into the current formal legal system in different ways.¹⁹² In some cases, sheikhs and religious leaders operate in parallel to the formal legal system, disregarding the laws without any legal liability.¹⁹³ As mentioned, religious leaders routinely conduct religious marriages for families who want to marry off

¹⁸⁶ See Mahmood, *supra* note 171, at 3; Taysi & Minwalla, *supra* note 61, at 109 (observing the ability of religious leaders, or mullahs, to circumvent the legal system due to lack of legal access and the tendency of mullahs to challenge the authority of the court in awarding women and girls their freedom).

¹⁸⁷ CHIEF JUSTICE MADHAT AL-MAHMOOD, *THE JUDICIARY IN IRAQ: THE PATH TO AN INDEPENDENT JUDICIARY AND MODERN COURT SYSTEM* xix, 5 (William Pryor & Abubakr Zaid eds., William Pryor et al. trans., iUniverse LLC 2014).

¹⁸⁸ See *id.* at xiv.

¹⁸⁹ See *id.* at 5. Through the Reconciliation Law of 1913, the Ottomans sought to expand access to state justice at the village level that was run by village chieftains and village councils.

¹⁹⁰ See CONSTANCE A. JOHNSON, *LAW LIBRARY OF CONGRESS, IRAQ: LEGAL HISTORY AND TRADITIONS* 11-31 (June 2004), <https://www.loc.gov/law/help/legal-history/iraq-legal-history.pdf>.

¹⁹¹ See *Tribal Conflict Resolution in Iraq*, *supra* note 149, at 3-4 (stating that law enforcement and courts may refer cases to the tribal system for settlement).

¹⁹² See *WORLD REPORT 2017: IRAQ*, *supra* note 92 (explaining the ineffectiveness of laws in place to protect women due to lack of specificity as to the roles of police and prosecutors and due to mitigating remedies such as having assailants marry victims and prioritizing reconciliation over justice).

¹⁹³ See *INSTITUTIONALIZED VIOLENCE*, *supra* note 144, at 34 (stating that religious leaders are not held accountable for sanctioning child marriages). There are no laws to sanction religious leaders who perform underage marriages, nor did lawyers representing survivors of forced marriage encounter a single case in which there was any effort to hold religious leaders accountable for circumventing the law. See *id.*; see also *Islamic Scholars in Iraqi Kurdistan Condemn Murder of an Underage Woman by Her Husband*, *EKURD DAILY* (May 26, 2017), <https://ekurd.net/mismas/articles/misc2014/5/state8027.htm>. A religious leader conducted a ceremony of an underage girl to an older man who already had one wife and six children; her husband viciously murdered her when she was 15 years old. *Id.*

their underage girls.¹⁹⁴ Tribes also function outside of the formal legal system, and resolve all sorts of issues through tribal justice mechanisms. Additionally, court prosecutions are often ineffectual to halt retaliatory violence and ongoing blood feuds, or they collude and collaborate with traditional customary justice actors.¹⁹⁵ Women are traded or given in marriage as an outcome of tribal reconciliation, which essentially translates to a life sentence for rape and domestic servitude, and as one would anticipate domestic violence.¹⁹⁶

Iman's case illustrates a fairly common way in which a family or tribe uses a girl to resolve a dispute. When Iman was less than 10-years old, her parents informed her that they betrothed her to an older man whom she would marry when she grew older. Iman learned later that there was a dispute between the two families that dated back to the Kurdish Civil War in the 1990s, and that she was promised in marriage to avoid a revenge killing for another man's murder. From that day on Iman's siblings and peers teased her that she was a married woman, and her family confined her to the home to avoid any problems that would compromise her reputation that could lead the other party to cancel the marriage. However, when Iman turned 15-years old, her family found themselves in conflict with another family, and they decided to pay money to withdraw her from the first intended marriage, and marry Iman to a man from the second family who was in his 40s. From her wedding night until she escaped several years later, Iman's husband brutally raped her while his family forced her into domestic servitude.¹⁹⁷

Traditional justice methods of reconciliation also intersect with, and are recognized by, Iraq's formal legal system.¹⁹⁸ In my experience this applies to a wide range of issues from land disputes, to car accidents that cause injury or death¹⁹⁹ to rape cases where the perpetrator's family attempts reconciliation in

¹⁹⁴ See Mahmood, *supra* note 171, at 3 (describing how religious leaders conclude child marriage contracts without formal registration).

¹⁹⁵ *Tribal Conflict Resolution in Iraq*, *supra* note 149, at 3-4, n.17 (stating that courts and law enforcement are happy to refer cases to the tribal system for settlement to avoid government involvement or bureaucracy). Iraqis frequently prefer to use traditional forms of justice when they perceive the formal legal systems to be inefficient, or because they fear retaliation if they report crimes to the police. *See id.* In honor-related cases, people prefer circumventing the courts to avoid drawing attention to private and sensitive matters. *See also* INSTITUTIONALIZED VIOLENCE, *supra* note 144, at 40 (observing that many Iraqis prefer to keep honor-related matters private, that they do not trust the courts, or they do not want to face accountability).

¹⁹⁶ See Taysi & Minwalla, *supra* note 61, at 98 (explaining that women can be traded in marriage for debt resolution or to be killed to protect honor); Interviews with B, in Kurdistan Region, Iraq (2015, 2016) (notes on file with author).

¹⁹⁷ Interview notes with Iman in shelter, KRI (Nov. 10, 2015) (notes on file with author).

¹⁹⁸ See Katherine Blue Carroll, *Tribal Law and Reconciliation in the New Iraq*, 65 MIDDLE EAST J., 11, 11 (2011); *see also* Haider Najm, *Tribal Law Trumping Civil in Iraq*, NIQASH, <http://www.niqash.org/en/articles/society/2836/>.

