

# **Displacement, Statelessness, and Questions of Gender Equality and the Convention on the Elimination of All Forms of Discrimination against Women**

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**Background paper prepared for a joint United Nations High Commissioner for Refugees and the UN Committee on the Elimination of Discrimination against Women seminar, to be held at the United Nations in New York, 16-17 July 2009**

**April 2009**

## **ACKNOWLEDGEMENTS**

This paper was prepared for a seminar between the United Nations high Commissioner for Refugees (UNHCR) and the UN Committee on the Elimination of Discrimination against Women (the Committee), to be held at the United Nations in New York, 16-17 July 2009. It has benefited from the careful guidance and advice of many persons within UNHCR and the Committee, including in particular Gisela Thater and Frances Nicholson.

I would like to thank my student researchers, Claire Balding, Lydia Gény, Laura O'Donnell, and Emily Soothill, as well as Mariana Lavanchy, intern at the UNHCR, who collectively trawled through ten years of annual reports of the Committee.

These are my personal views and are not necessarily shared by the UN or the UNHCR.

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## LIST OF ABBREVIATIONS

African Charter on Human and Peoples' Rights 1981	African Charter <i>or</i> ACHPR
American Convention on Human Rights	ACHR
Committee against Torture	CAT
Committee on Economic, Social and Cultural Rights	CESCR
Committee on the Elimination of All Forms of Discrimination against Women	the Committee
Committee on the Elimination of All Forms of Racial Discrimination	CERD
Committee on the Rights of the Child	Children's Committee
Committee on the Rights of Migrant Workers and Members of their Families	MWC
Committee on the Rights of Persons with Disabilities	CRPD
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984	UNCAT
Convention on the Elimination of All Forms of Discrimination against Women 1979	CEDAW
Convention on the Rights of the Child 1989	CRC
Convention on the Rights of Persons with Disabilities 2006	ICRPD
Convention relating to the Status of Refugees 1951	1951 Convention
European Convention on the Protection of Human Rights and Fundamental Freedoms 1950	ECHR
European Court of Human Rights	ECtHR
Executive Committee of the High Commissioner's Programme	EXCOM
Human Rights Committee	HRC
Inter-Agency Standing Committee	IASC
Inter-American Court of Human Rights	IACtHR
International Convention on the Elimination of All Forms of Racial Discrimination 1965	ICERD
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990	IMWC
International Covenant on Civil and Political Rights 1966	ICCPR
International Covenant on Economic, Social and Cultural Rights 1966	ICESCR
International Criminal Court	ICC
Office of the High Commissioner for Human Rights	OHCHR
Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2002	OPCAT
Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women 2000	OP-CEDAW
Protocol relating to the Status of Refugees 1967	1967 Protocol
Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women 2000	Women's Protocol to the ACHPR
Sexual and Gender-Based Violence	SGBV
Universal Declaration of Human Rights 1948	UDHR

## I. INTRODUCTION

Discrimination on the basis of sex and inequality between men and women is a worldwide phenomenon that interferes with the enjoyment of rights and the full advancement of women and girls<sup>1</sup> worldwide.<sup>2</sup> Displacement arising from armed conflict, persecution and other serious human rights violations can intensify this discrimination and inequality. Discrimination against women can be the, or a contributing, cause of displacement and it can occur at all stages in the displacement cycle – during flight, settlement and return. Although all forcibly displaced persons face protection problems, ‘women and girls can be exposed to particular protection problems related to their gender, their cultural and socio-economic position, and their legal status.’<sup>3</sup> Similarly, many persons are at risk of statelessness because of gender-based discriminatory nationality laws and women who are already stateless face various protection problems, not least gender-based barriers to the recognition of nationality.

Much has already been done to advance the rights of displaced and stateless women and girls. The United Nations High Commissioner for Refugees (UNHCR) has adopted a myriad of policies, guidelines and programmes since the early 1990s, which sought recognition for the now accepted fact that displacement affects men and women differently and that protection responses and strategies must recognise and

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<sup>1</sup> Throughout this paper, reference to ‘women’ also includes the girl-child, except where specifically excluded. A child is defined ‘as every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.’ (Convention on the Rights of the Child, art. 1).

<sup>2</sup> See, United Nations Department of Economic and Social Affairs, *The World’s Women 2005: Progress in Statistics*, UN Doc. ST/ESA/STAT/SER.K/17, UN Sales No. E/05/XVII.7 (2006); Report of the UN Secretary-General, *In-Depth Study on All Forms of Violence against Women*, UN Doc. A/61/122/Add.1, 6 July 2006.

<sup>3</sup> Executive Committee (EXCOM) Conclusion No. 105 (LVII) 2006, *Women and Girls at Risk*, pmbi para. 3.

take account of these differences.<sup>4</sup> According to the Organization, ‘The protection of refugee women and children is a core activity and an organizational priority.’<sup>5</sup> Internally displaced (IDP) women have also been incorporated into the Organization’s policy documentation and practical programmes.<sup>6</sup> The Executive Committee of the High Commissioner’s Programme (EXCOM) has likewise adopted statements concerning the international protection of refugee and IDP women,<sup>7</sup> as well as stateless women, albeit to a much lesser extent.<sup>8</sup> Some states have likewise attempted to incorporate gender-sensitive applications of international standards into national protection mechanisms for displaced women,<sup>9</sup> and to amend nationality laws that discriminate against women.<sup>10</sup>

Much of this momentum can be attributed to parallel developments in international

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<sup>4</sup> UNHCR, *Policy on Refugee Women*, 1990, 4.

<sup>5</sup> UNHCR, *Agenda for Protection*, 3<sup>rd</sup> ed., 2003, 85.

<sup>6</sup> See, e.g., UNHCR, *Handbook for the Protection of Women and Girls*, Jan. 2008. In 1998, the UN General Assembly ‘reaffirm[ed] its support for the role of the Office of the High Commissioner in providing humanitarian assistance and protection to internally displaced persons, on the basis of specific requests from the Secretary-General or the competent organs of the United Nations and with the consent of the State concerned, taking into account the complementarities of the mandates and expertise of other relevant organisations, and emphasises that activities on behalf of internally displaced persons must not undermine the institution of asylum.’ (GA res. 53/125, Dec. 1998). Under the ‘cluster approach’, the UNHCR has been assumed responsibility for protection, emergency shelter, and camp coordination and management for conflict-induced IDPs: see, UNHCR, *The Protection of Internally Displaced Persons and the Role of UNHCR*, Informal Consultative Meeting, 27 Feb. 2007, available at: <http://www.unhcr.org/refworld/pdfid/45ddc5c04.pdf>.

<sup>7</sup> See, e.g., EXCOM Conclusion No. 105 (LVII), 2006, *Women and Girls at Risk*.

<sup>8</sup> See, e.g., EXCOM Conclusion No. 106 (LVII), 2006, *Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons*, which mentions the CEDAW and the non-discriminatory basis for nationality laws, para. 5 and 6 and substantive para. (j). See, also, UNHCR and Inter-Parliamentary Union, *Nationality and Statelessness: A Handbook for Parliamentarians*, No. 11, 2005, 33.

<sup>9</sup> For an overview of state practice in this regard, see A. Edwards, ‘Age and Gender Dimensions in International Refugee Law’, in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge University Press, 2003) 46-80, available at: <http://www.unhcr.org/publ/41a1b51c6.html>; University of California, Hastings, Centre for Gender and Refugee Studies, which compiles up-to-date legislation and guidelines relating to gender-related persecution, available at: [http://cgrs.uchastings.edu/law/gender\\_guidelines.php](http://cgrs.uchastings.edu/law/gender_guidelines.php).

<sup>10</sup> See, for latest state practice in relation to reduction of statelessness, see ‘The Excluded: The Strange Hidden World of the Stateless’, *Refugees Magazine*, Issue 147, Sept. 2007, available at: <http://www.unhcr.org/doclist/publ/3b5696144.html>. See, also, ‘Statelessness’, *Forced Migration Review*, No. 32, Arp. 2009, available at: [www.fmreview.org](http://www.fmreview.org).

human rights law, in particular advances in women's rights.<sup>11</sup> The first EXCOM conclusion on refugee women and international protection, adopted in 1985, for example, came at the end of the UN Decade on Women 1975 – 1985.<sup>12</sup> Refugee and displaced women were mentioned in all of the global women's conferences since 1980, albeit peripherally.<sup>13</sup> The Beijing Platform for Action, in particular, called on the UNHCR and the Office of the High Commissioner for Human Rights (OHCHR) to '[e]stablish effective cooperation ... taking into account the close link between massive violations of human rights, especially in the form of genocide, ethnic cleansing, systematic rape of women in war situations and refugee flows and other displacements, and the fact that refugee, displaced and returnee women may be subject to particular human rights abuse.'<sup>14</sup>

Importantly, international human rights law reinforces the non-discriminatory basis of international law in general, which impacts on international law relating to displaced and stateless persons in particular. Neither the *1951 Convention relating to the Status*

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<sup>11</sup> See, Edwards, 'Age and Gender Dimensions in International Refugee Law', 47. See, also, R. Haines, 'Gender-Related Persecution', in Feller, Turk and Nicholson (eds.), *Refugee Protection in International Law*, 319-350. On the incorporation of displacement issues into human rights forums, see M. Stavropoulou, 'Displacement and Human Rights: Reflections on UN Practice' (1998) 20 *Hum. Rts. Qlty* 515.. See, also, UNHCR, *Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees*, Geneva, Apr. 2001, para. 17.

<sup>12</sup> See, e.g., EXCOM Conclusion No. 39 (XXXVI), 1985, *Conclusions Specific to Women*.

<sup>13</sup> There was no specific mention of displaced or stateless women in the 1975 World Conference on Women in Mexico (with the exception of Palestinian women and their right to return to their homes and property), however, the 1980, 1985 and 1995 global women's conferences did include references to refugee and displaced women and girls: World Conference on Women, Equality, Development and Peace, Copenhagen, 1980 UN Doc. A/CONF.94/35, 19 Sept. 1980, Pts 12, 13 (The situation of women refugees and displaced women the world over), 31 (women and discrimination based on race), 43 (trafficking); World Conference on Women, Report and Nairobi Forward-looking Strategies for the Advancement of Women, 1985, UN Doc. A/CONF.116/28/Rev.1, Areas of Special Concern, Pt L. Refugee and Displaced Women and Children; World Conference on Women, Beijing Declaration and Platform for Action, UN Doc. A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995), paras. 36, 46, 58(l), 60(a), 81(a), 82(k), 116, 124(g), 126(d), 128, 131, 133, 136, and Strategic Objectives E.5. (Provide protection, assistance and training to refugee women, other displaced women in need of international protection and internally displaced women), I.1 (para. 231) (mention of UNHCR and other UN agencies to give 'equal and sustained attention to the human rights of women in the exercise of their respective mandates ...').

<sup>14</sup> Beijing, para. 231(h).

of *Refugees* as amended by its *1967 Protocol* nor the two statelessness conventions contain provisions prohibiting non-discrimination on the basis of sex or gender.<sup>15</sup> Thus the *1979 Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), as one of several non-discrimination treaties at the international level,<sup>16</sup> and the principal women's human rights treaty, has been instrumental in consolidating and advancing many gains made for women's rights, and influencing other areas of international law. The rights enumerated in the CEDAW have been applied in many settings to bolster gaps in the international legal protection system for displaced and stateless women and girls.<sup>17</sup> As a codification of existing human rights standards, general rights to non-discrimination have been included expressly in the *Guiding Principles on Internal Displacement*, in addition to noting that some female IDPs require 'special protection and assistance'.<sup>18</sup> The UN's 'gender mainstreaming' policy has also contributed to the influence of gender equality as a goal of all organs of the UN.<sup>19</sup>

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<sup>15</sup> The definition of a 'refugee' in Art. 1A(2) of the 1951 Convention as amended by the 1967 Protocol does not mention sex or gender; and Art. 3 of the 1951 Convention requires only that the Convention rights be secured to individuals without discrimination as to 'race, religion or country of origin'. Mirror provisions are found in the 1954 Convention relating to the Status of Stateless Persons (see Arts. 1 and 3); meanwhile the 1961 Convention relating to the Reduction of Statelessness does not contain a non-discrimination provision, but does contain a provision relating to marriage (art. 5).

<sup>16</sup> See, International Convention on the Elimination of All Forms of Racial Discrimination 1965, G.A. res. 2106 (XX), 21 Dec. 1965, 660 UNTS 195; entered into force 4 Jan. 1969 (ICERD); Convention on the Rights of Persons with Disabilities 2006, GA res. 61/106, 13 Dec. 2006; entered into force 3 May 2008.

<sup>17</sup> E.g., the UNHCR's Agenda for Protection specifically calls on governments 'to consider acceding to' the CEDAW as a priority objective: UNHCR, *Agenda for Protection*, 3<sup>rd</sup> ed., 2003, Goal 6, 1. Para.

<sup>18</sup> *Guiding Principles on Internal Displacement*, art. 4(1) provides that: These Principles shall be applied without discrimination of any kind, such as race, colour, sex, language, religion or belief, political or other opinion, national, ethnic or social origin, legal or social status, age, disability, property, birth, or on any other similar criteria'; while Art. 4(2) recognises that certain IDPs, 'such as ... expectant mothers, mothers with young children, female heads of household... shall be entitled to protection and assistance required by their condition and to treatment which takes into account their special needs.'

<sup>19</sup> 'Gender mainstreaming' is described as: 'the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated', See, Report of the Economic and Social Council for 1997, *Mainstreaming the Gender*



Despite the endorsement of human rights principles as binding upon states parties in respect of displaced and stateless persons, subject to limited exceptions,<sup>20</sup> the Committee on the Elimination of Discrimination against Women (the Committee), the key supervisory body overseeing the implementation of the CEDAW by states parties, has only limitedly incorporated the interests and concerns of displaced and stateless women within its jurisprudence.<sup>21</sup>

It is argued in this paper that the rights contained in the CEDAW are applicable to displaced and stateless persons as human beings subject to international law and that they complement and reinforce the governing international protection regimes. In addition, the institutional mechanisms of redress and oversight contained in the CEDAW, including state party reporting, individual petitions, and fact-finding inquiries, offer supplementary supervisory capacity to the UNHCR's mandate over

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*Perspective into All Policies and Programmes in the United Nations System*, UN Doc. E/1997/66, 12 June 1997. For a feminist analysis of gender mainstreaming, see H. Charlesworth, 'Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations' (2005) 18 *Harv. Hum. Rts. J.* 1; S. Kouvo, *Making Just Rights? Mainstreaming Women's Human Rights and a Gender Perspective* (Uppsala, Sweden: Iustus Förlag, 2004); F. Beveridge and S. Nott, 'Mainstreaming: A Case for Optimism and Cynicism' (2002) 10 *Fem. Legal Stud.* 299. The UNHCR has also endorsed the 'gender mainstreaming' agenda but has expanded this to 'Age, Gender and Diversity Mainstreaming', defined as: 'The meaningful participation of all persons of concern to UNHCR, of all ages and backgrounds, in the design, implementation, monitoring and evaluation of all UNHCR policies and operations so that these impact equitably amongst them. The overall goals are gender equality and the enjoyment of the rights of all persons of concern of all ages and backgrounds.' UNHCR, *Operational Protection in Camps and Settlements: A Reference Guide of Good Practices in the Protection of Refugees and Other Persons of Concern*, June 2006, restated in UNHCR, *Handbook for the Protection of Women and Girls*, 377 (Glossary).

<sup>20</sup> For example, rights to political participation and to hold public office are generally reserved to citizens (Art. 25, International Covenant on Civil and Political Rights 1966, G.A. res. 2200A (XXI), 16 Dec. 1966, 999 UNTS 171; entered into force 23 Mar. 1976 (ICCPR)). In addition, some permissible distinctions can be made between nationals and non-nationals in the enjoyment of economic rights: see, Art. 4, International Covenant on Economic, Social and Cultural Rights 1966, G.A. res. 2200A (XXI), 16 Dec. 1966, 993 UNTS 3; entered into force 3 Jan. 1976 (ICESCR). For more on this, see A. Edwards, 'Human Rights, Refugees, and the Right to "Enjoy" Asylum' (2005) 17 *Int'l J. Ref. L.* 297-330.