¹⁹⁹ Based on case encountered through negotiation program run in an IDP camp in Kirkuk in 2008; conversation with former colleague in Kurdistan Region who explained how, following

order to stop criminal proceedings,²⁰⁰ to murder cases where courts may reduce a sentence if reconciliation occurs.²⁰¹ A judge or panel of judges may consider the result of an out of court reconciliation, in deciding a case, yet judges are not involved directly in the reconciliation process and there is no formal court oversight to determine whether one of the parties was pressured into reaching a decision.²⁰² Judges have discretion however, and there are exceptions. For example in the stoning of Du'a the Mosul court handed down death sentences against the four main perpetrators, which included two of her cousins, and the families complained that this was unfair because they had achieved tribal reconciliation.²⁰³

III. LACK OF LEGAL RIGHTS AND HUMANITARIAN ASSISTANCE FOR PWGS WITHIN BORDERS

UNHCR is the only United Nations agency dedicated solely to the protection of people who flee persecution, as well as those who are displaced because of conflict and human rights abuses.²⁰⁴ The focus of the refugee response is on those who flee across an international border. UNHCR has

a car accident caused by her brother, her family had to spend hours at the hospital to demonstrate their genuine concern for the injured party, hoping that the family of the victim would ultimately forgive her brother in order to mitigate potential damages and criminal liability.

²⁰⁰ Based on cases handled in Iraq through gender-based violence protection program funded by the U.S. Dep't of State's Bureau of Democracy, Lab. and H.R., from 2009–2011. *See* Taysi & Minwalla, *supra* note 61, at 103-04 (stating that women are pressured to resort to reconciliation or mediation strategies, and judges willingly accept the results of mediation, leading to a favorable verdict or reduced sentence).

²⁰¹ *See* Tracey Shelton, *Kurdish Teenager's "Honor Killing" Fades to Memory as Iraq Violence Swells*, HUFFPOST BLOG (Jul. 17, 2014, 2:38 PM, updated Dec. 6, 2017), https://www.huffingtonpost.com/the-groundtruth-project/kurdish-teenagers-honor-k_b_5596318.html; *See also* Interview with Aesha Ali, lawyer in Dohuk, Kurdistan Region (2015) (notes on file with author). This interview reported that after the police captured the husband, both families entered into a process of reconciliation in which the perpetrator offered money to the victim's family in order to encourage the court to mitigate the sentence.

²⁰² *See* Taysi & Minwalla, *supra* note 61, at 103-04.

²⁰³ *See* Cockburn, *supra* note 63. Tensions between the Yazidi and Muslim communities in Ninewah flared up again following the murder of Du'a when Muslims ordered 23 Yazidi men returning from work at a factory off a bus and executed them. Hundreds of Yazidi students at Mosul University were forced to flee, and there was a suicide bombing in two Yazidi villages also thought to be in retaliation for murdering Du'a. Several years later when the Mosul court issued death sentences against four of the accused, there were concerns violence would escalate again. *Id.*

²⁰⁴ *See* UNCHR, *Protecting Refugees and the Role of UNHCR* 14-15 [hereinafter *Protecting Refugees*], U.N. Doc. UNHCR/CPIS/B•3/ENG 1 (Oct. 2014). The UNHCR was originally created in 1951, almost in parallel with the passing of the 1951 Refugee Convention. Its three-year mandate was to help support those displaced and persecuted during World War II, however its mandate continued to be extended to address continued and new displacement crises, until 2003 when UNHCR achieved permanent status. *Id.*

expanded its mandate to respond to those who flee but remain within country borders, or who cross an international border and return, as these individuals are similarly situated to refugees when considering the reasons they flee such as conflict and human rights violations. Whether people fleeing violence and persecution remain within borders or not, they experience similar losses such as destruction of their homes, loss of livelihoods and education, disruption of social networks, and violations that include gender-based violence, killings, and torture. However, their legal status is different as discussed below, and refugees have greater rights under international law, but increasingly both have access to humanitarian assistance. When there is a UNHCR presence in a country dealing with a humanitarian crisis, UNHCR does respond to the problem of gender-based violence, but it is generally limited to cases where individuals are categorized as a “person of concern.” Individual cases of women experiencing gender-based violence, seeking shelter and other legal rights, do not clearly fall under the UNHCR protection system. Yet individual PWGs are also similarly situated to refugees and other displaced populations, but may be in a worse situation due to their lack of family support. PWGs face grave human rights violations, but may only flee to a shelter or jail, or are unable to flee, displaced in place, or immobilized.²⁰⁵

UNHCR’s mandate focuses on people who fall within categories defined as “persons of concern,” including refugees, internally displaced persons or IDPs, returnees, stateless persons, and migrants.²⁰⁶ UNHCR manages the refugee response in crises where there are large numbers of displaced individuals. One of UNHCR’s main tasks is to monitor implementation of the Refugee Convention, and in particular the duty of State parties to comply with the right of non-refoulement, or protection from unwilling return, for those persons entitled to refugee status.²⁰⁷ The agency wields considerable influence as it is authorized to determine who qualifies as a refugee through a refugee status determination process.²⁰⁸ UNHCR works with States that accept refugees to refer individuals who have passed this first threshold, and who meet that State’s criteria for third country resettlement.²⁰⁹ The agency also plays a central role in managing protection, shelter, and services for refugees and other “persons of concern.”²¹⁰ In furtherance of its mandate, UNHCR works in collaboration with

²⁰⁵ See Lubkemann, *supra* note 23. Lubkemann’s research demonstrated that those who were able to flee sometimes benefited from opportunities like employment or education or job training that allowed them to continue to support themselves and their families during and after crises, whereas those who remained, mostly women, fared worse. *Id.*

²⁰⁶ See *Protecting Refugees*, *supra* note 204, at 6.

²⁰⁷ *Id.* at 13, 16-17.

²⁰⁸ See *id.* at 16-17.

²⁰⁹ *Id.* at 22.

²¹⁰ See UNCHR, *Non-Governmental Organizations*, <http://www.unhcr.org/en-us/non-governmental-organizations.html> (last visited Sept. 27, 2019).

governments and NGOs to provide for the welfare of displaced populations.²¹¹ As mentioned above, UNHCR's "persons of concern" have access to different levels of international legal protection depending on which category they fall into.²¹²

A. *Refugees*

Refugees benefit from the greatest level of international legal protection, because they fall under the 1951 Refugee Convention and its 1967 Protocol.²¹³ An estimated one percent of the world's refugees are permanently resettled,²¹⁴ with the rest remaining in receiving countries of first arrival, often for many years without any long-term solution.²¹⁵ Increasingly, UNHCR is responsible for providing refugees with basic assistance such as food, water, temporary shelter, vocational training, legal assistance, and medical care, usually through local implementing partners.²¹⁶ In addressing these needs, as well as available resources for refugee populations, UNHCR is engaged in identifying long-term or "durable" solutions.²¹⁷ There are three primary avenues pursued by UNHCR in looking for a durable solution: (1) voluntary repatriation, (2) local integration, and (3) third country resettlement.²¹⁸

Voluntary repatriation, where refugees freely choose to return home, is the preferred solution when circumstances have improved such that refugees no longer face a threat upon returning to their home country.²¹⁹ When voluntary repatriation is not feasible, UNHCR will explore other long-term solutions, usually local integration, or resettlement in a third country.²²⁰ Local integration

²¹¹ See UNHCR, *Persons of Concern to UNHCR*, <http://www.unhcr.org/ph/persons-concern-unhcr> (last visited Sept. 27, 2019).

²¹² See *Handbook*, *supra* note 10, at 134 (describing UNHCR's responsibility to protect refugees, asylum-seekers, IDPs, and stateless persons).

²¹³ See Immigration and Nationality Act, 8 U.S.C. 1101(a)(42); 1951 Refugee Convention, *supra* note 8.

²¹⁴ See UNHCR, *Resettlement* [hereinafter *Resettlement*], <http://www.unhcr.org/en-us/resettlement.html> (last visited Sept. 27, 2019).

²¹⁵ See Elizabeth Ferris, *When Refugee Displacement Drags On, Is Self-Reliance the Answer?*, Brookings Institution (June 19, 2018), <https://www.brookings.edu/blog/order-from-chaos/2018/06/19/when-refugee-displacement-drags-on-is-self-reliance-the-answer/> (stating that with persistent conflicts causing displacement and no workable solutions, refugees remain in countries of first arrival without full integration and instead work toward self-reliance).

²¹⁶ See generally Executive Committee of the High Commissioner's Programme, UNCHR, UNHCR's Role in Support of the Enhanced Humanitarian Response to Situations of Internal Displacement: Policy Framework and Implementation Strategy, U.N. Doc. EC/58/SC/CRP.18 (June 4, 2007).

²¹⁷ See UNHCR, *UNCHR Resettlement Handbook* 28-44 (rev. ed., June 2011) [hereinafter *Resettlement Handbook*], <http://www.unhcr.org/46f7c0ee2.pdf>.

²¹⁸ See *id.* at 4.

²¹⁹ See *id.* at 31.

²²⁰ See *id.* at 30.

of refugees in the country of asylum, where they applied for refugee status, is the most common alternative to voluntary repatriation.²²¹ Local integration can only be achieved if there is an “enabling environment” that includes, among other things, the grant of a legal status, access to civil, socioeconomic, and cultural rights, as well as a viable economic situation, availability of affordable housing, and receptive attitudes within the host community.²²² In other words, integration involves more than a legal process. To be a viable solution, refugees must be able to live amongst the local population without discrimination or exploitation.²²³

Country resettlement involves the “transfer of refugees from a State in which they have sought protection to a third State that has agreed to admit them,” known as the country of refuge.²²⁴ Resettlement is an option and not a right for refugees; however, it is a vital international protection tool available to those who can demonstrate “compelling reasons” to be removed from their country of refuge.²²⁵ Under UNHCR’s criteria, resettlement is geared primarily to protect refugees whose “life, liberty, safety, health, or other fundamental rights are at risk in the country where they sought refuge.”²²⁶ Regardless of need, no country is legally obligated to offer resettlement and few States do so on a regular basis.²²⁷

In 2016, in response to the high number of individuals fleeing El Salvador, Guatemala, and Honduras, UNHCR established the Protection Transfer Arrangement (PTA) to provide safe access to international protection for a small number of individuals who were identified in the country to be relocated to a safe transit country pending resettlement.²²⁸ A number of important lessons can be learned from this innovative program that could be applied here, such as ways to improve case identification, fraud and security issues, technical assistance to partners, and other issues that would accompany a program that identifies individuals qualifying for international protection while still inside their country borders.

²²¹ *See id.*

²²² *See id.* at 34.

²²³ *See id.* at 34-35.

²²⁴ *See id.* at 416.

²²⁵ *See id.* at 211, 256, 285.

²²⁶ *See id.* at 3.

²²⁷ *See* UNHCR, *Resettlement Data*, <http://www.unhcr.org/en-us/resettlement-data.html> (last visited Sept. 27, 2019). In 2016, UNHCR submitted 163,206 cases and 126,291 departed; in 2017 this number dropped dramatically, with UNHCR submitting 75,188 and 65,108 departing. 2018 has seen even fewer cases resettled, with UNHCR submitting 64,445 and 50,086 departing.