<sup>21</sup> By 'jurisprudence' I mean the authoritative (quasi—judicial) statements of the treaty bodies, including their concluding observations on state party reports, General Recommendations, reports of fact-finding inquiries, and its 'views' (decisions) on individual communications. These are explained further under III.

issues of refugees, statelessness, and conflict-driven IDPs (discussed below).

This paper is divided into four parts. Following this Introduction, Part II briefly defines the terms employed throughout this paper. Part III summarises the main monitoring mechanisms of the Committee, and explores how they might supplement UNHCR's 'supervisory' role for the benefit of displaced and stateless persons. Part IV outlines the fundamental principles upon which the CEDAW is based, as the theoretical framework for the remainder of the paper. Parts V and VI describe the gender dimensions of displacement and statelessness respectively, drawing out the impact of gender inequality on women's access to and enjoyment of their human rights in these contexts and identifying relevant CEDAW provisions at issue. Part VI concludes with a series of recommendations on how the rights protection regime for displaced and stateless women could be enhanced by reference to the CEDAW.

## II. DEFINITIONS AND TERMINOLOGY

There is a lot of terminology in this area: sex, gender, gender mainstreaming, asylum-seekers, refugees, returnees, internally displaced persons, and stateless persons. These terms are defined for the purposes of this paper below.

In its *Handbook for the Protection of Women and Girls*, the UNHCR adopts the definition of '**gender**' of the Office of the Special Adviser on Gender Issues and Advancement of Women (OSAGI), as:

The social attributes and opportunities associated with being male and female and the relationships between women and men and girls and boys, as well as the relations between women and those between men. These attributes are socially constructed and are learned through socialization processes. They are

context/time-specific and changeable. Gender determines what is expected, allowed and valued in a woman or a man in a given context. In most societies there are differences and inequalities between women and men in responsibilities assigned, activities undertaken, access to and control over resources, as well as decision-making opportunities. Gender is part of the broader socio-cultural context. Other important criteria for socio-cultural analysis include class, race, poverty level, ethnic group and age.<sup>22</sup>

Similarly in its *Guidelines on Gender-Related Persecution*, the UNHCR distinguishes

‘sex’ and ‘gender’ as follows:

Gender refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another, while sex is a biological determination. Gender is not static or innate but acquires socially and culturally constructed meaning over time.<sup>23</sup>

Adopting a similarly worded definition, the Committee defines ‘gender’ as:

... the social meanings given to biological sex differences. It is an ideological and cultural construct, but is also reproduced within the realm of material practices; in turn it influences the outcomes of such practices. It affects the distribution of resources, wealth, work, decision-making and political power, and enjoyment of rights and entitlements within the family as well as public life. Despite variations across cultures and over time, *gender relations throughout the world entail asymmetry of power between men and women as a pervasive trait*. Thus, gender is a social stratifier, and in this sense it is similar to other stratifiers such as race, class, ethnicity, sexuality, and age. It helps us understand the social construction of gender identities and the *unequal structure of power* that underlies the relationship between the sexes.<sup>24</sup> (my emphasis)

In comparison to the definitions employed by the UNHCR, the Committee’s definition emphasises the unequal power relations between men and women that

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<sup>22</sup> OSAGI, UN Department of Economic and Social Affairs, available at: <http://www.un.org/womenwatch/osagi/conceptsanddefinitions.htm>, as cited in UNHCR, *Handbook for the Protection of Women and Girls*, Jan. 2008, 12.

<sup>23</sup> UNHCR, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, UN Doc. HCR/GIP/02/01, 7 May 2002, para. 3.

<sup>24</sup> *World Survey on the Role of Women in Development*, United Nations, New York, 1999, ix, referred to in CEDAW, General Recommendation No. 25: Temporary Special Measures (2008) (no UN Doc.), n. 2. For the varying approaches of other UN bodies, see V. Oosterveld, ‘The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?’ (2005) 18 *Harv. Hum. Rts J.* 55.

inform and influence the status, roles, responsibilities and identities of women and men (i.e. gender inequality). It thus highlights that the socially and culturally constructed identities, status, roles, and responsibilities of women are deeply rooted in patriarchy or the domination of men over women and the related subordination or oppression of women by men. Too often the implementation of the UN's 'gender mainstreaming' agenda overlooks its gender equality objective, and instead focuses rather banally on understanding the dynamics between women and men.<sup>25</sup>

A 'refugee' is defined in Article 1A(2) of the 1951 Convention as amended by its 1967 Protocol<sup>26</sup>, as any person:

with a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion who is outside the country of his [or her] nationality and is unable or, owing to such fear, is unwilling to avail himself [or herself] of the protection of that country.

Although Article 1A(2) does not explicitly refer to 'gender' as a ground of persecution,

it is widely accepted that it can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment. The refugee definition, properly interpreted, therefore covers gender-related claims.<sup>27</sup>

Status may be denied on a number of grounds, including if there are serious reasons for considering that the applicant has committed a war crime or crime against humanity.<sup>28</sup> An almost identical definition of a 'refugee' is incorporated in the 1950 Statute of the Office of the United Nations High Commissioner for Refugees

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<sup>25</sup> See, e.g., D. Otto, 'Lost in Translation: Re-Scripting the Sexed Subjects of International Human Rights Law', in A. Orford (ed.), *International Law and Its Others* (Cambridge: Cambridge University Press, 2006) 318-356.

<sup>26</sup> Protocol relating to the Status of Refugees 1967, 606 U.N.T.S. 267; entered into force Oct. 4, 1967.

<sup>27</sup> *Guidelines on Gender-Related Persecution*, para. 6.

<sup>28</sup> Art. 1F(a), 1951 Convention.

(Statute)<sup>29</sup>, with the exception that ‘membership of a particular social group’ is not included as an asylum ground.<sup>30</sup> The UNHCR is particularly concerned with how gender impacts on one’s application to refugee status and the related ability to access rights as refugees.

Regional forums have adopted broader definitions of a ‘refugee’. In Africa, the definition of a ‘refugee’ was expanded in 1969 to include persons who are compelled to leave their place of habitual residence due to ‘external aggression, occupation, foreign domination or events seriously disturbing public order in either the whole or part of the territory.’<sup>31</sup> It is often widely assumed that persons fleeing armed conflict are not in fear of being persecuted, but rather are fleeing indiscriminate violence and as such, they do not meet the 1951 Convention criteria for refugee status. However, it has more recently been argued that where conflicts are rooted in ethnic, religious or political differences, persons belonging to those groups who are victimised or targeted would also qualify as refugees under the 1951 Convention.<sup>32</sup> Likewise, the 1984 Cartagena Declaration recommends an enlargement of the definition of a ‘refugee’ in the 1951 Convention to incorporate ‘persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.’<sup>33</sup>

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<sup>29</sup> Statute of the UNHCR, G.A. Res. 428(V), U.N. Doc. A/1775 (Dec. 14, 1950).

<sup>30</sup> Art. 6(A)(ii), UNHCR Statute.

<sup>31</sup> Art. 1(2), Organisation of African Unity (now African Union) Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted by the Assembly of Heads of State and Government, Addis Ababa, Sept. 10, 1969; entered into force June 20, 1974. On the definition, see A. Edwards, ‘Refugee Status Determination in Africa’ (2006) 14(2) *Afri. J. Int’l & Comp. L.* 204-233.

<sup>32</sup> UNHCR, *Interpreting Article 1 of the 1951 Convention relating to the Status of Refugees*, Geneva, Apr. 2001, para. 21.

<sup>33</sup> Cartagena Declaration on Refugees 1984, adopted by the Colloquium of the International Protection of Refugees in Central America, Mexico and Panama, Part III, P 3. See, also, San José Declaration on

An asylum-seeker is, by comparison, an individual who has left her country of origin in order to seek international protection. She may have formally applied for status as a refugee but has yet to be recognized as such by the applicable national asylum body, or it may be sufficient that she has left her country for international protection reasons without having yet applied for status.<sup>34</sup> The term ‘asylum-seeker’ is not defined under any international legal instrument and is subject to definition by national law. Although the granting of refugee status is the prerogative of the state, subject to some exceptions,<sup>35</sup> refugee status is declaratory rather than determinative: a person does not become a refugee because of recognition, but is recognised because she is a refugee.<sup>36</sup> Thus, it is arguable that the range of rights owed to refugees applies also to putative refugees (or asylum-seekers) until such time as their status is denied.<sup>37</sup> This distinction as to *when* a person can enjoy rights is relevant to the application of the 1951 Convention, as treaty rights are granted according to a complex ‘structure of entitlement’ that provides for ‘enhanced rights as the bond strengthens between a

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Refugees and Displaced Persons, adopted by the International Colloquium in Commemoration of the ‘Tenth Anniversary of the Cartagena Declaration on Refugees’, San José, 5-7 Dec. 1994; Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Central America, Mexico City, 16 Nov. 2004.

<sup>34</sup> D. Weissbrodt, *The Human Rights of Non-Citizens* (Oxford University Press, 2008), 110-111.

<sup>35</sup> Although it is generally accepted at international law that Art. 14(1) of the UDHR and the 1951 Convention do not impose obligations to be ‘granted’ asylum or refugee status, a number of regional instruments have arguably altered this position, in which obligations ‘to grant’ asylum are evident: see, ACHR, art. 22(7) (‘Every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions, in the event he is being pursued for political offenses or related common crimes’); ACHPR, art. 12(3) (‘Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions’); EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who otherwise need International Protection and the Content of the Protection Granted, art. 1.

<sup>36</sup> UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Geneva, re-edited Jan. 1992, para. 28.

<sup>37</sup> See, Edwards, ‘Human Rights, Refugees, and the Right to “Enjoy” Asylum’.

particular refugee and the state party in which he or she is present.’<sup>38</sup> That is, not all rights contained in the 1951 Convention apply to recognised refugees immediately upon recognition, and only a few overtly apply to asylum seekers.<sup>39</sup> This distinction is not however relevant to the application of international human rights law (including the CEDAW), which apply in principle to all persons on the basis of their shared humanity (with limited exceptions<sup>40</sup>) and according to principles of non-discrimination.<sup>41</sup>

According to the *Guiding Principles on Internal Displacement*, **internally displaced persons** (IDPs) are:

persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in 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.<sup>42</sup>

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38 J.C. Hathaway, *The Rights Of Refugees Under International Law* (Cambridge University Press, 2005), 154. See, also, G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (3<sup>rd</sup> ed., Oxford University Press, 2008), 305-307, which distinguishes four general categories on which the extent of a refugee’s rights may depend, namely “simple presence,” “lawful presence,” “lawful residence,” and “habitual residence.”

39. These include non-discrimination, non-penalization for illegal entry or stay in cases of threat to life or freedom and *non-refoulement*: arts. 3, 31, and 33, 1951 Convention.

40 See e.g., ICCPR, art. 25 (applying the right to participate in public affairs only to citizens); Ibid. art. 13 (only applying the protection against arbitrary expulsion to aliens). See also International Covenant on Economic, Social and Cultural Rights, GA res. 2200A, art. 2(3), (allowing for discretion by developing countries in guaranteeing economic rights to non-nationals).

41 See, Human Rights Committee General Comment No. 15 on ‘The Position of Aliens under the Covenant’, UN Doc. CCPR/C/21/Rev.1 (May 19, 1989), para. 2, in which it is stated that: ‘Thus the general rule is that each one of the rights of the [ICCPR and the ICESCR] must be guaranteed without discrimination between citizens and aliens.’ See, also, Human Rights Committee, ‘General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant’, UN Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004); Committee on the Elimination of Racial Discrimination, General Recommendation XI on ‘Non-Citizens’, UN Doc. A/46/18 (Mar. 19, 1993); *Loizidou v. Turkey*, App. No. 15318/8923, Eur. H.R. Rep. 513 (Dec. 18, 1996), in which the European Court of Human Rights stated at 52, ‘The obligation to secure . . . the rights and freedoms set out in the Convention, derives from the fact of . . . control [of territory.]’

<sup>42</sup> *Guiding Principles on Internal Displacement*, introductory para. 2.

For the purposes of this paper, which is prepared in the context of UNHCR's mandate, internal displacement arising from armed conflict is the focus of this paper, although some of the material and findings may also apply to other IDPs.

I also refer to '**displaced persons**', '**displaced women**' and '**displacement**' as shorthand to refer to both refugees and IDPs collectively, as they share many of the same human rights and protection problems.

The term '**returnee**' refers to a refugee who has returned to her country of origin or former habitual residence, whether by means of spontaneous return, facilitated voluntary repatriation programmes, or under operation of the cessation clauses of the 1951 Convention.<sup>43</sup> The term is also used to apply to IDPs who have returned to their former places of habitual residence within the state. It is not a legal status but a description of a factual situation.

Likewise, the terms '**refugee locally integrating**' or '**IDP locally integrating**' are not legal terms. Rather they describe a particular factual scenario of a person integrating into their local environment. According to the UNHCR:

Local integration in the refugee context is the end product of a multifaceted and on-going process, of which self-reliance is but one part. Integration requires a preparedness on the part of the refugees to adapt to the host society, without having to forego their own cultural identity. From the host society, it requires communities that are welcoming and responsive to refugees, and public institutions that are able to meet the needs of a diverse population. As a process leading to a durable solution for refugees in the country of asylum, local integration has three inter-related and quite specific dimensions:

First, it is a legal process, whereby refugees are granted a progressively wider range of rights and entitlements by the host State that are broadly commensurate with those enjoyed by its citizens. These include freedom of movement, access to education and the labour market, access to public relief

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<sup>43</sup> 1951 Convention, art. 1C. See, also, UNHCR, *Guidelines on International Protection: Cessation of Refugee Status under Article 1C(5) and (6) of the 1951 Convention relating to the Status of Refugees (the 'Ceased Circumstances' Clauses)*, UN Doc. HCR/GIP/02/01, 7 May 2002.



and assistance, including health facilities, the possibility of acquiring and disposing of property, and the capacity to travel with valid travel and identity documents. Realization of family unity is another important aspect of local integration. Over time the process should lead to permanent residence rights and in some cases the acquisition, in due course, of citizenship in the country of asylum.

Second, local integration is clearly an economic process. Refugees become progressively less reliant on State aid or humanitarian assistance, attaining a growing degree of self-reliance and becoming able to pursue sustainable livelihoods, thus contributing to the economic life of the host country.

Third, local integration is a social and cultural process of acclimatization by the refugees and accommodation by the local communities, that enables refugees to live amongst or alongside the host population, without discrimination or exploitation and contribute actively to the social life of their country of asylum. It is, in this sense, an interactive process involving both refugees and nationals of the host State, as well as its institutions. The result should be a society that is both diverse and open, where people can form a community, regardless of differences.<sup>44</sup> [here or later under legal regimes]

Finally, a **stateless person** is ‘a person who is not considered as a national by any State under the operation of its law.’<sup>45</sup> This definition describes a situation of *de jure* statelessness. However, some legal scholars (and the UNHCR, which refers to persons not having ‘an effective nationality’<sup>46</sup>) believe that focus on ‘legal status’ is too narrow as ‘it excludes those persons whose citizenship is practically useless or who cannot prove or verify their nationality.’<sup>47</sup> It is also possible for stateless persons to be refugees as defined under the second sentence in Article 1A(2) of the 1951 Convention.<sup>48</sup> In fact, it was initially incorrectly assumed that all *de facto* stateless

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<sup>44</sup> UNHCR Global Consultation on International Protection, *Local Integration*, UN Doc. EC/GC/02/6, 25 Apr. 2001, paras. 5-8 (footnotes omitted).

<sup>45</sup> Convention relating to the Status of Stateless Persons 1954, art. 1. In addition to defining statelessness in the 1954 Convention, this definition is presumed to define statelessness in the Convention on the Reduction of Statelessness 1961.

<sup>46</sup> UNHCR, *Statelessness: Prevention and Reduction of Statelessness and Protection of Stateless Persons*, UN Doc. EC/57/SC/CRP.6, 14 Feb. 2006, para. 2. See, also, UNHCR, *Statelessness: An Analytical Framework for Prevention, Reduction and Protection*, 2008.

<sup>47</sup> Weissbrodt, 84. See, further, C.A. Batchelor, ‘Stateless Persons: Some Gaps in International Protection’ (1995) 7 *Int’l J. Ref. L.* 232.