²²⁸ *See* Emmanuelle Diehl, *Evaluation of effectiveness of the Protection Transfer Arrangement in Central America*, Dec. 2018, <https://www.unhcr.org/en-us/research/evalreports/5c7e63064/evaluation-effectiveness-protection-transfer-arrangement-central-america.html>.

B. Returnees

Returnees are individuals who fled their country of origin and may or may not have been granted refugee status, but then returned home either because the situation at home improved somewhat, or because they found the situation of displacement intolerable and unsustainable.²²⁹ Throughout the world refugees are generally denied the right to work legally, many cannot send their children to school or afford housing, medical care, and other services and become wholly dependent on humanitarian assistance.²³⁰ For these reasons it is incredibly difficult to live under these circumstances long-term, and people do return home even when the security situation is still unstable.²³¹ Those who remain tend to be individuals who fear that returning home will almost certainly lead to persecution, because they are so destitute they lack the resources to return, or a government prevented their return. Once a person returns home, UNHCR's focus on "returnees" is to help them safely reintegrate.²³²

C. Internally Displaced Persons

Internally displaced persons constitute a growing number of people who flee from one part of their country to another because of conflict, discrimination that rises to the level of persecution, or other human rights violations.²³³ The UNHCR has recognized that the main distinguishing characteristic between refugees and IDPs is whether or not they have crossed an international border.²³⁴ According to the UNHCR, the distinction was arbitrary, and the agency found it necessary to address growing displacement within states where large populations had significant humanitarian needs.²³⁵ The UNHCR recognized the inadequate response by the international community to assist IDPs, which ultimately led to an expansion of its mandate to specifically apply humanitarian assistance programs to those still inside their country borders.²³⁶ UNHCR explained its

²²⁹ See *Resettlement Handbook*, *supra* note 217, at 24.

²³⁰ See U.N., *Refugees*, <https://www.un.org/en/sections/issues-depth/refugees/index.html>.

²³¹ See generally Helen Morris & Machiel Salomons, UNHCR, *Difficult Decisions: A Review of UNHCR's Engagement with Assisted Voluntary Return Programmes*, U.N. Doc. PDES/2013/11 (July 2013).

²³² See *Resettlement Handbook*, *supra* note 217, at 32-33.

²³³ See *id.* at 24; see also *Persons of Concern to UNHCR*, *supra* note 17, ¶ 1.

²³⁴ See *Resettlement Handbook*, *supra* note 217, at 25 (explaining that the only difference between refugees and IDPs are that the latter have not crossed an international boundary and remain in their own state); see also UNHCR, *Internally Displaced Persons: The Role Of The United Nations High Commissioner For Refugees* 1, U.N. Doc. EC/50/SC/INF.2 (June 20, 2000) [hereinafter *Role of UNHCR*].

²³⁵ See *Resettlement Handbook*, *supra* note 217, at 25, (stating that states have the primary responsibility toward IDPs and yet the global IDP population has been increasing 1997).

²³⁶ See *id.* (describing UNHCR's development of guidelines based on international human rights and humanitarian law as well as UNHCR's efforts to raise awareness).

rationale to extend protection to IDPs by contrasting their situation to that of refugees:

UNHCR has an interest in the protection and welfare of persons who have been displaced by persecution, situations of general violence, conflict or massive violations of human rights: in other words, all those, who had they crossed an international frontier, would have had a claim to international protection. This interest arises from the similarity between such internally displaced persons and refugees, in terms of the causes and consequences of their displacement and their humanitarian needs. Like refugees, many internally displaced have been forced to leave their homes because of fear of persecution, war and violence. Again, like refugees, they are in need of protection and assistance, as well as a solution to their plight.²³⁷

UNHCR's Guiding Principles on Internal Displacement lay out its humanitarian mandate towards IDPs.²³⁸ This includes identifying and advocating for the needs of IDPs, and supporting services and protection programs, including specifically targeting victims of gender-based violence.²³⁹ Recognizing the primary role of the State in ensuring protection to its people, the UNHCR has to work with governments in order to implement any of its mandates within a country where there are IDPs.²⁴⁰ This presents clear challenges when dealing with repressive States, or during acute phases of conflict, and may also limit the type of work that can be conducted in a particular country.²⁴¹

D. UNHCR Response to Victims of Gender-Based Persecution

The right to be free of violence, including forms of gender-based violence, is universally a recognized human right under the Declaration of Human Rights²⁴² that is also recognized in several key international conventions.²⁴³

²³⁷ See *Role of UNHCR*, *supra* note 234, at 3 (proceeding to explain that the UNHCR's interest arises from similarity between refugees and IDPs).

²³⁸ See *id.* at 6.

²³⁹ See UNHCR, *Sexual and Gender-Based Violence Against Refugees, Returnees, and Internally Displaced Persons: Guidelines for Prevention and Response* 53-68, (May 2003) [hereinafter *Guidelines for Prevention and Response*].

²⁴⁰ See *Role of UNHCR*, *supra* note 234, at 6.

²⁴¹ See *id.*

²⁴² See G.A. Res. 217 (III) A, *Universal Declaration of Human Rights* (Dec. 10, 1948), art. 2 (recognizing that all human beings are equal and that human rights apply to everyone without any distinction such as sex).

²⁴³ See CEDAW, *supra* note 136; G.A. Res. 48/104, *Declaration on the Elimination of Violence Against Women* (Dec. 20, 1993); G.A. Res. 50/203, *Beijing Declaration and Platform for Action*, at Ch. IV, ¶ 224 (Sept. 15, 1995); Rome Statute of the International Criminal Court,

UNHCR has a broad protection mandate that includes identifying and responding to the needs of victims of gender-based violence.²⁴⁴ The agency coordinates the protection cluster, and specifically a protection sub-cluster devoted to sexual and gender-based violence specifically, bringing together international and local actors that work on this issue.²⁴⁵ In addition to having a coordinating function, which may also be handled by, or shared with, other UN agencies, UNHCR funds local and international organizations to provide a range of services such as mental health and psychosocial support services, and access livelihoods programming, education, awareness activities about their rights as women, health services, and legal services. In Iraq and other countries facing humanitarian crises, UNHCR and its implementing partners often deliver these services to persons of concern who are in camps as well as urban and other non-camp areas, depending on patterns of displacement and other factors related to the particular context.

IV. RECOMMENDATIONS TO ENHANCE ACCESS TO LEGAL RIGHTS AND HUMANITARIAN ASSISTANCE FOR PWGS TRAPPED WITHIN BORDERS

The recommendations below are intended to begin a conversation to build on what options currently exist and are by no means intended to be limiting; instead if the UNHCR takes the lead on developing solutions, States may expand their own laws and mechanisms to reach inside country borders to respond to women fleeing gender-based persecution. To address the heightened barriers women face that impede their ability to access international legal protections while fleeing gender-based persecution, and the limited humanitarian protection assistance available while they remain trapped within borders, I propose creating a new category of persons of concern to include “persecuted women and girls” (PWGs) within UNHCR’s mandate, to bring this group explicitly into the humanitarian response which would qualify them for services and basic needs, and to conduct refugee status determinations with PWGs while they remain in their countries of origin.

Creating a new protected category would lead to the development of tailored, in-country programs that improve safety of women who have little choice but to rely on weak or non-existent domestic programs and services. Furthermore, once an individual is determined to be a PWG, she would qualify

art. 7(1)(g), (July 17, 1998), 2187 U.N.T.S. 38544 (defining rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity as a crime against humanity); S.C. Res.1325, ¶ 10 (“Calls on all parties to armed conflict to take special measures to protect women from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict”).

²⁴⁴ See *Guidelines For Prevention And Response*, *supra* note 239, at 53.

²⁴⁵ See UNHCR, *Emergency Handbook: Protection Cluster*, (4th ed., 2019), <https://emergency.unhcr.org/entry/82064/protection-cluster>.

to apply for legal protection as a refugee, and possible resettlement, without having to cross an international border.

In response to anticipated and legitimate concerns that such a change would open the floodgates to women leaving countries where there is widespread violence, there are ways to limit access through criteria and quotas, and it is worth noting that most of the world's refugees are never resettled to a third country. UNHCR demonstrated with the PTA program that it is willing to develop innovative programs to respond to specific needs, and the agency can apply important lessons learned in Central America to apply to countries where it would offer protection to PWGs. Women and girls who would gain access to legal benefits and humanitarian assistance would therefore not include all victims of gender-based persecution; as a threshold matter each individual would need to fall into the PWG category, and then establish they qualify as a refugee but for the fact they have not left their country. Additionally, many women who qualify would never seek assistance, or if they did would not agree to leave their country to restart their lives in an unknown place, perhaps without their children if they could not legally take their children with them. Furthermore, any program would need to establish criteria and receiving countries would set their own quotas, further limiting the number of individuals who would qualify to be resettled.²⁴⁶ As explained above, a number of these cases are resolved domestically, and exploring whether a case can be "solved" locally could be one of the criteria that determines whether an individual can remain safely anywhere in her country.²⁴⁷ PWGs should include genetically female women and individuals who are perceived as female including individuals identifying or presenting as transsexual, transgender, or intersex.²⁴⁸

A woman seeking PWG status would not need to establish that she was persecuted, or has a well-founded fear of gender-based persecution which is part of the determination of whether someone is a refugee.²⁴⁹ Instead, the term or category should be broadly construed to include women experiencing or threatened with all forms of gender-based violence such as sexual violence, domestic violence, human trafficking, threats of honor killing, FGM, and forced marriage, regardless of the level of severity, including those that would rise to the level of persecution where they include "threat[s] to life or freedom"²⁵⁰ and

²⁴⁶ See *Guidelines For Prevention And Response*, *supra* note 239, at 111 (stating that a gender-sensitive interpretation of the 1951 Refugee Convention will not automatically entitle all women to refugee status).

²⁴⁷ See Taysi & Minwalla, *supra* note 61, at 98-100.

²⁴⁸ See UNHCR Asylum Lawyers Project, UNHCR, *UNHCR's Views On Asylum Claims Based On Sexual Orientation And/Or Gender Identity*, at 1 (Nov. 2016), <http://www.unhcr.org/582364804.pdf> (stating that UNHCR recognizes claims based on sexual orientation and sexual identity).

²⁴⁹ See 1951 Refugee Convention, *supra* note 8.