<sup>48</sup> The second sentence of Art. 1A(2) provides: ‘or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.’

persons were, and would conceivably be refugees and therefore benefit from the protection of the 1951 Convention.<sup>49</sup> This neglected that not all persons in a situation of *de facto* statelessness are subject to persecution or have left the country of their nationality.

### **III. THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN AND THE UNHCR: COMPLEMENTARY SUPERVISION**

The Committee is a body of 23 independent experts that monitors implementation of the CEDAW by states parties. It is established pursuant to the CEDAW and commenced its work in 1982.<sup>50</sup> The Committee sits on a part-time basis and meets three times per year for periods of three weeks per session.<sup>51</sup> It has four main functions.

First, the Committee receives and examines reports submitted by states parties on a periodic basis as the primary means of monitoring the implementation of treaty obligations.<sup>52</sup> Initial reports are due one year after ratification/accession, with follow-up reports due four years after the initial report, or whenever the Committee so requests.<sup>53</sup> The state party is expected to report on the steps taken to implement their obligations, including legislative, judicial, administrative, and other measures that have been adopted, and any difficulties that have been experienced in meeting treaty

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<sup>49</sup> Weissbrodt, 85, referring to C.A. Batchelor, 'Statelessness and the Problem of Resolving Nationality Status' (1998) 10 *Int'l J. Ref. L.* 156, 172.

<sup>50</sup> CEDAW, Pt V.

<sup>51</sup> CEDAW, art. 20 (originally envisaged 'not more than 2 weeks annually', but now the Committee meets for three sessions per year of three weeks' duration).

<sup>52</sup> CEDAW, art. 18.

<sup>53</sup> CEDAW, art. 18 (initial report after 1 year and then every 4 years or whenever requested).

obligations.<sup>54</sup> In order to ensure that reports supply adequate information for the Committee to do its work, there are guidelines on the form and content of state reports,<sup>55</sup> although there is considerable variation in the form in which reports are presented.<sup>56</sup>

In addition to the information furnished by the state party, the Committee receives information on a country's human rights situation from other sources, including UN agencies, other intergovernmental organisations, non-governmental organizations (NGOs), academic institutions, and the press.<sup>57</sup> The UNHCR, for example, regularly provides confidential comments on state party performance in respect of persons of concern to the Organization and as part of its supervisory functions. Most committees allocate specific plenary time to hearing submissions from UN agencies and NGOs. Depending upon when the information is received, related questions may be added to the list of issues submitted to the state party in advance of the session.

The second function of the Committee is that, from time to time, it issues authoritative statements or guidance to states parties on the meaning of substantive rights, the obligations of states parties, and other common issues (known as General Recommendations).<sup>58</sup> To date, the Committee has issued a total of 26 General

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<sup>54</sup> CEDAW, art. 18.

<sup>55</sup> See, e.g., UN, *Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to the International Human Rights Treaties*, UN Doc. HRI/GEN/2/Rev.2/Add.1, 6 May 2005.

<sup>56</sup> Office of the High Commissioner for Human Rights (OHCHR), *The Human Rights Treaty System: An Introduction to the Core Human Rights Treaties and the Treaty Bodies*, Fact Sheet No. 30 (undated), 28.

<sup>57</sup> OHCHR, *The Human Rights Treaty System: An Introduction to the Core Human Rights Treaties and the Treaty Bodies*, Fact Sheet No. 30 (undated), 30. In fact, the CEDAW provides explicitly for the receipt of such information (CEDAW, art. 22).

<sup>58</sup> CEDAW, art. 21.

Recommendations on various provisions of the treaty and related themes.<sup>59</sup> It has not issued General Recommendations on either displacement or the right to a nationality (art. 9).

By virtue of the Optional Protocol to the CEDAW (OP-CEDAW), agreed on 6 October 1999 without a vote by the General Assembly and entered into force on 22 December 2000, the third function of the Committee is to receive and to consider petitions by individuals alleging violation of one or more of their human rights by a state party (officially known as ‘individual communications’).<sup>60</sup> To date, the CEDAW has received ten individual complaints.

The fourth function of the Committee, also established by the OP-CEDAW, is an optional procedure to allow the Committee to respond to the receipt of reliable information indicating grave or systematic violations of human rights. This may include carrying out country visits. The Committee has only ever exercised this function on one occasion.<sup>61</sup>

Unlike many of the other treaty bodies,<sup>62</sup> there is no inter-state complaints mechanism.

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<sup>59</sup> The most recent General Recommendation is on women migrant workers and shows a willingness on the part of the Committee to engage with the context of migration-displacement and the application of its treaty provisions to non-nationals: CEDAW General Recommendation No. 26: Women Migrant Workers, 2008.

<sup>60</sup> *Optional Protocol to the CEDAW 2000*, GA res. 54/5, 15 Oct. 1999; entered into force 22 Dec. 2000 (OP-CEDAW), arts. 1-7.

<sup>61</sup> See, CEDAW, Report on Mexico produced by the Committee on the Elimination of Discrimination against Women under article 8 of the Optional Protocol to the Convention, and reply from the Government of Mexico, UN Doc. CEDAW/C/2005/OP.8/MEXICO, 27 Jan. 2005.

<sup>62</sup> See, e.g., OP-ICCPR, art. 41 (on an optional basis – subject to declaration accepting the jurisdiction of the HRC); ICERD, art. 11 (automatic jurisdiction upon ratification of the ICERD); UNCAT, art. 21 (on an optional basis – subject to declaration accepting jurisdiction of the CAT); IMWC, art. 76 (on an optional basis – subject to declaration accepting jurisdiction of the MWC, but it has yet to enter into force).

The main supervisory body overseeing the implementation by states parties of the 1951 Convention and/or 1967 Protocol and the 1954 and 1961 statelessness conventions is the UNHCR. The UNHCR's core mandate is to provide, on a non-political and humanitarian basis, international protection to refugees and to seek permanent solutions for them.<sup>63</sup> In addition, the UNHCR has 'supervisory responsibility' over the application of the provisions of the 1951 Convention and/or its 1967 Protocol.<sup>64</sup> The UNHCR is also mandated by the General Assembly as the lead agency with respect to conflict-driven IDPs.<sup>65</sup> How to enhance the supervisory capacity of the UNHCR has been under discussion for some time,<sup>66</sup> and the

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<sup>63</sup> Statute, art. 8. For more on UNHCR's mandate of 'international protection' see, W. Kälin, 'Supervising the 1951 Convention Relating to the Status of Refugees: Article 35 and beyond', in Feller, Turk and Nicholson (eds.), *Refugee Protection in International Law*, 614-666, 618-627.

<sup>64</sup> 1951 Convention, art. 35: '*Co-operation of the national authorities with the United Nations*: 1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention. 2. In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning: (a) The condition of refugees, (b) The implementation of this Convention, and (c) Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees. See, also, Art. II, 1967 Protocol. For more on UNHCR's mandate in respect of statelessness, see UNHCR, *Statelessness: Prevention and Reduction of Statelessness and Protection of Stateless Persons*, UN Doc. EC/57/SC/CRP.6, 14 Feb. 2006.

<sup>65</sup> On UNHCR's mandate over conflict-driven IDPs, see supra n. 6.

<sup>66</sup> It has, for example, been proposed to establish a Sub-Committee on Review and Monitoring (with many of the functions of the treaty body reporting procedures) (Kälin, 657-658), an international

Organization has been seeking cooperation and collaboration with other UN agencies and bodies to facilitate its work.

Unlike the CEDAW, there are no formal structures relating to how its supervisory role is to be performed. Article 35 of the 1951 Convention stipulates that state parties are to provide to the UNHCR information pertaining to conditions of refugees, the implementation of the Convention, and existing or proposed laws, regulations and decrees relating to refugees. However, there is no periodic state reporting requirement equivalent to the treaty body system, although states parties have been requested from time to time to communicate on particular issues to the UNHCR<sup>67</sup> and such information forms part of its annual protection reports (which remain confidential) and other public statements.<sup>68</sup> The CEDAW's public, systematic and periodic state reporting mechanism offers, therefore, a supplementary review process over complementary substantive issues. Although the limited time and resources available to the Committee 'make it unlikely that [it] will be able to deal in detail or systematically with issues relating to displacement and refugees ... at this time [it] remain[s] underutilized as [a forum] for the protection of refugees and displaced

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refugee court (Haines), or at least to discuss the issue of supervision (J.C. Hathaway, 'Taking Oversight of Refugee Law Seriously', in series of working papers drafted in light of the 50<sup>th</sup> anniversary of the 1951 Convention, and published at: <http://www.icva.ch/doc00000489.html>). Türk has recommended a closer analysis of the two systems (the human rights system and the refugee protection system) and perhaps the creation of a new 'mechanism' in the area of refugee rights would be useful, but one that should build on the work already undertaken by the UNHCR and avoid the problems associated with the human rights treaty monitoring mechanisms: V. Türk, 'UNHCR's Supervisory Responsibility', Working Paper N. 67, *New Issues in Refugee Research*, UNHCR, Oct. 2002. On various other proposals for improved supervision see, inter alia, A.C. Helton, 'Displacement and Human Rights: Current Dilemmas in Refugee Protection' (1994) 47 *J. Int'l Aff.* 379, at 389: 'Monitoring by a UN court for the protection of refugees and displaced persons would accord to aggrieved individuals or representative groups a right of petition to redress violations of international refugee and human rights law, thus protecting their rights and achieving greater uniformity in the interpretation of the refugee status criteria.'

<sup>67</sup> See, e.g., UN Sub-Commission on Human Rights, res. 2000/21, *Detention of Asylum-Seekers*, 27<sup>th</sup> meeting, 18 Aug. 2000, para. 7, requested state parties to provide information to the UNHCR on how detention policies and practices conform with UNHCR's *Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-Seekers*, Feb. 1999, para. 1.

<sup>68</sup> Kälin, 624.

persons.<sup>69</sup> Nonetheless, there are openings for enhanced mutual collaboration and cooperation between the UNHCR and the Committee in monitoring the implementation of human rights obligations in respect of displaced and stateless women.<sup>70</sup> The preparation of this paper is one step in this process. In its 2008 state party reviews, for example, the Committee called on states parties to the CEDAW, inter alia, to strengthen their cooperation with the UNHCR,<sup>71</sup> welcomed cooperation agreements signed between the UNHCR and states parties,<sup>72</sup> and recommended states parties to the CEDAW to accede to relevant refugee protection instruments, in particular the 1951 Convention and/or 1967 Protocol.<sup>73</sup>

Like the Committee, the UNHCR also issues authoritative statements on the interpretation and application of the treaties it supervises. These statements and policy guidance regularly draw upon developments in international human rights law, and have been recognised by various national courts as ‘a useful resource’, ‘an important source of law’, or ‘considerable persuasive authority’.<sup>74</sup>

Moreover, the individual complaints procedure of the CEDAW grants to displaced and stateless avenues to access justice. Apart from writing a letter of complaint to the UNHCR or exercising rights in domestic legal settings, no formal complaints

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<sup>69</sup> M. Stavropoulou, ‘Displacement and Human Rights: Reflections on UN Practice’ (1998) 20 *Hum. Rts. Qlty* 515, at 540.

<sup>70</sup> For more on the inter-relationship between human rights and refugee laws, see A. Edwards, Crossing Legal Borders: The Interface Between Refugee Law, Human Rights Law and Humanitarian Law in the “International Protection” of Refugees’, in R. Arnold and N. Quenivet (eds). *International Humanitarian Law and International Human Rights Law: Towards a New Merger in International Law* (Brill, 2008) Ch. 16.

<sup>71</sup> E.g., Morocco, 40<sup>th</sup> session, para. 257, Yemen, 41<sup>st</sup> session, para. 356; Tanzania, 41<sup>st</sup> session, para. 145: CEDAW, Annual Report 2008, UN Doc. A/63/38 (2008).

<sup>72</sup> E.g., Morocco, 40<sup>th</sup> session, para. 257, Yemen, 41<sup>st</sup> session, para. 356; Tanzania, 41<sup>st</sup> session, para. 145: CEDAW, Annual Report 2008, UN Doc. A/63/38 (2008).

<sup>73</sup> E.g., Lebanon, 40<sup>th</sup> session, para. 201: CEDAW, Annual Report 2008, UN Doc. A/63/38 (2008).

<sup>74</sup> See, Kälin, 626-627, who refers to a range of decisions of various national courts.

procedures exist under the 1951 Convention and/or its 1967 Protocol, or under the statelessness conventions. Asylum-seekers and refugees are now regular users of the petitions procedures available under the other international and regional human rights treaties,<sup>75</sup> but they have yet to exercise their rights in the same way under the CEDAW. It is possible to envisage, for example, an individual communication being lodged by a rejected female asylum-seeker who has been denied refugee status on the basis of a refusal to recognise her fear of gender-related forms of persecution or because sex/gender has not been recognised as a ground to asylum in the relevant domestic procedure, as potential candidates for individual complaints to the Committee.<sup>76</sup> It is also possible to imagine cases being brought by women refugees living in states parties in which there are inadequate protections against violence against women, including violence linked to ethnic, religious or economic discrimination. Or where there are no procedures to determine statelessness and/or to challenge discriminatory domestic nationality laws, which do not allow a mother to confer her nationality to her child

As a field-based agency of the UN, the UNHCR's 'international protection' activities are aimed at 'ensuring the basic rights of refugees, and ... their physical safety and security',<sup>77</sup> beginning 'with securing admission, asylum, and respect for basic human rights, including the principle of *non-refoulement*' and ending 'only with the

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<sup>75</sup> See, B. Gorlick, 'Human Rights And Refugees: Enhancing Protection Through International Human Rights Law', UNHCR New Issues in Refugee Research Working Paper No. 3, Oct. 2000, *available at*: [www.unhcr.org/research/RESEARCH/3ae6a0cf4.pdf](http://www.unhcr.org/research/RESEARCH/3ae6a0cf4.pdf); O. Andrysek, 'Gaps in International Protection and the Potential for Redress through Individual Complaints Procedures' (1997) 9 *Int'l J. Ref. L.* 392.

<sup>76</sup> The Committee has recommended to states parties to the CEDAW to introduce gender-sensitive asylum procedures on several occasions: e.g. Lebanon (40<sup>th</sup> Session, paras. 200-201), UK (41<sup>st</sup> Session, paras. 295-296), Sweden (40<sup>th</sup> Session, para. 361): Annual Report 2008, UN Doc. A/63/38 (2008); Australia (para. 22), Malawi (paras. 35-36), Malaysia (paras. 27-28); China (paras. 33-34): Annual Report 2006, UN Doc. A/61/38 (2006); Italy (32<sup>nd</sup> Session, paras. 332-333), Ireland (33<sup>rd</sup> Session, paras. 364 and 367): Annual Report 2005, UN Doc. A/60/38 (2005).

<sup>77</sup> UNHCR, Note on International Protection, UN Doc. A/AC.96/930, 7 July 2000, para. 2. See, also, UNHCR, Note on International Protection, UN Doc. A/AC.96/830, 7 Sept. 1994, para. 12.



attainment of a durable solution, ideally through the restoration of protection by the refugee's own country.<sup>78</sup> 'Protection includes ensuring that the special needs of refugee women, particularly victims of violence, and of children, especially those separated from their families, are met.'<sup>79</sup> The UNHCR is both at the cold face of assistance delivery and at the same time, performs supervisory functions that require it to monitor and supervise the activities of governments, often in countries where it works hand-in-hand with the government, or where it in fact fulfils the primary role of protecting refugees.<sup>80</sup> In the context of IDPs, the UNHCR's position and mandate is reliant upon the enabling environment provided by the state itself.<sup>81</sup> Third party supervision can thus be helpful, and in some circumstances it may be necessary, to reduce the impact of the UNHCR's own conflict of interest on the protection of displaced persons.<sup>82</sup>

Although the CEDAW has only undertaken one fact-finding mission to date, this mechanism represents a further opportunity for monitoring the rights of displaced and stateless women. At a minimum, the Committee can enter into dialogue with the state party in question, but conducting a visit requires the consent of the state party.

Overall the Committee's four main functions can serve to complement the role of the UNHCR in overseeing implementation of rights for displaced and stateless women.