²⁵⁰ See *Handbook*, *supra* note 10, at 21.

also involve “[o]ther serious violations of human rights.”²⁵¹

A. *Extending Services and Programs Currently Available to Persons of Concern to Victims of Gender-Based Persecution*

Once women qualify as PWGs, they could, as part of UN policy guidance, formally benefit from programs and services provided by the UNHCR and other UN agencies as part of a humanitarian response. The UN, through local and international NGOs, would be positioned to incorporate PWGs into programs that distribute basic items such as clothing, hygiene products, diapers, baby formula or other basic “core relief items” as well as food. The UN and implementing partners could also deliver services such as social services, case management, legal services, medical and mental health services. UNHCR and other UN agencies and implementing partners already encourage host governments to respond to women’s demands for equal rights and establish safe spaces such as shelters and improve the conditions in which women live; these efforts could specifically incorporate needs of PWGs into those advocacy efforts.²⁵²

UNHCR would be well positioned to lead on setting up a strategy for how to identify women at risk, provide protection, and a package of services to women. This would require establishing protocols for how to identify potential cases without compromising the safety of women and staff and working with and training local partners on how to manage such cases. Training UNHCR staff and local partners would need to include how to communicate about the program in a way that manage expectations since there are no guarantees when it comes to resettlement, as women in country continue to face threats of harm, and there are many requirements including documentation and evidentiary that accompany the refugee determination and resettlement process.²⁵³ UNHCR would evaluate women facing gender-based persecution first for refugee protection, and secondly for submission to resettlement States in accordance with submission criteria.

²⁵¹ *See id.*

²⁵² *See Guidelines for Prevention and Response, supra* note 239, at 36, 46.

²⁵³ By the end of 2018 there were 20.4 million refugees globally; less than 1% were resettled that year. *See Resettlement, supra* note 214. According to UNHCR data, between January–June 2019 UNHCR submitted 48,754 refugee submissions, most for individuals from the Syrian Arab Republic, the Democratic Republic of Congo, Afghanistan, Somalia, and South Sudan. Of these 50% included women and girls, and 14% of refugee submissions were for women and girls at risk. The countries receiving the highest number of refugees were the United States, Canada, Germany, Sweden, and Australia. *See* UNHCR, *Resettlement at a Glance: January–June 2019* (Aug. 5, 2019), <https://www.unhcr.org/protection/resettlement/5d4822077/resettlement-fact-sheet-june-2019.html>.

B. Durable Protection for PWGs Qualifying as Refugees

Ultimately women who qualify as refugees except for their location within their country borders need access to long-term solutions such as resettlement to a safe country. According to UNHCR policy, resettlement is a viable option with UNHCR policy where resettlement “offers the only means to preserve fundamental human rights and to guarantee protection.”²⁵⁴ Those PWGs who meet the definition of a refugee except the requirement to be outside one’s country would ultimately be eligible to be resettled to a safe country similar to other refugees.²⁵⁵ Generally to qualify for resettlement, an individual must be determined to be a refugee first, and then evaluated to determine that resettlement is the most suitable option.²⁵⁶

“Refugee Status Determination” refers to the formal process through which an individual achieves official refugee status under the 1951 UN Refugee Convention and the subsequent 1967 Protocol.²⁵⁷ UNHCR plays a vital role in this process by conducting interviews to determine whether a person is or is not a refugee.²⁵⁸ UNHCR has issued internal guidelines for its own operations that are instructive in evaluating whether policies are designed to insure that the goal of refugee protection is met in practice.²⁵⁹

Women who are PGWs would need to establish they have been persecuted, or have a well-founded fear of persecution on account of a protected ground, and severe forms of gender-based violence are equivalent to other types of persecution as they involve threats to “life or freedom” and violate human rights.²⁶⁰ UNHCR guidelines, interpreting the 1951 Refugee Convention and 1967 Protocol from a gender perspective, recognize forms of harm that are predominantly inflicted against women as persecution, and provide guidance to field staff when handling these types of cases.²⁶¹ For example, sexual abuse, rape, infanticide, genital mutilation, forced marriage, slavery, domestic violence, and forced abortion or pregnancy are all forms of harm that are unique to or more commonly happen to women.²⁶² There can be no serious debate over whether these forms of harm are capable of causing severe pain and suffering, and

²⁵⁴ See *Resettlement Handbook*, *supra* note 217, at 242, 246-47.

²⁵⁵ See *id.* at 263-64.

²⁵⁶ See *id.* at 246.

²⁵⁷ UNHCR, *Refugee Status Determination*, <https://www.unhcr.org/en-us/refugee-status-determination.html> (last visited Sept. 27, 2019).

²⁵⁸ See UNHCR, *Information on UNHCR Resettlement*, <https://www.unhcr.org/en-us/information-on-unhcr-resettlement.html> (last visited Sept. 27, 2019).

²⁵⁹ See *generally Handbook*, *supra* note 10.

²⁶⁰ See *id.* at 85 (stating that gender-related claims should not be limited to one of the five grounds for persecution but rather should be examined with respect to how acts and situations affecting women fit into these grounds).

²⁶¹ See *id.* at 83.

²⁶² See *id.* at 85.

therefore raise the level of persecution.²⁶³ Indeed, the UNHCR Gender Guidelines explicitly state that gender-related violence including domestic violence and sexual abuse that inflicts severe pain and suffering can be forms of persecution.²⁶⁴

Although traditionally the persecutor must have been acting on behalf of the State, this requirement has been expanded, and the UNHCR Handbook clarifies that the persecutor must be either acting under color of law, or be a person or group the government is unable or unwilling to control.²⁶⁵

There is not a requirement that the persecutor be a State actor. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.²⁶⁶

This is particularly relevant to cases involving gender-based persecution where, like Iraq, the government has established it is unable and unwilling to control perpetrators of family violence as well as perpetrators of gender-based violence and persecution who are part of militias, tribes, and insurgent groups.²⁶⁷ The extension of protection to non-State actors is especially crucial in gender persecution claims because perpetrators are commonly private actors such as relatives, members of clans or tribes, or militant armed groups like ISIS that the government is unable or unwilling to control.²⁶⁸ When the State does not work to improve the status and rights of women, it is perceived to be acting in a way that disregards its obligation and is therefore taking a clear position—against women’s equality, rights, and protection—that violence against women is not a priority.²⁶⁹ As explained in detail in this case study of Iraq, there are multiple and

²⁶³ See *Legal Rights of Women and Girl Asylum Seekers*, *supra* note 13, at 22-23 (noting the recognition by the United Nations and CEDAW member States of the use of sexual violence as a tool for persecution).

²⁶⁴ See *Handbook*, *supra* note 10, at 154.

²⁶⁵ See *id.* at 97.

²⁶⁶ *Id.*

²⁶⁷ See *The Lost Women of Iraq*, *supra* note 39, at 16.

²⁶⁸ See *Legal Rights of Women and Girl Asylum Seekers*, *supra* note 13, at 24 (observing that cases of gender-related persecution are made complex by the tendency for perpetrators to be private individuals rather than the State).

²⁶⁹ See United Nations Assistance Mission for Iraq, OHCHR, *Promotion and Protection of Rights of Victims of Sexual Violence Captured by ISIL/or in Areas Controlled by ISIL in Iraq*, ¶ 35 (Aug. 22, 2017), https://www.ohchr.org/Documents/Countries/IQ/UNAMIRreport22Aug2017_EN.pdf. For example, women’s advocates have been trying unsuccessfully for several years to pass a bill that would criminalize family violence. See HUMAN RIGHTS WATCH, *Iraq: Strengthen Domestic Violence Bill*, (Mar. 19, 2017, 12:01 AM), <https://www.hrw.org/news/2017/03/19/iraq-strengthen-domestic-violence-bill>.

intersecting ways that the State encourages and condones gender-based violence through perpetuating negative stereotypes and cultural practices and most clearly by maintaining harmful laws that regulate family life, including marriage, divorce, custody, access to documentation in ways that discriminate against women, as well as laws and practices that encourage violence against women or fail to enforce laws against perpetrators of gender-based violence.²⁷⁰ As long as governments fail to adequately hold perpetrators accountable for violence against women, perpetrators who are non-state actors will be determined to be persecutors for refugee status determinations.²⁷¹

Women who fall into the PWGs category must also establish a “nexus” between gender-based persecution and a cognizable protected ground.²⁷² They must establish that they are persecuted *because* of, or on account of, race, religion, nationality, or in gender-persecution cases, political opinion or a particular social group. While it is understood that the drafters of the 1951 Refugee Convention did not recognize gender as a protected category, excluding women and homosexuals who faced gender-based persecution from protection, today refugee law and practice acknowledge that gender can be the primary reason a person encounters a specific harm or form of persecution. According to UNHCR, “[t]he refugee definition, properly interpreted, therefore covers gender-related claims.”²⁷³

Like refugees, those PWGs requesting resettlement to another country would need to establish they cannot safely relocate to another part of the country.²⁷⁴ If a woman in Iraq could not live alone without exposing herself to further harm and exploitation, where at least in parts of the country, the government prohibits her from living alone, as a matter of law or policy, she would likely meet this requirement.²⁷⁵

Once those threshold requirements are established, the person must fall into

²⁷⁰ See INSTITUTIONALIZED VIOLENCE, *supra* note 144, at 23.

²⁷¹ See U.N. Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 35 on Gender-based Violence Against Women, Updating General Recommendation No. 19*, ¶ 11, U.N. Doc. CEDAW/C/GC/35 (July 14, 2017) (describing State obligations under CEDAW to protect women in various enumerated circumstances as addressed in General Recommendations No. 26, 27, 28, 30, 31, 32, 33, and 34).

²⁷² See NATIONAL IMMIGRANT JUSTICE CENTER, ASYLUM PRACTICE ADVISORY: APPLYING FOR ASYLUM AFTER MATTER OF A-B-, at 2 (June 2018), <https://www.immigrantjustice.org/sites/default/files/content-type/resource/documents/2018-06/Matter%20of%20A-B-%20Practice%20Advisory%20-%20Final%20-%2006.21.18.pdf> (explaining that the nexus element of the asylum test looks to whether the asylum seeker was persecuted due to gender or was instead persecuted because of personal reasons specific to the circumstances between the persecutor and the asylum seeker, as the latter type of claim is rejected for lack of nexus to an asylum ground).

²⁷³ See *Guidelines for Prevention And Response*, *supra* note 239, at 120.

²⁷⁴ See 1951 Refugee Convention, *supra* note 8.

²⁷⁵ See INSTITUTIONALIZED VIOLENCE, *supra* note 144, at 6.

one of UNHCR's submission categories for resettlement.²⁷⁶ UNHCR's submission categories include: legal and/or physical protection needs,²⁷⁷ survivors of violence and/or torture,²⁷⁸ medical needs, women and girls at risk,²⁷⁹ family reunification, children and adolescents at risk, or lack of foreseeable alternative durable solutions.²⁸⁰ Additionally, UNHCR has three priority levels of risk including emergency,²⁸¹ urgent,²⁸² and normal.²⁸³ UNHCR will submit cases of "women at risk" if they face precarious gender-related physical or security threats, have specific needs that arise out of past persecution, or face severe hardship and are exposed to exploitation and abuse.²⁸⁴ States that accept refugees would work with the UNHCR to determine the number and type of cases they would be willing to accept. If accepted, UNHCR would work with organizations in the receiving State to provide resettlement assistance.