#### **IV. THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF**

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<sup>78</sup> UNHCR, Note on International Protection, para. 12.

<sup>79</sup> *Ibid.*

<sup>80</sup> See, A. Edwards, 'The Optional Protocol to the Convention against Torture and the Detention of Refugees' (2008) 57 *Int'l & Comp. L. Qty* 789-825.

<sup>81</sup> On debates regarding whether the UNHCR should be involved in IDPs and difficulties in this regard, see (2007) 20(3) *J. Ref. Studies*.

<sup>82</sup> On conflict of interest, see further Kälin.

## DISCRIMINATION AGAINST WOMEN: FUNDAMENTAL PRINCIPLES

Building on universal principles that ‘all human beings are born equal in dignity and rights’<sup>83</sup> and ‘[belief in] the dignity and worth of the human person, the equal rights of men and women and of nations large and small’<sup>84</sup>, the CEDAW is a discrimination-based treaty that codifies and strengthens the rights of women. Like other human rights treaties, it applies to all women regardless of their nationality, citizenship or other legal status, including immigration or marital status.<sup>85</sup> The CEDAW has been referred to as an International Bill of Rights for Women.<sup>86</sup> It sets out a range of civil, political, economic, social and cultural rights for women and covers a variety of situations in which women face discrimination, including in politics, the economy, the family, labour, education and health. Many of these rights are relevant to displaced and stateless persons and are explored in more detail below.

Article 1 defines ‘discrimination against women’ as:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.<sup>87</sup>

Article 1 is similarly worded to international definitions of discrimination on other

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<sup>83</sup> UDHR, art.1.

<sup>84</sup> UN Charter, pmbl para. 2.

<sup>85</sup> See, GA Declaration on the Human Rights of Individuals who are not Nationals of the Countries in Which they Live, GA res. 40/144, 13 Dec. 1985; HRC General Comment No. 15: The position of aliens under the Covenant (1986); CERD General Recommendation No. 11: Non-Citizens (1993); CERD General Recommendation No. 20: Non-Discriminatory implementation of rights and obligations (1996); CERD General Recommendation No. 22: Art. 5 and refugees and displaced persons (1996); CERD General Recommendation No. 30: Discrimination against Non-Citizens (2004); CEDAW General Recommendation No. 26: Women migrant workers (2008); CRC General Comment No. 6: Treatment of unaccompanied and separated children outside their country of origin (2005).

<sup>86</sup> See, e.g., A. Byrnes and J. Connors, *The International Bill of Rights for Women: The Impact of the CEDAW Convention* (Oxford University Press, forthcoming 2009).

<sup>87</sup> CEDAW, art. 1.

grounds.<sup>88</sup> Endorsing a broad reading of discrimination, the Committee has stated that '[t]he Convention goes beyond the concept of discrimination used in many national and international legal standards and norms. While such standards and norms prohibit discrimination on the grounds of sex and protect both men and women from treatment based on arbitrary, unfair and/or unjustifiable distinctions, the Convention focuses on discrimination against women, emphasizing that women have suffered, and continue to suffer from various forms of discrimination because they are women.'<sup>89</sup>

This definition has been praised in particular for moving beyond the notion of formal equality to ideas of substantive equality, and dispensing with the traditional Aristotelian model of equality of comparing like alike, or not treating unequals unequally.<sup>90</sup> The traditional view of equality is problematic for women on two levels. First, it assumes that the point of comparison is male; and second, it cannot be applied where a comparable male is missing.<sup>91</sup> The CEDAW instead focuses on the eradication of policies and practices which have the 'purpose or effect' of 'impairing or nullifying' women's human rights. In pursuit of equality, therefore, the CEDAW permits and provides for special (or differential) treatment of women. As MacKinnon argues: 'The fundamental issue of equality is not whether one is the same or different;

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<sup>88</sup> E.g., ICERD, art. 1(1) defines racial discrimination as: 'any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.' See, also, ICRPD, art. 2 and HRC, General Comment No. 18: Non-Discrimination (1989), UN Doc. HRC/GEN/1/Rev.5, para. 7: 'the [Human Rights] Committee believes the term 'discrimination' as used in the ICCPR should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.'

<sup>89</sup> CEDAW General Recommendation No. 25: Temporary Special Measures, 2004, para. 5.

<sup>90</sup> W. McKean, *Equality and Discrimination under International Law* (Oxford: Clarendon Press, 1983), 3.

<sup>91</sup> K. Frostell, 'Gender Difference and the Non-Discrimination Principle in the CCPR and the CEDAW', in L. Hannikainen and E. Nykänen (eds.), *New Trends in Discrimination Law – International Perspectives* (Turku, Finland: Turku Law School, 1999) 29, 29.

it is not the gender difference; it is the difference gender makes.’<sup>92</sup>

This view is reflected in the Committee’s jurisprudence:

... the Convention requires that women be given an equal start and that they be empowered by an enabling environment to achieve equality of results. It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account. Under certain circumstances, non-identical treatment of women and men will be required in order to address such differences.<sup>93</sup>

The Committee has held that ‘discrimination against women is a multifaceted phenomenon that entails indirect and unintentional as well as direct and intentional discrimination’.<sup>94</sup> It has argued against maintaining a sole focus on formal or *de jure* equality, because doing so ‘tends to impede a proper understanding of the complex issue of discrimination, such as structural and indirect discrimination’.<sup>95</sup> Both qualitative and quantitative equality are considered to be at the heart of the CEDAW.<sup>96</sup> The Committee has also regularly referred to double or multiple discrimination, in which one’s experience of gender may be influenced by other factors, such as race, religion, nationality, poverty, age, or sexuality.<sup>97</sup> In particular, the Committee has stated:

Certain groups of women, in addition to suffering from discrimination directed against them as women, may also suffer from multiple forms of discrimination based on additional grounds such as race, ethnic or religious identity, disability, age, class, caste or other factors. Such discrimination may affect these groups of

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<sup>92</sup> C.A. MacKinnon, ‘Making Sex Equality Real’, in C.A MacKinnon, *Are Women Human? And Other International Dialogues* (Cambridge, MA: Harvard University Press, 2006) 71, 74.

<sup>93</sup> CEDAW General Recommendation No. 25: Temporary Special Measures, 2004, para. 8.

<sup>94</sup> CEDAW, Concluding observations on Ukraine, UN Doc. A/57/38 (Part II), para. 279 (2002); Kyrgyzstan, UN Doc. A/54/38/Rev.1 (Part I), para. 113 (1999).

<sup>95</sup> CEDAW, Concluding observations on Bulgaria, UN Doc. A/53/38/Rev.1 (Part I), para. 232 (1998).

<sup>96</sup> CEDAW, General Recommendation No. 25: Temporary Special Measures (Art. 4(1)) (2004), UN Doc. HRI/GEN/1/Rev.7, para. 9.

<sup>97</sup> See, CEDAW, Concluding observations on Spain (31<sup>st</sup> Session, para. 338): Annual Report 2004, UN Doc. A/59/38 (2004) (regarding migrants); Norway (para. 413): Annual Report 2003, UN Doc. A/58/38 (2003) (concern for multiple discrimination faced by migrant, refugee and minority women with respect to access to education, employment and health care and exposure to violence).

women primarily, or to a different degree or in different ways than men. States parties may need to take specific temporary special measures to eliminate such multiple forms of discrimination against women and its compounded negative impact on them.<sup>98</sup>

It is clear that displaced and stateless women can face multiple forms of discrimination, related to their gender coupled with their ethnicity, race, religion, culture, socio-economic status, or immigration, or other status.<sup>99</sup>

Moreover, in condemning discrimination against women in all its forms and calling on governments to take all appropriate measures to eliminate such discrimination, whether perpetrated by the state directly or ‘by any person, organization or enterprise’,<sup>100</sup> the CEDAW prohibits discrimination in the public as well as in the private sphere.

As noted above, the CEDAW permits the introduction of temporary special measures (a.k.a. time-limited measures of affirmative action) and stipulates that these measures shall not be considered discrimination.<sup>101</sup> Furthermore, Articles 2(f) and 5(a) impose obligations upon states to address cultural and traditional practices that constitute discrimination against women and, in effect, to seek to redress structural causes of

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<sup>98</sup> CEDAW, General Recommendation No. 25: Temporary Special Measures (Art. 4(1)) (2004), UN Doc. HRI/GEN/1/Rev.7, para. 12.

<sup>99</sup> See, e.g., the Committee noted that in France ‘immigrant women ... continue to suffer from multiple discrimination, including with regard to access to education ...’ (CEDAW, Concluding comments on France, 40<sup>th</sup> Session, Annual Report 2008, UN Doc. A/63/38 (2008), para. 326); ‘Vulnerable groups of women, for example ... migrant women ... continue to suffer from discrimination in education, employment, health, housing and other areas based on their sex and gender and on other grounds, thus being exposed to multiple forms of discrimination’ (CEDAW, Concluding comments on Lithuania, 41<sup>st</sup> Session, Annual Report 2008, UN Doc. A/63/38 (2008), paras. 84-85).

<sup>100</sup> Art. 2, CEDAW.

<sup>101</sup> Art. 4, CEDAW provides: 1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory  
See, further, GR on TSM ...

inequality.<sup>102</sup> These provisions require governments to act to eradicate practices, customs and social stereotypes that reinforce the inferiority of women. They reinforce arguments about the universality of human rights, and dismiss contrary arguments that human rights are culturally relative or that culture should trump women's rights.<sup>103</sup>

The Committee has stipulated that Articles 1-5 read conjointly with Article 24 form the fundamental framework of the Convention and impose three main obligations upon States parties:

Firstly, States parties' obligation is to ensure that there is no direct or indirect discrimination against women in their laws and that women are protected against discrimination — committed by public authorities, the judiciary, organizations, enterprises or private individuals — in the public as well as the private spheres by competent tribunals as well as sanctions and other remedies.

Secondly, States parties' obligation is to improve the de facto position of women through concrete and effective policies and programmes.

Thirdly, States parties' obligation is to address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions.<sup>104</sup>

Beyond the core provisions are a group of provisions (Articles 6-16) which deal with

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<sup>102</sup> For more, see R. Holtmaat, 'Preventing Violence against Women: The Due Diligence Standard with Respect to the Obligation to Banish Gender Stereotypes on the Grounds of Article 5(a) of the CEDAW Convention', in C. Benninger-Budel (ed.), *Due Diligence and its Application to Protect Women from Violence* (Leiden and Boston: Martinus Nijhoff Publishers, 2008) 63-89.

<sup>103</sup> For more on women's rights and universality-cultural relativity arguments, see C. Harries, 'Daughters of Our Peoples: International Feminism Meets Ugandan Law and Custom' (1984) 25 *Colum. Hum. Rts. L. Rev.* 493; V. Amos and P. Parmar, 'Challenging Imperial Feminism' (1984) 17 *Feminist Rev.* 3; J.A.M. Cobbah, 'African Values and the Human Rights Debate: An African Perspective' (1987) 9 *HRQ* 309; A.P. Harris, 'Race and Essentialism in Feminist Legal Theory' (1990) 42 *Stan. L. Rev.* 581; N. Kim, 'Toward a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism' (1993) 25 *Colum. Hum. Rts. L. Rev.* 49; J. Oloka-Onyango and S. Tamale, "'The Personal is Political" or Why Women's Human Rights are Indeed Human Rights: An African Perspective on International Feminism' (1995) 17 *HRQ* 691; T.E. Higgins, 'Anti-Essentialism, Relativism, and Human Rights' (1996) 19 *Harv. Women's L. J.* 89; E. Brems, 'Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse' (1997) 19 *HRQ* 136; K. Engle, 'Culture and Human Rights: The Asian Values Debate in Context' (2000) 32 *NYU J. Int'l L. & Pol.* 291.

<sup>104</sup> CEDAW General Recommendation No. 25: Temporary Special Measures, 2004, para. 7.

discrimination in specific areas of life. Article 6 aims to suppress all forms of traffic in women and exploitation of women in prostitution. Article 7 guarantees equality of political participation of women and men (noting that this is one area in which the rights of non-nationals can be restricted according to international law<sup>105</sup> and that the CEDAW guarantees women's equal rights to political and public life as those enjoyed by men<sup>106</sup>). Article 9 grants to women equal rights with men in regard to nationality. In particular, it clarifies that a woman's nationality should not automatically be changed by marriage or a change in her husband's nationality. Being specifically relevant to the discussion of statelessness, the right to a nationality is discussed further under V below. Economic, social and cultural rights are guaranteed in Articles 10 (education), 11 (employment), 12 (health and family planning), 13 (family benefits, credit, and cultural life), and 14 (equality for rural women). Article 15 reaffirms the recognition of equality before the law between women and men, especially in the fields of legal capacity, freedom of movement, and choice of residence. Finally, equality in all matters relating to family life and marriage is protected by Article 16.

One obvious omission from this catalogue of rights is a provision outlawing violence against women.<sup>107</sup> Moreover, the main provisions used in other human rights instruments to protect against particular forms of violence were not transcribed to the

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<sup>105</sup> See supra n. 85.

<sup>106</sup> Art. 7 of the CEDAW provides: 'States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right: (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies; (b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government; (c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.'

<sup>107</sup> For historical overview of the approach of human rights to violence against women, see S.E. Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago and London: The University of Chicago Press, 2006).

CEDAW.<sup>108</sup> In response to this gap in the law, the Committee has stated that violence against women is a form of sex discrimination and therefore rightly within its mandate.

In its first General Recommendation on violence against women, issued in 1989, the Women's Committee stated that Articles 2, 5, 11, 12, and 16 of the CEDAW imposed obligations on states parties to protect women against violence of any kind occurring within the family, at the workplace, or in any other area of social life.<sup>109</sup> Elaborating upon its earlier position, the Women's Committee adopted a more comprehensive General Recommendation in 1992 in which it dealt with individual treaty provisions and links between sex discrimination and violence against women.<sup>110</sup> The Women's Committee was particularly concerned that, despite its 1989 General Recommendation, not all state party reports adequately reflected the close connection between discrimination against women, gender-based violence, and violations of human rights and fundamental freedoms.<sup>111</sup>

The 1992 General Recommendation that ensued declared that '[g]ender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy

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<sup>108</sup> For example, the rights to liberty and security of person, to be free from torture or other cruel, inhuman or degrading treatment or punishment, and to life contained in the ICCPR (arts. 9, 7, and 6 respectively) are not reiterated in the CEDAW. Further discussion, Alice Edwards, 'The "Feminizing" of Torture under International Human Rights Law' (2006) 19 *Leiden J. Int'l L.* 349-391 and A. Edwards, 'Violence against Women as Sex Discrimination: Judging the Jurisprudence of the UN Human Rights Treaty Bodies' (2009) 18 *Texas J. Women & the L.* 101-165,

<sup>109</sup> CEDAW, General Recommendation No. 12: Violence against Women (1989), UN Doc. HRC/GEN/1/Rev.7, Preamble.

<sup>110</sup> CEDAW, General Recommendation No. 19: Violence against Women (1992), UN Doc. HRI/GEN/1/Rev.7.

<sup>111</sup> *Ibid.*, Background para. 4.



rights and freedoms on a basis of equality with men'.<sup>112</sup> It stated that the definition of 'discrimination' in Article 1 of the CEDAW:

includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.<sup>113</sup>

Clarifying its approach, the Committee stated:

Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 of the Convention.<sup>114</sup>

In particular, the Committee held that '[g]ender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence'.<sup>115</sup>

In many ways, these General Recommendations have transformed the CEDAW from an anti-discrimination treaty into a gender-based violence treaty. The Committee routinely addresses this issue in respect of almost every state, including occasionally in the context of displacement.<sup>116</sup>

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<sup>112</sup> CEDAW, General Recommendation No. 19: Violence against Women (1992), UN Doc. HRI/GEN/1/Rev.7, Background para. 1.

<sup>113</sup> CEDAW, General Recommendation No. 19: Violence against Women (1992), UN Doc. HRI/GEN/1/Rev.7, para. 6.

<sup>114</sup> CEDAW, General Recommendation No. 19: Violence against Women (1992), UN Doc. HRI/GEN/1/Rev.7, para. 7.

<sup>115</sup> *Ibid.*, para. 6.