²⁷⁶ *See id.*

²⁷⁷ *See id.* at 247-48. Resettlement under the "legal and/or physical protection needs" category applies when a refugee is at risk of *refoulement* to the country of origin, or a country from which she would be *refouled*; faces threat of arbitrary arrest, detention or imprisonment; or faces a threat to physical safety or fundamental human rights in the country of refuge. *Id.* This applies to refugees facing ongoing threats to life and personal safety that are "real and direct, not accidental or collateral." *Id.* This includes threats involving gender-based violence as well as LGBTI persons and may come from a range of actors including family members, security actors and other refugees. *Id.*

²⁷⁸ *See id.* at 250. This category includes survivors of violence and/or torture who have specific needs in the place of refuge that are not being met and that might exacerbate trauma. Many of these refugees, which includes those who experienced gender-based persecution, go undetected in a country of refuge. *See id.* at 251-53. When looking into resettlement for traumatized individuals, UNHCR looks for places that provide services needed to help individuals heal and recover. *See id.* at 255.

²⁷⁹ *See id.* at 261. This category specifically includes women facing gender-related forms of persecution and who are vulnerable as women and survivors in the country of refuge including ongoing threats of gender-based violence. Girl refugees in particular are vulnerable to abuse due to their young age, inability to make key decisions, or separation from family members; they are at higher risk of forced and early marriage, trafficking, and FGM. *Id.* at 264.

²⁸⁰ *See id.* at 287-88.

²⁸¹ *See id.* at 246. Emergency priority cases require removal within a matter of hours or days, ideally no more than a week due to urgent security or medical needs. *Id.*

²⁸² *See id.* at 246-47. Urgent priority cases require "expeditious resettlement" often for medical or safety reasons within six weeks of making a request. Once an urgent case is identified UNHCR is expected to put in a request to a resettlement State within two weeks. *Id.*

²⁸³ *See id.* at 247. Normal priority applies to all other cases in which there is no immediate medical or security issue. Under the normal refugee resettlement policy, women and children at risk are supposed to be prioritized over those lacking alternative durable solutions, and assuming there is space in resettlement States, should take about one year from submission to departure. *Id.*

²⁸⁴ *See id.* at 265.

V. CONCLUSION

Witnessing women's experiences in Iraq firsthand was the impetus for writing this article. Soon after moving to Iraq in 2007, I met Sara in a women's shelter. She was in her late twenties with much of her life ahead of her, yet to leave the shelter her only choices were to commit suicide, which she contemplated often, or be killed by her father. The judge took his own initiative to save her life, yet once she moved to a shelter run by an NGO the government did nothing to help her—this was unacceptable. Sara did eventually qualify for asylum though I cannot disclose these details of her case, yet moving her out of the country was very difficult because international law does not exist to help someone in her situation, and UNHCR also did not assist her, informing me that she did not fall within their mandate.

When cases similar to Sara's surface it is very difficult for front line workers: lawyers, social workers, NGO staff, and health care providers to find durable solutions. The current situation where each case must be handled on an *ad hoc* basis because there is no systematic response is untenable. And while it is true that governments are responsible to protect their people, we also know they are significantly failing under international and domestic law to take violence against women seriously. Women must have access to life saving options at the same time that change is happening, slowly if not at all.

By shedding light on this issue, I encourage a re-examination of existing laws and policies that offer protection under international law to recognize and tackle this protection gap. Creating a new category of PWGs would bring persecuted women and girls into the larger humanitarian protection framework, qualify these individuals for a range of services that are afforded to other persons of concern, and would lead to a multi-agency response resettling women and girls to allow them to start their lives free from persecution. Many will assert that extending refugee protection to those still inside their country is not possible, and yet in Iraq we have a clear example where the U.S. government established an in-country refugee resettlement program for individuals who worked the U.S. government or U.S. funded organizations; these individuals had access to refugee resettlement without having to leave the country. Additionally, UNHCR's pilot program in Central America indicates that identifying the program can lead to creative solutions.

The main purpose of this article is to highlight, using Iraq as a case study, the unique challenges facing women victims of gender-based persecution, outlining the cultural and legal institutions that subordinate women's status and safety and similarly prevent them from crossing an international border to seek refugee protection. I have met and heard stories of many refugees who fled Iraq due to persecution on account of their political opinion or religion or other grounds; they conveyed how they fled with their families, or had the support of their families. That is less the case for women fleeing gender-based persecution since it is the frequently family or someone close to the victim that that is the

persecutor, and in control of the woman's movement and access to documents.

My overall purpose is to encourage a difficult conversation about the issues raised in this Article, and to outline the reality that women face in trying to flee persecution through a detailed case study of Iraq. I recommend an in-country resettlement option for a newly established category of PWGs, as one possible option to debate and discuss. A detailed discussion of the UN and specifically UNHCR policies, as well as more background into the history and development of refugee law are beyond the scope of this Article. I would also encourage States that protect refugees as part of their humanitarian asylum programs to consider whether they could create other mechanisms to help evacuate women by means of asylum protection while they remain within their borders, or establishing immigrant and non-immigrant visas that lead to eventual permanent status.

As previously stated, there are ways to address anticipated concerns, such as opening the floodgates given what are known to be high rates of violence against women globally. Concerns about high numbers of cases should not be a justification for failing to act, and this issue can be managed through quotas and sharing the responsibility between different countries. Also, to qualify, women must meet rigorous criteria to be considered refugees, and face even more hurdles to benefit from resettlement. These criteria will exclude many women who face gender-based violence that does not rise to the level of persecution, or who fail to establish the nexus requirement of persecution on account of a protected ground, or other legal requirements.

It is essential that the work to improve conditions for women around the world is a primary goal, applying international laws and standards to improve abusive and discriminatory laws and policies that encourage gender-based violence, in countries that are plagued by conflict, poor governance, weak rule of law, and harmful patriarchal laws and policies. These efforts take time and, in the meantime, women are raped, mutilated, tortured, and killed. We must find a way to address this harm for individual women while also finding ways to achieve women's legal rights and safety at a societal level.