<sup>116</sup> See, e.g., CEDAW, Concluding observations on Switzerland (para. 120) (concern about particular situation of foreign women who experience domestic violence); Japan (para. 316) (concern about foreign victims of domestic violence whose immigration status might depend on their living with their spouse): Annual Report 2003, UN Doc. A/58/38 (2003); Fiji (26<sup>th</sup> Session, para. 58) (high incidence of ethnic and gender based violence against women in periods of civil unrest), Sri Lanka (26<sup>th</sup> Session, para. 282) (concern for women pregnant as a result of rape or incest and physical and mental torture; targeting of Tamil women by police and security forces in conflict zones): Annual Report 2002, UN Doc. A/57/38 (2002).

In its 1992 General Recommendation, the Women’s Committee, furthermore, drew a link between custom and tradition, and violence. The General Recommendation provided that ‘[t]raditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision’.<sup>117</sup> The Committee further stated that ‘[s]uch prejudices and practices may justify gender-based violence as a form of protection or control of women’ as well as contribute to the maintenance of women in subordinate roles, their low level of political participation, and low levels of education, skills, and work opportunities.<sup>118</sup> In other words, ‘[t]he effect of such violence on the physical and mental integrity of women is to deprive them of the equal enjoyment, exercise, and knowledge of human rights and fundamental freedoms’.<sup>119</sup> Moreover, the Committee asserted that ‘[t]hese attitudes also contribute to the propagation of pornography and the depiction and other commercial exploitation of women as sexual objects, rather than as individuals. This in turn contributes to gender-based violence.’<sup>120</sup>

## V. DISPLACEMENT AND GENDER EQUALITY

Displaced women, like all women, are entitled to benefit from the rights contained in the CEDAW and they should not be discriminated against in any sphere of life.<sup>121</sup>

Like all women, displaced women face many barriers to the equal enjoyment of their

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<sup>117</sup> CEDAW, General Recommendation No. 19: Violence against Women (1992), UN Doc. HRI/GEN/1/Rev.7, para. 11.

<sup>118</sup> *Ibid.*

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*, para. 12.

<sup>121</sup> CEDAW, General Recommendation No. 26: Women Migrant Workers (2008), para. 1 (affirming that ‘migrant women, like all women, should not be discriminated against in any sphere of their life’).

human rights, but they also face **additional obstacles and hardships** arising from the fact of being either outside their country of origin or away from their homes. Discrimination may be compounded, inter alia, because of her legal status (or lack of or precarious legal status) in the asylum country (or loss of documentation needed to access local services, including social housing, in internal displacement situations), socio-economic position, trauma arising from armed conflict or persecution, prior subjection to violent conduct, loss of livelihood and family, or cultural, social and linguistic differences between themselves and their displacement country and/or community.

As noted above, discrimination against women can occur **at all stages in the displacement cycle**.<sup>122</sup> Flight is often triggered, for example, by severe sex discrimination and gender-based persecution.<sup>123</sup> These gendered dimensions of displacement may further be compounded by discrimination and abuse on other grounds, such as ethnicity, religion, and class. Sex discrimination is also evident in refugee status determination procedures in many countries of asylum, in which the gendered nature of persecution may not be recognized or where sex/gender may not be seen as a legitimate ground for asylum.<sup>124</sup>

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<sup>122</sup> See, further, S.F. Martin, *Refugee Women* (2<sup>nd</sup> ed., Lexington Books, 2004); E.K. Baines, *Vulnerable Bodies: Gender, The UN, and the Global Refugee Crisis* (Ashgate, 2004).

<sup>123</sup> See, Edwards, 'Age and Gender Dimensions in International Refugee Law'; H. Crawley, *Refugees and Gender: Law and Process* (Jordans, 2001); T. Spijkerboer, *Gender and Refugee Status* (Ashgate, 200); A. Macklin, 'Refugee Women and the Imperative of Categories' (1995) 17 *Hum. Rts. Qlty* 213.

<sup>124</sup> *ibid.* See, e.g., CEDAW Concluding comment on Lebanon, 41<sup>st</sup> Session, Annual Report 2008, UN Doc. A/63/38 (2008): 'It also recommends that the State party full integrate a gender-sensitive approach throughout the process of granting asylum/refugee status ...' (paras. 200-201); UK, 41<sup>st</sup> Session, Annual Report 2008, UN Doc. A/63/38 (2008) : 'It notes that asylum on the grounds of gender-related persecution, including violence against women, is frequently granted ...' (paras. 295-296); Sweden, 40<sup>th</sup> Session, Annual report 2008, UN Doc. A/63/38 (2008): 'The Committee welcomes the amendment of the Swedish Aliens Act in 2006, which provides for the granting of refugee status to persons claiming fear of persecution on grounds of gender and sexual orientation and which will be of benefit to women refugees' (para. 361).

Moreover, **women's access to asylum procedures** and related services may be hindered by gender factors. Even if her claim to asylum, for example, relates to racially- or politically- motivated persecution, she may still face difficulties presenting her case because of gendered barriers to asylum, such as lack of access due to assumptions by asylum authorities that her husband is the 'proper' claimant, culturally or religiously insensitive interviews and interview settings, or lack of child care facilities to care for any children.<sup>125</sup>

However, even before she has access to asylum proceedings, there are many factors that can **prevent a women reaching her asylum destination.** These can include restrictions on the freedom of movement of women in her country of origin,<sup>126</sup> lack of necessary documentation, including passports, legal requirements for permission from husbands to travel,<sup>127</sup> or cultural factors that put women travelling alone or without male family members at risk of violence. Women and girls may also be forced into providing sexual services in exchange for safe passage for themselves or their families, or to obtain necessary documentation or other assistance.<sup>128</sup> Many of these same restrictions may also be imposed upon IDP women.

Women also often suffer discrimination and related human rights abuses throughout

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<sup>125</sup> See by analogy the CERD's General Recommendation No. XXV: Gender-Related Dimensions of Racial Discrimination (2000), UN Doc. HRI/GEN/1/Rev.7, in which the CERD notes that 'Women may also be further hindered by a lack of access to remedies and complaint mechanisms for racial discrimination because of gender-related impediments, such as gender bias in the legal system and discrimination against women in private spheres of life.'

<sup>126</sup> CEDAW, art. 15(4).

<sup>127</sup> See, by analogy, CEDAW, General Recommendation No. 26: Women Migrant Workers, UN Doc. CEDAW/C/2009/WP.1/R.

<sup>128</sup> *Women, Peace and Security*, Study Submitted by the Secretary-General pursuant to Security Council Resolution 1325 (2000), 2002, at <http://www.un.org/womenwatch/daw/public/eWPS.pdf>, paras. 93-108.

their **settlement and return**. Displacement, whether internal<sup>129</sup> or international, weakens existing community and family protection mechanisms, which exposes refugee and IDP women and girls to sexual and gender-based violence.<sup>130</sup> Increased militarization and the presence of both civilians and combatants in camps heighten insecurity for all refugees and IDPs, but women and girls may be exposed to particular forms of insecurity. Poorly lit camps, or those that lack adequate security, place women and girls at heightened risk of attack by men inside and outside of the camps and settlements.<sup>131</sup>

**Responsibilities of women and girls**, dictated by social and cultural norms, such as those relating to the collection of water and firewood, can heighten a woman's risk of injury and violence outside camps, including from landmines, banditry or sexual attack.<sup>132</sup> Distribution systems that allocate food and non-food items to the 'head of the household', often interpreted as the male family member, have been found to deprive women and their children of food security and exacerbate the neglect and malnourishment of women and children.<sup>133</sup> Measures adopted to reduce this risk, such as distributing such items to women, have yet to fully resolve the problem of family tensions and family-based violence, which can be exacerbated by such measures if

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<sup>129</sup> On the gender dimensions of internal displacement, see J.A. Benjamin and K. Fancy, *The Gender Dimensions of Internal Displacement: Concept Paper and Annotated Bibliography* (Women's Commission on Refugee Women and Children, Nov. 1998).

<sup>130</sup> See, e.g., UNHCR and Save the Children UK, 'The Experience of Refugee Children in Guinea, Liberia and Sierra Leone based on Initial Findings and Recommendations from Assessment Mission 22 October – 30 November 2001', Feb. 2002, referred to in *Women, Peace and Security*, Study Submitted by the Secretary-General pursuant to Security Council Resolution 1325 (2000), 2002, at <http://www.un.org/womenwatch/daw/public/eWPS.pdf>, paras. 93-108.

<sup>131</sup> UNHCR, *Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons: Guidelines on Prevention and Response*, May 2003 [SGBV Guidelines], available at: <http://www.unhcr.org/refworld/pdfid/3edcd0661.pdf> and UNHCR, Handbook on the Protection of Women and Girls, Pt 5.3.

<sup>132</sup> *Women, Peace and Security*, Study Submitted by the Secretary-General pursuant to Security Council Resolution 1325 (2000), 2002, at <http://www.un.org/womenwatch/daw/public/eWPS.pdf>, paras. 93-108.

<sup>133</sup> UNHCR, SGBV Guidelines and UNHCR, Handbook on the Protection of Women and Girls.

they are not implemented in consultation with the community, or they may add burdens on women who now have the added responsibility for collecting the food and non-food items. That is, it can contribute to women's allocation to family-related activities and prevent their full participation in other aspects of community life. Similar efforts to transport firewood to camps to reduce the need for women to walk long distances to collect it, which increases their risk of attack, have produced some important short-term benefits (reduction in such attacks), but they have done little to address the underlying causes of structural inequality. Although much has now been done to address the shortcomings in some of these programmes,<sup>134</sup> the problems remain.

Article 5(a) of the CEDAW requires states to deal with the **root causes of inequality** that lie in patriarchal cultures and religions and to engage with and to take steps to eradicate them:

Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms.<sup>135</sup>

The obligation contained in the CEDAW is not simply for states parties to respond to the consequences of discrimination (e.g. to bring the firewood to women), but rather 'to take all appropriate measures ... to modify the social and cultural patterns of

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<sup>134</sup> Women's Commission on Refugee Women and Children, *UNHCR Policy on Refugee Women and Guidelines on Their Protection: An Assessment of Ten Years of Implementation*, May 2002, Pt 4.4.3, available at: <http://www.womenscommission.org/pdf/unhcr.pdf> and WCRWC, *Beyond Firewood: Fuel Alternatives and Protection Strategies for Displaced Women and Girls*, Mar. 2006, available at: <http://www.womenscommission.org/pdf/fuel.pdf> (recommending alternative fuel sources, but not addressing broadly the role of women in food preparation and the fuel sourcing).

<sup>135</sup> CEDAW, General Recommendation No. 19: Violence against Women, 1992, para. 11.

conduct of men and women ...'<sup>136</sup> Articles 5(b) and 16(c) further recognise the common responsibility of men and women in the upbringing and development of their children. Read together Articles 5(a) and 2(f) have been interpreted as to establish an *immediate obligation*, and not an obligation merely to take steps with a view to achieving progressively the full realisation of rights, as required in the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>137</sup> The Committee itself has recognised that 'unequal power relationships between women and men in the home and workplace may [also] negatively affect women's nutrition and health.'<sup>138</sup>

Failure to **individually register all refugees**, especially adult women, can make refugee women 'non-persons' and unable to access the assistance and help that they need. Articles 3 and 15 of the CEDAW require that women shall be equal before the law and shall enjoy equality in all fields. Access to identity documentation and legal status must be ensured as a prerequisite to equal access and enjoyment of many rights. It can also place them in an unequal position vis-à-vis their husbands or other male family members and reinforces their unequal position in society. Accessing assistance and services and enjoying basic rights, including freedom of movement and family reunification, is often dependent on proof of identity.<sup>139</sup> Refugee and IDP women who lack adequate registration and personal documentation, including identity cards, marriage certificates, divorce certificates, and birth certificates for their children have

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<sup>136</sup> CEDAW, art. 5(a).

<sup>137</sup> H.J. Steiner and P. Alston, *International Human Rights in Context: Law, Politics and Morals* (2<sup>nd</sup> ed., Oxford University Press, 2000), 179, as cited in F. Raday, 'Culture, Religion, and CEDAW's Article 5(a)', in H.B. Schöpp-Schilling and C. Flinterman (eds.), *Circle of Empowerment: Twenty-Five Years of the UN Committee on the Elimination of Discrimination against Women* (New York: Feminist Press, 2007) 68-85, at 74.

<sup>138</sup> CEDAW, General Recommendation No. 24: Women and Health (Article 12) (1999), para. 12 (b).

<sup>139</sup> CEDAW, arts. 15(4) (freedom of movement and choice of residence) and 16(f) (the same rights with regard to guardianship, wardship, trusteeship and adoption of children).

sometimes been denied freedom of movement and access to basic rights.<sup>140</sup> In addition, refugee and IDP woman and their children are made more vulnerable to being **rendered stateless**, they have been unable to **claim or inherit property** upon return, to seek **support for children from estranged husbands or partners**, have been **arrested and detained** by police because they do not have proper documents, and they **risk refoulement** being unable to prove their refugee status.<sup>141</sup> In spite of efforts to guarantee registration of all refugees – men and women alike<sup>142</sup> - proper care also needs to be taken in carrying out the registration process, as women have been **intimidated, bullied, and subjected to sexual exploitation during registration exercises and procedures**.<sup>143</sup>

Displacement and associated armed conflict also involve death of close family members, or family separation and breakdown, leading to a **transition in roles and responsibilities** for women and for men. Women may find themselves for the first time as the primary income earners for their families, as carers not only for children but also for the elderly, sick and injured, without male support or security.<sup>144</sup> Such responsibilities can restrict women's ability to engage outside the home. For adolescent girls or eldest daughters of any age who have lost their mothers, they may be required – either owing to survival or social and cultural norms and expectations – that they become the main caretakers for younger siblings and/or fathers or other male

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<sup>140</sup> See, also, CRC, arts. 7-8.

<sup>141</sup> UNHCR, *Handbook on Registration* (Provisional Release, Sept. 2003), 12

<sup>142</sup> Registration and documentation is the second of the High Commissioner's Five Commitments to Refugee Women: UNHCR, High Commissioner's Five Commitments to Refugee Women, Report on the Dialogue with Refugee Women, UNHCR and WCRWC, Geneva, 20-22 June 2001; UNHCR, 'Report of the High Commissioner's Five Commitments to Refugee Women', UN Doc. EC/55/SC/CRP/17, 13 June 2005.

<sup>143</sup> UNHCR, *Handbook on Registration* (Provisional Release, Sept. 2003), 13.

<sup>144</sup> See, e.g., A. Edwards, *Daunting Prospects: Minority Women in Bosnia and Herzegovina – Obstacles to their Return and Integration in Bosnia and Herzegovina* (UNHCR and Office of the High Commissioner for Human Rights, Sarajevo, Apr. 2000).



relatives and/or the family home. Because of these additional roles, they are less likely to be able to attend school, interfering with their right to education as children,<sup>145</sup> but also on an equal basis with boys.<sup>146</sup>

**Men and adolescent boys** residing in camps and settlements, on the other hand, often suffer from a ‘dangerous level of inactivity. This volatile combination of overburden for some and inactivity and consequent frustration for others can become explosive. Incidents of domestic violence can escalate.’<sup>147</sup> There is evidence that domestic violence actually increases in post-conflict societies, and by analogy in refugee and IDP settings, although there is a dearth of displacement-specific research on this issue.<sup>148</sup> Idleness is also prevalent in countries that ban asylum-seekers from taking up employment as a form of deterrence, the impact of which has also been little studied to date.<sup>149</sup>

Although displacement is normally portrayed as a setting of risk for women, it can also be a **site of empowerment, self-reliance, and opportunity**. Girls may have

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<sup>145</sup> CRC, art. 28; 1951 Convention, art. 22; 1954 Statelessness Convention, art. 22.

<sup>146</sup> CEDAW, art. 10.

<sup>147</sup> *Women, Peace and Security*, Study Submitted by the Secretary-General pursuant to Security Council Resolution 1325 (2000), 2002, at <http://www.un.org/womenwatch/daw/public/eWPS.pdf>, para. 101, referring to a study that found that all married Burundian women interviewed had been subjected to domestic violence as refugees: Human Rights Watch, *World Report 1999* (New York, 1999).

<sup>148</sup> See, e.g., R. Siefert, ‘War and Rape: A Preliminary Analysis’, in A. Stiglmayer (ed.), *Mass Rape: The War Against Women in Bosnia-Herzegovina* (Lincoln: University of Nebraska Press, 1994) 66; E. Rehn and E. Johnson Sirleaf, *Women, War and Peace: The Independent Experts’ Assessment on the Impact of Armed Conflict on Women and Women’s Role in Peacebuilding*, New York: UNIFEM, 2002 at p. 14-15, 18, available at: [http://www.unifem.org/attachments/products/213\\_chapter01.pdf](http://www.unifem.org/attachments/products/213_chapter01.pdf); Report of the Special Rapporteur on Systematic Rape, Sexual Slavery and Slavery-like Practices During Armed Conflict, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998. There is limited, if any, specific research on domestic violence in refugee or IDP settings, but see J. El-Bushra and K. Fish, ‘Refugees and Internally Displaced Persons’, in *Inclusive Security, Sustainable Peace: A Toolkit for Advocacy and Action* (Hunt Alternatives Fund, 2007), available at: [http://www.huntalternatives.org/download/40\\_refugees.pdf](http://www.huntalternatives.org/download/40_refugees.pdf).

<sup>149</sup> WCRWC, *Masculinities: Male Roles and Male Involvement in the Promotion of Gender Equality*, Sept. 2005; WCRWC, *Engaging Men and Boys in Refugee Settings to Address Sexual and Gender-Based Violence*, Sept. 2008, both available at: <http://www.womensrefugeecommission.org/programs/protection/gender>.

access to education for the first time, women may have opportunities for micro-credit projects that advance their skills not available to them at home, and many women take part in camp leadership training and management committees.<sup>150</sup> In other words, women's access to many of the rights contained in the CEDAW may be enhanced during displacement. Displacement can also provide space and opportunity to alter traditional and cultural practices that reinforce the inferiority of women due to the influence of rights-based approaches to humanitarian assistance and protection.

Displacement can also lead however to the **re-assertion or legitimisation of traditional practices** such as child or forced marriages owing to, for example, beliefs that an unaccompanied girl or single adult woman is unsafe without male protection, because of a shortage of prospective husbands owing to the secondary and onward migration of young men out of the camps, or the exploitation of fostered children especially girls by their foster families, being effectively held as child slaves.<sup>151</sup> There is further concern that girls may be sold or forced into marriage due to poverty, including the trafficking of girl children abroad for the purposes of marriage, oftentimes to diasporas.<sup>152</sup>

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<sup>150</sup> See, e.g., CEDAW, arts. 7 (elections and public office), 10 (education), 13(b) (right to bank loans, mortgages and other forms of financial credit), 14(2)(a) (participation in the elaboration and implementation of development planning at all levels), 14(2)(g) (access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as land resettlement schemes). See, also, UNHCR's *Women Leading for Livelihoods*, available at: <http://www.unhcr.org/protect/47ce6f532.html>.

<sup>151</sup> Findings based on a research project I conducted as gender focal point for UNHCR Rwanda in which all Congolese unaccompanied and separated children residing in Kiziba Refugee Camp, Kibuye, Rwanda were interviewed and registered (2001-2002) (notes on file with the author).

<sup>152</sup> On my research visit to Nakivale Refugee Settlement in Uganda in July 2008, Somali refugees told me that they no longer practised female genital mutilation and that the marriage ages of girls had been increased, the latter however arising from a lack of male suitors due to poverty and the fact that many young men leave the camps to migrate to the cities or Europe than a conscious decision to delay marriage for girls. Correspondingly there was also a concern raised by the humanitarian workers that the large Somali diaspora encouraged arranged (and sometimes forced) marriages with Somali men abroad (notes on file with the author).

Women's **reproductive health** is also often compromised in displacement, in contravention of Article 12 of the CEDAW.<sup>153</sup> In this context, the Committee has recognised that societal factors can compound the inequality of women belonging to 'vulnerable and disadvantaged groups', including 'refugee and internally displaced women.'<sup>154</sup> In addition, it has stated that 'States parties should ensure that adequate protection and health services, including trauma treatment and counselling, are provided for women in especially difficult circumstances, such as those trapped in situations of armed conflict and women refugees.'<sup>155</sup> At times there is inadequate or non-existent provision of sexual and reproductive health services in displacement, let alone during an emergency.

Inadequate provision of sanitation materials during menstruation has resulted in adolescent girls not attending school and women missing the distribution of assistance.<sup>156</sup> Other issues include separate latrines for males and females, ensuring that latrine doors close properly, and there are appropriate places to dispose of feminine hygiene products,<sup>157</sup> and latrines must be accessible and well lit at night.<sup>158</sup>

Proper information about family planning, including for women who have been raped, availability of care and services during pregnancy and after birth, information and

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<sup>153</sup> CEDAW, art. 12 provides: '1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.

2. Notwithstanding the provisions of paragraph I of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.'

<sup>154</sup> CEDAW, General Recommendation No. 24: Women and Health (Article 12) (1999), para. 6.

<sup>155</sup> CEDAW, General Recommendation No. 24: Women and Health (Article 12) (1999), para. 16.

<sup>156</sup> The provision of sanitary materials to women and girls is the fifth of the High Commissioner's Five Commitments to Refugee Women: UNHCR, High Commissioner's Five Commitments to Refugee Women, Report on the Dialogue with Refugee Women, UNHCR and WCRWC, Geneva, 20-22 June 2001; UNHCR, 'Report of the High Commissioner's Five Commitments to Refugee Women', UN Doc. EC/55/SC/CRP/17, 13 June 2005.

<sup>157</sup> UNHCR, Guidelines on Refugee Women, 1995; *Women, Peace and Security*, Study Submitted by the Secretary-General pursuant to Security Council Resolution 1325 (2000), 2002, para. 103.

<sup>158</sup> UNHCR, SGBV Guidelines and UNHCR, Handbook on the Protection of Women and Children, Pt. 5.3

protection against HIV/AIDS and other sexually transmitted diseases, and zones of safety, respect, privacy and confidentiality, are often missing in refugee and IDP settings, and are far from available in emergencies.<sup>159</sup>

Exposure to **sexual and gender-based violence** (SGBV) is also exacerbated in times of displacement, if not one of the greatest human rights violations occurring in refugee and IDP settings. According to a study of 13 refugee hosting countries, rape was reported as a problem by all the countries surveyed, and within this category, attempted rape, gang rape, and statutory rapes were mentioned specifically. Other forms of SGBV included, inter alia, forced and/or early (child) marriage; abuse by authorities, including physical abuse; sexual exploitation; sexual assault; other inappropriate sexual behaviour, indecent acts and sexual harassment; incest; abductions or kidnapping (especially of girls and women); trafficking of women and girls; forced prostitution; and disappearances of women and girls.<sup>160</sup> Amongst the most frequently mentioned crimes in refugee camps, and the most prevalent forms of SGBV, were the various forms of domestic violence, rape and forced or early marriages.<sup>161</sup>

A lack of secure livelihood opportunities can force women to have recourse to prostitution.<sup>162</sup> Women also therefore become at **risk of traffickers**. Under Article 6 of the CEDAW, states parties must take ‘all appropriate measures, including

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<sup>159</sup> See, UNHCR, Handbook on Women and Girls, Pt 5.5.2; see further UNHCR, WHO, UNFPA, *Reproductive Health in Refugee Situations: An Inter-Agency Field Manual*, 1999.

<sup>160</sup> R. da Costa, *The Administration of Justice in Refugee Camps: A Study of Practice*, UNHCR, Legal and Protection Policy Research Series, UN Doc. PPLA/2006/01, Mar. 2006. The countries in the study were: Bangladesh, Cote d’Ivoire, Ethiopia, Guinea, Kenya, Mexico, Nepal, Pakistan, Sierra Leone, Tanzania, Thailand, Yemen, and Zambia.

<sup>161</sup> *Ibid.*

<sup>162</sup> Report of the Special Representative of the Secretary-General on Internally Displaced Persons, UN Doc. E/CN.4/2000/83/Add.1, 11 Jan. 2000.

legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.’ This has been held to include accession to the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children to the UN Convention against Organized Crime 2000* and the revision of laws so that they are in conformity with it. It has also been held to afford protection under the 1951 Convention to trafficked women who seek asylum on grounds of gender-related persecution.<sup>163</sup> This supports the UNHCR’s approach to trafficking in which it has recognised the links between displacement and risk of trafficking, and between trafficking and the need for asylum.<sup>164</sup> Reduction in assistance or the **limited availability of international resettlement places** can also have a similar impact, and can lead to sexual exploitation, bribery, and corruption by government officials, humanitarian workers, and other displaced persons in positions of authority.<sup>165</sup>

Follow-up services and redress mechanisms for victims of violence or exploitation are often lacking in refugee and IDP settings. **Access to justice**, guaranteed by Article 15 of the CEDAW, is far from straightforward for any victim of SGBV. The Committee has stated that the guarantee of ‘equality before the law’ in Article 15 of the CEDAW requires states parties to establish effective complaints procedures and remedies, support services for victims and their families, and criminal investigation, prosecution

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<sup>163</sup> CEDAW, Concluding observations on Finland (40<sup>th</sup> Session, para. 389): Annual Report 2008, UN Doc. A/63/38 (2008); Paraguay (32<sup>nd</sup> Session, para. 283), Israel (33<sup>rd</sup> Session, paras. 149-150): Annual Report 2005, UN Doc. A/60/38 (2005); Spain (31<sup>st</sup> Session, para. 33-37) (including urging the state party to afford full protection under the 1951 Convention to trafficked women who seek asylum on grounds of gender-based persecution in line with the latest developments): Annual Report 2004, UN Doc. A/59/38 (2004).

<sup>164</sup> UNHCR, *Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked*, UN Doc. HCR/GIP/06/07, 7 Apr. 2006. UNHCR, *Guidelines on Gender-Related Persecution*, para. 18. See, also, R. Piotrowicz, ‘Victims of People Trafficking and Entitlement to International Protection’ (2005) 24 *Aust. YB Int’l L.* 159-179.

<sup>165</sup> See, by analogy, UNHCR and Save the Children (UK), *Note for Implementing and Operational Partners, Sexual Violence and Exploitation: The Experience of Refugee Children in Guinea, Liberia and Sierra Leone*, Feb. 2002.

and punishment.<sup>166</sup> National criminal law systems may, for example, legalise marital rape, provide exemptions from prosecution for rapists who agree to marry the victim, support a compensation culture rather than justice system, under sharia systems women alleging rape are at risk of prosecution for adultery should they be unsuccessful and could face death, or operate prejudiced judicial systems that do not prioritise crimes against women or in which low levels of rape convictions are the norm leading to a sense of impunity. There may be few safeguards for victims, such as anonymity, access to legal advice, or safeguards against community, social or family ostracism as a result of making a complaint.<sup>167</sup>

For refugees and other non-nationals, the situation can be more complex as they are frequently denied access to justice because of ‘cultural’ excuses especially as far as they relate to women’s claims, or for reasons of jurisdiction. Local authorities may defer the matter to the UNHCR, which has no judicial authority in this regard but may be able to offer some non-judicial remedies,<sup>168</sup> or reject that they have authority over foreigners.<sup>169</sup> Poverty, uncertain or an ‘inferior’ legal status compared with nationals, a general lack of willingness on the part of local authorities to become involved, cultural attitudes, and unrepresentative refugee leadership, are all factors that

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<sup>166</sup> These are taken from paras. 24(i), (k) and (r)(ii) of the CEDAW, General Recommendation No. 19: Violence against Women (1992), although it notes that the Committee has now moved on from requiring only ‘civil remedies in domestic violence cases’, which is provided for in this Recommendation, to criminal sanction: e.g., Concluding observations on Tanzania (41<sup>st</sup> Session, para. 144-145) (concern about women’s inadequate protection from and redress for all forms of violence in communities of refugees and the apparent impunity of the perpetrators of such violence), Nigeria (41<sup>st</sup> Session, paras. 340-341) (requests state party to ensure the protection of internally displaced women from violence and their access to immediate means of redress): Annual Report 2008, UN Doc. A/63/38 (2008).

<sup>167</sup> See, Special Rapporteur on Violence against Women, Its Causes and Consequences, *Cultural Practices in the Family that are Violent Towards Women*, UN Doc. E/CN.4/2002/83, 31 Jan. 2002; *A Framework for Model Legislation on Domestic Violence*, UN Doc. E/CN.4/1996/53/Add. 2, 2 Feb. 1996; *Indicators on Violence against Women and State Response*, UN Doc. A/HRC/7/6, 29 Jan. 2008.

<sup>168</sup> For example, resettlement of ‘women at risk’ or persons subjected to torture or violence is a recognised ground for international resettlement: see, UNHCR, *Resettlement Handbook*, Nov. 2004.

<sup>169</sup> See, e.g., R. da Costa, *The Administration of Justice in Refugee Camps: A Study of Practice*, UNHCR, Legal and Protection Policy Research Series, UN Doc. PPLA/2006/01, Mar. 2006.

influence an individual's access to justice. A study of the administration of justice in refugee camps found that '[w]hile these cultural attitudes towards women and girls tend[ed] to be pervasive across all cultures to varying degrees, there was also a 'double standard' which manifest itself by local authorities in relation to refugees (as opposed to nationals), and characteristics such as level of literacy, the rural or urban background of the person, the region in which they reside, and socio-economic background (i.e. their ethnic, clan, caste, religious or other social affiliation which has meant that they have been traditionally marginalised to the lower strata of their society) may also affect attitudes both by refugees and organisations working with them.'<sup>170</sup> Due to inadequate resources and unfamiliarity with the legal system in the country of asylum, asylum-seekers and refugees arguably more than nationals may be in need of free legal assistance in order to access justice.<sup>171</sup>

In the context of internal displacement, women may have been raped by government or government-sponsored soldiers or armed groups and therefore they may be subject to intimidation, punitive action for making claims, or allegations of false claims by the very authorities charged with protecting them.<sup>172</sup> Under the CEDAW, they are entitled to '[t]he right to equal protection according to humanitarian norms in time of international or internal armed conflict,'<sup>173</sup> which should include access to criminal prosecution and punishment of offenders. Reliant on the same police or authorities to provide protection or to prosecute the individuals involved makes IDP women easy targets for abuse and may leave them without remedies.

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<sup>170</sup> See, e.g., R. da Costa, *The Administration of Justice in Refugee Camps: A Study of Practice*, UNHCR, Legal and Protection Policy Research Series, UN Doc. PPLA/2006/01, Mar. 2006, 7.

<sup>171</sup> UNHCR, *Tool Boxes on EU Asylum Matters*, Sept. 2003, 344.

<sup>172</sup> Report of the UN High Commissioner for Human Rights, *Access to Justice for Victims of Sexual Violence [in Sudan]*, 29 July 2005;

<sup>173</sup> CEDAW, General Recommendation No. 19: Violence against Women (1992), para. 7(c).

**Traditional justice systems** that operate in the many refugee camps, at times to fill a vacuum left because no official justice system is in place, may constitute serious violations of individual human rights in their own right and raise grave protection concerns.<sup>174</sup> As explained by Da Costa:

The refugee community as a whole, however, may not perceive certain issues as crimes or violations at all, or may have collective interests which it wishes to protect over and above individual rights, including to maintain control over its own political and justice issues in the camp, and to accept certain compromises (forgoing certain rights) in return for preserving ‘privileges’ or a beneficial ‘entente’ with the local population. Many, if not most, of these violations involve victims with little or no power, influence and resources within the traditional and political structures of their society. This is accentuated in the refugee camp, where they are now more disempowered than ever, have fewer options, and are at greater risk of various threats against their physical safety, general well-being, and even survival.<sup>175</sup>

Western legislators, too, have struggled to deal with crimes committed against migrant and refugee women that are not already criminalised in national laws, such as female genital mutilation, forced marriages, or ‘honour’ killings.<sup>176</sup>

**Increasing the involvement and participation** of women and adolescent girls in all aspects of planning and management of camp life, including the organisation of camps, the layout of shelters and facilities, and the distribution and delivery of goods and services, is necessary to meet the priorities and needs of women and girls, to ensure effective camp management, and to reduce the risks women and girls face in camp

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<sup>174</sup> da Costa, 8.

<sup>175</sup> da Costa, 8.

<sup>176</sup> Betrothals and child marriages are considered to have no legal effect under the CEDAW, art. 16(2). See, further, S. Hossain and L. Welchman (eds.), *Honour: Crimes, Paradigms and Violence against Women* (2005).



situations.<sup>177</sup>

Factors that affect a woman's ability to **return and to reintegrate** into her home community are related to many of the same issues outlined above, such as lack of identity papers, poverty, domestic violence, or the inability to repossess property arising from discriminatory property or inheritance laws.<sup>178</sup> In relation to the latter, the CEDAW obliges states parties to provide rural women with equal access to participate in all community activities, including access to agricultural credit, and equal treatment in land resettlement schemes.<sup>179</sup> Article 16(h) further provides for 'the same rights for both spouses in respect of ownership, acquisition, management, administration, enjoyment and disposition of property...'.<sup>180</sup> , and the Committee has been heavily critical of ....

**Reintegration programmes** have been heavily criticised for prioritising men's experiences but not those necessarily of women. For example, although Graça Machel's *Study on the Impact of Armed Conflict on Children*<sup>181</sup> called attention to the plight of children separated from their families and their exploitation as soldiers and

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<sup>177</sup> *Women, Peace and Security*, Study Submitted by the Secretary-General pursuant to Security Council Resolution 1325 (2000), 2002, at <http://www.un.org/womenwatch/daw/public/eWPS.pdf>, para. 107.

<sup>178</sup> See, S. Leckie (ed.), *Housing and Property Restitution Rights of Refugees and Displaced Persons: Laws, Cases and Materials* (Cambridge University Press, 2007); (2000) 19(3) *Ref. Survey Qty* Special Issue on Housing and Property Restitution for Returnees; L. Farha, 'Women's Rights to Land, Property and Housing' (2000) 7 *Forced Migration Review* 23-26, with a list of further resources.

<sup>179</sup> CEDAW, art. 14(2)(f) and (g).

<sup>180</sup> On discrimination in relation to property and land, see, e.g., CEDAW, Concluding observations on Lao (32<sup>nd</sup> Session, para. 93) and Burkina Faso (33<sup>rd</sup> Session, para. 348): Annual Report 2005, UN Doc. A/60/38 (2005); Kenya (para. 223) (discriminatory customs and traditions remain in rural areas preventing women from inheriting or acquiring ownership of property): Annual Report 2003, UN Doc. A/58/38 (2003).

<sup>181</sup> Report of Graça Machel, Expert of the UN Secretary-General, *Impact of Armed Conflict on Children*, available at: <http://www.un.org/rights/introduc.htm>.

captives of war, very little has been studied about girl soldiers.<sup>182</sup> The social reintegration of girls affected by armed conflict has not received the same attention as those of boys. The Lost Boys of the Sudan resettlement programme, lauded as an important scheme by many, was simultaneously criticised for ignoring the needs of the 'Lost Girls'.<sup>183</sup> Some repatriation programmes do not make allowances for women or girls who may have valid protection reasons for not wishing to return home;<sup>184</sup> or may not take account of their wishes and views on repatriation generally, or on a basis of equality with men. Refugee women are also rarely involved in **peace negotiation processes**.<sup>185</sup> Likewise, lack of local integration possibilities affects one's free choice concerning return.

At the heart of all these issues is a culture of sex discrimination and unequal treatment of women. As a discrimination-based treaty, the CEDAW can serve to reinforce the legal basis for many of the arguments made for involving women in all aspects of the displacement cycle, for improving the treatment of women and girls in these settings, and for eradicating some of the causes of discrimination and displacement. The loss of home and livelihood and the fact of displacement raise many serious human rights

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<sup>182</sup> J.A. Benjamin and K. Fancy, *The Gender Dimensions of Internal Displacement: Concept Paper and Annotated Bibliography* (Women's Commission on Refugee Women and Children, Nov. 1998), 20. See, though, R. Brett, *Girl Soldiers: Challenging the Assumption* (Quaker UN Office, 5 Nov. 2002), available at: [http://www.guno.org/geneva/pdf/Girl\\_Soldiers.pdf](http://www.guno.org/geneva/pdf/Girl_Soldiers.pdf).

<sup>183</sup> See, e.g., A. Beshkin, 'The Lost Girls of Sudan Try to Tell Their Story', available at: <http://www.peacewomen.org/news/Sudan/Aug04/lostgirls.html>.

<sup>184</sup> See, Edwards, *Daunting Prospects*, which recommended that women and girls with legal and protection concerns and not wishing to return home be given alternatives.

<sup>185</sup> UNHCR, Handbook on Protection of Women and Girls, Pt. 4.3.1 and SC res. 1325 (2000), which emphasises the importance of women's equal participation in peace and security discussions. See, further, E. Johnson-Sirleaf and E. Rehn, *Women, War and Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace-building*, Progress of the World's Women, UNIFEM, 2002. See, also, Report of the Peacebuilding Commission on its First Session, UN Doc. A/62/137-S/2007/458, 25 July 2007, para. 11; NGO Working Group on Women, Peace and Security, *Enhancing Security and the Rule of Law: How Can Gender Be Better Incorporated into the Priorities of the UN Peacebuilding Commission?*, 5 June 2007; J.F. Klot, Independent Expert Paper, *Women and Peacebuilding*, 29 Jan. 2007, commissioned by UNIFEM and the Peacebuilding Support Office.

issues. Gender relations and inequality impact and compound the experiences of displaced women and girls in these settings.

## VI. THE RIGHT TO A NATIONALITY, QUESTIONS OF STATELESSNESS AND GENDER EQUALITY

The **right to a nationality** and the related prohibition against the arbitrary deprivation of a nationality are contained in many human rights instruments.<sup>186</sup> Women are entitled to enjoy these rights on the basis of equality with men.<sup>187</sup> In addition, the *Convention on the Nationality of Married Women 1957*<sup>188</sup> establishes independent nationality of married women and the CEDAW provides for equal rights with men to acquire, change or retain one's nationality.<sup>189</sup> Meanwhile there are two main international instruments dealing with the related issue of statelessness, the *Convention on the Status of Stateless Persons 1954*<sup>190</sup> and the *Convention on the*

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<sup>186</sup> UDHR, art. 15; ICERD, art. 5(d)(iii); IMWC, art. 29 ('every child of a migrant worker shall have the right to a name, to registration of birth and to a nationality'); American Convention on Human Rights, art. 20; European Convention on Nationality, para. 4(a); ICCPR, art. 24(3) (in relation to the right of a child to a nationality, but not a general right); CRC, art. 7(1); African Charter on the Rights and Welfare of a Child, art. 6(3); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, provides: art. 6(g) a woman shall have the right to retain her nationality or to acquire the nationality of her husband; h) a woman and a man shall have equal rights, with respect to the nationality of their children except where this is contrary to a provision in national legislation or is contrary to national security interests.'

<sup>187</sup> E.g. Accessory non-discrimination clauses include ICCPR, art. 2; ACHR, art. 1(1); CRC, art. 2(1) (note art. 2(2) also protects the child against discrimination based on parent's status); ACHPR, art. 2. See, also, HRC, General Comment No. 31: Nature of General Legal Obligations Imposed on States Parties to the Covenant (2004), para. 10: '... the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness ...'. HRC, General Comment No. 28: Equality of Rights Between Men and Women (Art. 3, ICCPR) (2000), para. 25: '... Also, States parties should ensure that no sex-based discrimination occurs in respect of the acquisition or loss of nationality by reason of marriage, of residence rights, and of the right of each spouse to retain the use of his or her original family name or to participate on an equal basis in the choice of a new family name.'

<sup>188</sup> Convention on the Nationality of Married Women 1957, GA res. 1040 (XI), 29 Jan. 1957; entered into force 11 Aug. 1958. At the time of writing, there are X states parties.

<sup>189</sup> CEDAW, art. 9.

<sup>190</sup> *Convention on the Status of Stateless Persons 1954*, 360 UNTS 117; entered into force 6 June 1960.

*Reduction of Statelessness 1961*,<sup>191</sup> and various regional instruments.<sup>192</sup> The UNHCR's *Agenda for Protection* calls on states, intergovernmental organisations and UNHCR to adopt a more resolute response to the problem of statelessness. Noting that statelessness is often associated with displacement and refugee flows, states were invited to give renewed consideration to ratifying the 1954 and 1961 Conventions relating to statelessness.<sup>193</sup>

Nationality has been classified as the ultimate right, or **'the right to have rights'**.<sup>194</sup> The rights common to legal citizenship in virtually all countries include the unconditional right to enter and reside permanently in the territory and to return to it from abroad, the right to receive protection from the state of nationality within and outside of the territory, including access to consular assistance and diplomatic protection, the variety of political rights pertaining to active and full membership of the state, and rights to economic, social, and cultural protection.<sup>195</sup> As a national, an individual is recognised as a full member of the state, with the overriding right to enjoy membership in the state with all its attendant rights and obligations in full

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<sup>191</sup> *Convention on the Reduction of Statelessness 1961*, 989 UNTS 175; entered into force 13 Dec. 1975. See, further, International Law Commission, *Draft Articles on Nationality of Natural Persons in relation to the Succession of States*, 1999.

<sup>192</sup> E.g., *European Convention on Nationality*, ETS No. 166, 6 Nov. 1997, which provides: art. 4 – Principles: The rules on nationality of each State Party shall be based on the following principles: (a) everyone has the right to a nationality; (b) statelessness shall be avoided; (c) no one shall be arbitrarily deprived of his or her nationality; (d) neither marriage nor the dissolution of a marriage between a national of a State Party and an alien, nor the change of nationality by one of the spouses during marriage, shall automatically affect the nationality of the other spouse. Art. 5 – Non-discrimination: (a) The rules of a State Party on nationality shall not contain distinctions or include any practice which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin. (b) Each State Party shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently. See, also, *European Convention on the Avoidance of Statelessness in relation to State Succession*, 19 May 2006, art. 4.

<sup>193</sup> UNHCR, *Agenda for Protection*, 3<sup>rd</sup> ed., 2003, Goal 1, Objective 12.

<sup>194</sup> See, H. Arendt, *The Origins of Totalitarianism* (New York: Harcourt Brace & Co., 1<sup>st</sup> ed., 1951; 1979), as referred to in A. Macklin, 'Who Is the Citizen's Other? Considering the Heft of Citizenship', 335. See, also, *Perez v. Brownell* (1958) 356 U.S. 44, at 64 (Warren, C.J. dissenting: 'Citizenship is man's basic right for it is nothing less than the right to have rights.').

<sup>195</sup> A. Macklin, 'Who Is the Citizen's Other? Considering the Heft of Citizenship', *Theoretical Inquiries in Law*, 8 (2007), 333, 334. See, also, D. Weissbrodt, *The Human Rights of Non-Citizens*, (Oxford University Press, 2008), Ch. 4.

equality and without discrimination. It not only gives rise to protection *by* the state, but also protection *from* the state.

Stateless persons are often not considered to be persons before the law.<sup>196</sup> ‘Without status as citizens, women are deprived of the right to vote or to stand for public office and may be denied access to public benefits and choice of residence.’<sup>197</sup> And although the imperative of human rights law is to grant rights to all persons,<sup>198</sup> distinctions are frequently made with respect to non-nationals in the territory of a state party, depriving non-national women of many of the rights of citizenship. Moreover, it may operate to treat women as less than full members of the communities in which they live. ‘[N]ationality is critical to full participation in society.’<sup>199</sup>

The international law relating to nationality was initially approached as a matter of statelessness and dual nationality arising from the **conflict of nationality laws** of different states.<sup>200</sup> Gradually, however, international law began to treat women’s nationality as a **question of equality**.<sup>201</sup> In fact, it is probably best approached as an issue of both. Not every discriminatory nationality law will necessarily result in statelessness, but such laws do put women at greater risk of being rendered stateless and it is therefore also a question of gender equality. Conversely, statelessness may be reduced by measures that reinforce women’s equality in the acquisition and choice of

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<sup>196</sup> M. Manly and S. Persaud, ‘UNHCR and Responses to Statelessness’ (2009) 32 *Forced Migration Review* 7-10, at 7.

<sup>197</sup> CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations (1994), at 2.

<sup>198</sup> Cf. CERD, General Recommendation No. 20: Discrimination against Non-Citizens (2004).

<sup>199</sup> CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations, 1994, 2.

<sup>200</sup> International Law Association, Committee on Feminism and International Law, C. Chinkin and K. Knop, *Final Report on Women’s Equality and Nationality in International Law* (2000), at 25 [ILA, Committee on Feminism and International Law].

<sup>201</sup> ILA, Committee on Feminism and International Law, 25.

nationality.<sup>202</sup> Some states parties to the CEDAW, for example, have given statelessness as the reason for their reservations or declarations to Article 9 of the CEDAW.<sup>203</sup> Other states have argued that objections to dual nationality trump concerns over gender equality.<sup>204</sup> Many of the problems the Committee describes in relation to nationality rights, for example, are also problems of statelessness but they are not framed as such. Despite the specific mention of statelessness in Article 9(1) of the CEDAW, statelessness has been little discussed by the Committee. Of the ten year review of annual reports from 1999-2009 carried out for the purposes of this paper, 'statelessness' is mentioned explicitly only in relation to Kuwait in 2004.<sup>205</sup> In comparison, discriminatory nationality laws are mentioned in many reports.<sup>206</sup>

The UNHCR estimates that there are 12 million stateless persons worldwide.<sup>207</sup>

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<sup>202</sup> ILA, Committee on Feminism and International Law, 31.

<sup>203</sup> ILA, Committee on Feminism and International Law, 31. See, e.g. prior to 29 January 2008, the Government of the Republic of Turkey when it withdrew its reservations, Turkey maintained the following reservation: 'Article 9, paragraph 1 of the Convention is not in conflict with the provisions of article 5, paragraph 1, and article 15 and 17 of the Turkish Law on Nationality, relating to the acquisition of citizenship, since the intent of those provisions regulating acquisition of citizenship through marriage is to prevent statelessness.' Iraq still maintains a reservation to art. 9(1) and (2), including relating to it to sharia law; Monaco does not consider the provisions compatible with its nationality laws. Many more countries, interestingly, have entered reservations to art. 9(2), such as Egypt, Republic of Korea, Jamaica and Tunisia. There are also a number of objections made to these reservations.

<sup>204</sup> E.g., judgment of the 1983 Constitutional Court of Italy came up against such arguments but held that 'the need to avoid dual nationality was not a valid reason to ignore the articles of the Constitution on equality before the law without distinction as to sex and on the moral and legal equality of spouses.' See, Judgment No. 30 of 28 January 1983, 63 Racolta Ufficiale delle Sentenze e Ordinanze della Corte Costituzionale 157 (Italian Constitutional Court) as referred to in ILA, Committee on Feminism and International Law, 33.

<sup>205</sup> CEDAW, Concluding observations on Kuwait (30<sup>th</sup> Session, para. 66), Annual Report 2004, UN Doc. A/59/38 (2004) (concern that the Nationality Act allows Kuwaiti women to transfer their nationality to their children in specific circumstances, such as when the nationality of the father is unknown or if he is stateless or deceased, or after an irrevocable divorce).

<sup>206</sup> See, e.g., CEDAW, Concluding observations on Saudi Arabia, Burundi, Lebanon, Morocco, Sweden, Tanzania, Nigeria, and Yemen: Annual Report 2008, UN Doc. A/63/38 (2008).

<sup>207</sup> For more on the global phenomenon of statelessness, see Refugees International, *Lives on Hold: The Human Cost of Statelessness*, 2005, updated in 2009 and released as *Nationality Rights for All: A Progress Report and Global Survey on Statelessness* (K. Southwick and M. Lynch), available at: <http://www.refugeesinternational.org/policy/in-depth-report/nationality-rights-all>; UNHCR, *Final Report Concerning the Questionnaire on Statelessness pursuant to the Agenda for Protection, Steps Taken by States to Reduce Statelessness and to Meet the Protection Needs of Stateless Persons*, Mar. 2004.

Statistics are not (yet) collated however by sex. Some informal statistics in a range of countries indicate that in those countries that operate discriminatory nationality laws, women make up 51-78 per cent of the stateless population.<sup>208</sup> Although the international treaty framework on nationality rights are neutrally drafted and many require their application to comply with principles of non-discrimination (as outlined above), the operation of citizenship laws in many countries nonetheless still directly or indirectly discriminate against women,<sup>209</sup> and this exposes women to a greater extent than men to the risk of being rendered stateless.<sup>210</sup> The CEDAW is particularly important in this regard, not least because the two statelessness conventions are not widely subscribed to.<sup>211</sup>

The EXCOM has recognised statelessness as an issue on several occasions, but it has not turned its attention to the particular protection concerns of stateless women or the increased risk of women being rendered stateless by virtue of discriminatory nationality laws,<sup>212</sup> except peripherally. In 2001, for example, the EXCOM called upon states to address the disproportionate impact of statelessness on women and children by ensuring identity documentation, effective registration of births and marriages, and cooperation in the establishment of identity and nationality status of

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<sup>208</sup> UNHCR, *Sex Breakdown for Stateless Populations in Selected Countries*, end-2008 (on file with the author), shows that 51% of Viet Nam's and 78% of Egypt's stateless population are women.

<sup>209</sup> Nationality and citizenship are often used interchangeably, however, according to the International Law Association, they 'technically relate to different aspects of membership in a state. Nationality corresponds to membership in a state vis-à-vis other states; that is, it stresses the international protections afforded by membership within the state.' Citizenship, in comparison, refers to the rights attributable to membership within the state itself. See, ILA, Committee on Feminism and International Law, at 12-13.

<sup>210</sup> Refugees International, *Nationality Rights for All*, i.

<sup>211</sup> At the time of writing, there are 63 state parties to the 1954 Convention and only 35 states parties to the 1961 Convention.

<sup>212</sup> None of the 7 EXCOM Conclusions address women's particular concerns: see, Conclusion No. 78(XLVI) on the prevention and reduction of statelessness and protection of stateless persons; 90 (LII), 95 (LIV), 96 (LIV) and Conclusions 99 (LV) and 102 (LVI) with regard to protracted statelessness situations and No. 106 (LVII) 2006.

victims of trafficking.<sup>213</sup> In 2003, UNHCR was ‘encourag[ed] ... to provide to the Standing Committee an outline of nationality issues impacting women and children that increase their vulnerability to statelessness, such as problems of registration of births, marriages and nationality status.’<sup>214</sup> The 2006 Conclusion on Statelessness refers to the CEDAW in its preambular paragraphs<sup>215</sup> and recognises that statelessness may arise as a result of ‘denial of a woman’s ability to pass on nationality; ... loss of nationality due to a person’s marriage to an alien or due to a change of nationality of a spouse during marriage; and deprivation of nationality resulting from discriminatory practices ...’<sup>216</sup> However, the language of gender equality is largely missing. Moreover, statelessness or discriminatory nationality laws are not mentioned in the 2006 Women at Risk Conclusion, even though they place women at risk of may human rights concerns as well as at risk of being rendered stateless (this is despite links between displacement and statelessness being acknowledged in an earlier conclusion<sup>217</sup>), although there is mention of the requirement for ‘individual documentation of refugee women and separated and unaccompanied girls and [the registration of] births, marriages and divorces in a timely manner.’<sup>218</sup> The UNHCR has increasingly seen statelessness as an issue of gender equality and has requested:

- (b) States to review legislation with a view to amending provisions which impose an automatic change in nationality status by virtue of marriage or dissolution of marriage;
- c) States to review legislation to ensure equality between men and women in passing on nationality as means to combat the occurrence of statelessness.<sup>219</sup>

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<sup>213</sup> EXCOM Conclusion No. 90 (LII), 2001, UN Doc. A/AC.96/959, para.22 (o)-(s). See, also, UNHCR, *Final Report Concerning the Questionnaire on Statelessness pursuant to the Agenda for Protection*, Steps Taken by States to Reduce Statelessness and to Meet the Protection Needs of Stateless Persons, Mar. 2004, Section C: Approaches to Family Unity, Women and Children, 19-24.

<sup>214</sup> EXCOM Conclusion No. 95 (LIV) 2003, para. (x). **DID STATES PARTIES DO THIS?**

<sup>215</sup> EXCOM Conclusion No. 106 (LVII) 2006, pmbi para. 5.

<sup>216</sup> EXCOM Conclusion No. 106 (LVII) 2006, para. (j).

<sup>217</sup> EXCOM Conclusion No. 78 (XLVI) 1995, pmbi para. 2: ‘Concerned that statelessness, including the inability to establish one’s nationality, may result in displacement.’

<sup>218</sup> EXCOM Conclusion No. 105 (LVII) 2006, para. (j)(iii).

<sup>219</sup> UNHCR, *Statelessness: Prevention and Reduction of Statelessness and Protection of Stateless Persons*, UN Doc. EC/57/SC/CRP.6, 14 Feb. 2006, para. 5(b) and (c).



The decision regarding who is to be recognised as a national (or consequently who is considered a non-national) of a particular state is a question for each state and is governed by national law.<sup>220</sup> However, equality guarantees and non-discrimination principles limit the discretion of each state in this regard as overarching principles of custom.<sup>221</sup> There are two bases of nationality: *jus sanguinis* and *jus soli*.

**Jus sanguinis nationality laws** of some countries grant citizenship through **paternal descent** alone. In these countries, a mother cannot independently pass her nationality on to her children. While children of a marriage bear the father's nationality, and are therefore not stateless, the mother's inability to pass on her nationality to the children may nevertheless cause problems of residency, mobility, and access to state benefits.<sup>222</sup> Very few women are aware of the impact **marriage to a non-national** will have on their rights and those of their children.<sup>223</sup> Even where theoretically the children may bear their father's nationality, his country may require the child's **registration** at the nearest consulate. Where there are no diplomatic relations between the two states involved, or where diplomatic ties are severed due to conflict, children

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<sup>220</sup> *Nottebohm Case (Liechtenstein v. Guatemala)* [1955] ICJ Rep. 4 at 23.

<sup>221</sup> Juridical Condition and Rights of the Undocumented Migrants (Advisory Opinion), IACtHR, OC-18/03, 17 September 2003, para. 101.

<sup>222</sup> See, *Unit Dow v. Attorney-General of Botswana* [1992] L.R. Commonwealth (Const.) 623; 103 Int'l L. Rep. 128 (Botswana C.A.), as referred to in ILA, Committee on Feminism and International Law, at 19. See, also, Centre for Research and Training on Development, Gender, Citizenship and Nationality Programme, *Denial of Nationality: The Case of Arab Women*, Summary of Regional Research (Feb. 2004, Beirut, Lebanon), which studied the implementation of nationality laws in 8 countries of the Middle East, namely Lebanon, Syria, Jordan, Palestine, Yemen, Tunisia, Morocco and Egypt. The study found a myriad of consequences for Arab women having married non-national men and their inability to pass their nationality onto their children, including inability to register their children at the civil registry, access to education, health care, travel difficulties because children must travel on their husband's passport, etc.

<sup>223</sup> Centre for Research and Training on Development, Gender, Citizenship and Nationality Programme, *Denial of Nationality: The Case of Arab Women*, Summary of Regional Research (Feb. 2004, Beirut, Lebanon), 20. See, also, UNDP, Regional Bureau for Arab States, *Women are Citizens Too: The Laws of the State, the Lives of Women*, (undated, but around 2002).

may be rendered without nationality or even identity.<sup>224</sup> It may also give rise to problems of access to, and custody of, children if the marriage is terminated by divorce or death.<sup>225</sup> Women in abusive relationships may be forced to choose between staying with their husband or losing their children.<sup>226</sup> As ‘foreigners’, her children may be denied a whole range of rights, including health care, education, and other social services.<sup>227</sup> Also, if a women marries a stateless person or has children outside marriage with a man of her own nationality, then her children could be born stateless.<sup>228</sup> Children born of rape, whose father is unknown or a foreigner, may not have any nationality.<sup>229</sup>

The *Convention on the Reduction of Statelessness 1961* provides that the loss of nationality as a consequence of any change in the personal status of a person, such as marriage or the dissolution of marriage, should be conditional upon the possession or acquisition of another nationality.<sup>230</sup> The UNHCR and the Inter-Parliamentary Union recommend that where women have lost their citizenship through dissolution of marriage their former state should introduce provision to allow these women to automatically re-acquire that citizenship through simple declaration.<sup>231</sup>

*Jus sanguinis* laws not only produce statelessness, they can **perpetuate statelessness**

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<sup>224</sup> Centre for Research and Training on Development, Gender, Citizenship and Nationality Programme, *Denial of Nationality: The Case of Arab Women*, Summary of Regional Research (Feb. 2004, Beirut, Lebanon), 21, referring to Syria and Lebanon, and Kuwait and Iraq, respectively.

<sup>225</sup> UN Division for the Advancement of Women, *Women, Nationality and Citizenship, Women2000 and Beyond*, June 2003, at 4.

<sup>226</sup> *Ibid.*

<sup>227</sup> Centre for Research and Training on Development, Gender, Citizenship and Nationality Programme, *Denial of Nationality: The Case of Arab Women*, Summary of Regional Research (Feb. 2004, Beirut, Lebanon), 22.

<sup>228</sup> D. Weissbrodt, *The Human Rights of Non-Citizens*, at 87.

<sup>229</sup> UNHCR, *Handbook on the Protection of Women and Girls*, 187.

<sup>230</sup> Convention on the Reduction of Statelessness 1961, art. 5.

<sup>231</sup> UNHCR and Inter-Parliamentary Union, *Nationality and Statelessness: A Handbook for Parliamentarians*, Geneva, 2005, 33 [Parliamentary Handbook].

**from one generation to the next.**<sup>232</sup> Stateless children face a myriad of problems relating to the ability to exercise their human rights,<sup>233</sup> but their statelessness can impact on the rights of their mothers also, including for example rights to family life and unity,<sup>234</sup> to freedom of movement,<sup>235</sup> to voluntary repatriation,<sup>236</sup> or to leave any territory, including her own, accompanied by her children.<sup>237</sup>

**Jus soli nationality laws,** in contrast, grant citizenship by the simple fact of birth within a state's territory. While this principle is facially gender neutral, it favours the father's nationality insofar as women have traditionally tended to reside in their husband's state.<sup>238</sup>

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<sup>232</sup> D. Weissbrodt, *The Human Rights of Non-Citizens*, at 88.

<sup>233</sup> Parliamentary Handbook, 31-33. On children, see further CRC, arts. 7-8; ICCPR, art. 24. See, also, HRC, General Comment No. 17: The Rights of the Child (Art. 24, ICCPR) (1989), para. 8: 'Special attention should also be paid, in the context of the protection to be granted to children, to the right of every child to acquire a nationality, as provided for in article 24, paragraph 3. While the purpose of the provision is to prevent a child from being afforded less protection by society and the State because he is stateless, it does not necessarily make it an obligation for States to give their nationality to every child born in their territory. However, States are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born. In this connection, no discrimination with regard to the acquisition of nationality should be admissible under internal law as between legitimate and children born out of wedlock or of stateless parents or based on the nationality status of one or both of the parents.'

<sup>234</sup> CEDAW, art. 16. See, also, HRC, General Comment No. 19: The Family (Art. 23, ICCPR) (1990), para. 7: 'With regard to equality as to marriage, the Committee wishes to note in particular that no sex-based discrimination should occur in respect of the acquisition or loss of nationality by reason of marriage.'

<sup>235</sup> CEDAW, art. 15(4). See, also, HRC, General Comment No. 27: Freedom of Movement (Art. 12, ICCPR) (1999), para. 20: 'The wording of article 12, paragraph 4, does not distinguish between nationals and aliens ("no one"). Thus the persons entitled to exercise this right can be identified only by interpreting the meaning of "his own country". The concept of "his own country" is broader than the concept of "country of nationality". It is not limited to nationality in a form sense, that is, nationality acquired at birth or by conferral; it embraces, at the very least, an individual who, because of his or her special ties or claims in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, of nationals of a country who have been stripped of their nationality in violation of international law, and of individuals whose country of nationality has been incorporated or transferred to another national entity, whose nationality is being denied to them ... permits a broader interpretation that might embrace other categories of long-term residents, including but not limited to stateless persons arbitrarily deprived of the right to acquire the nationality of the country of such residence...'

<sup>236</sup> See, UNHCR, *Handbook for Protection of Women and Children*, Pt 4.3.1 and UNHCR Handbook on Voluntary Repatriation: International Protection, Geneva, 1996 (some references to citizenship status and rights of children).

<sup>237</sup> ICCPR, art. 12.

<sup>238</sup> ILA, Committee on Feminism and International Law, at 15.

**Naturalization laws**, too, can discriminate against women. It should be recalled that both the 1954 Convention relating to the Status of Stateless Persons and the 1951 Convention relating to the Status of Refugees encourage states to facilitate naturalization as far as possible.<sup>239</sup> Where citizenship is acquired via naturalization procedures, many states have operated under **dependent nationality** principles (also called the unity of nationality of spouses principle) in which a woman who marries a foreign national loses her own nationality and acquires that of her husband simply by virtue of marriage (that is, automatically upon marriage). If her husband's nationality changes or is lost during the marriage, her nationality alters accordingly. For women who remain in her own country after marriage, this principle can result in her loss of civil, political, economic, and social rights which depend upon nationality. Similarly, '[i]f a woman from a state that automatically deprived her of her nationality on marriage (based on some form of dependent nationality) [weds] a man from a state that [does] not automatically grant her nationality on marriage (based on some form of independent nationality) then she [would become] stateless.'<sup>240</sup> A woman who is abandoned or widowed does not have the right to return to her country since that right is a function of nationality. If she were able to re-enter, she may find herself without the rights attached to nationality; and her children may similarly be deprived of nationality of that state because it may operate *jus sanguinis* laws based on paternal descent. Moreover, divorce could render a woman stateless. In many cases, women have been rendered stateless without even knowing it.<sup>241</sup>

Similarly, if a woman seeks to **change her nationality**, including because she wishes

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<sup>239</sup> 1954 Statelessness Convention, art. 32; 1951 Convention, art. 34.

<sup>240</sup> ILA, Committee on Feminism and International Law, at 66, as re-stated in D. Weissbrodt, *The Human Rights of Non-Citizens*, 89.

<sup>241</sup> ILA, Committee on Feminism and International Law, at 17.

to marry a foreign national, she may be required to renounce her former nationality first prior to naturalization in the new state. This may be based on laws prohibiting dual nationality. It may apply, for example, to a refugee woman who marries in the country of asylum. In these circumstances, she risks being rendered stateless pending the granting of new nationality, or even longer if the marriage ends before she is naturalised.<sup>242</sup> That is, she may be rendered stateless by ‘administrative delay’.

The introduction of **citizenship testing** can also discriminate against women. In practice, many states require language testing before nationality is granted. This may be especially burdensome on women who have not had the opportunity to learn a language because they have remained within the home compared with men who are more likely to have worked outside the home and to have had greater exposure to learn the language.<sup>243</sup> Moreover, the acquisition of nationality in some countries requires the national spouse to sponsor or promote the non-national spouse. This effectively gives the national spouse control over the non-national spouse, and in situations of domestic violence, this can place the latter in an untenable situation.<sup>244</sup> ‘Where such women are economically, socially, culturally, and even linguistically dependent on their husbands, they may be vulnerable to violence and abuse.’<sup>245</sup>

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<sup>242</sup> See, UNHCR, *Handbook on the Protection of Women and Girls*, 186.

<sup>243</sup> See, e.g., Council of Europe Parliamentary Assembly Recommendation No. 1261 (1995), para. 3, referred to in ILA, Committee on Feminism and International Law, at 20.

<sup>244</sup> See, e.g., Amnesty International, *France: Violence against Women: A Matter for the State*, AI Index: EUR 21/001/2006, 8 Feb. 2006, Part. 2.5 (reflects on the vulnerability of irregular and regular migrant women living in abusive personal relationships and who are likely to lose their right to remain should they leave their partners/husbands). The same argument has been recognised by the Committee in relation to migrant women and access to immigration status: CEDAW, General Recommendation No. 26: Women Migrant Workers, 26(f).

<sup>245</sup> UNHCR, *Handbook on the Protection of Women and Girls*, 187, referring to UN Division for the Advancement of Women, *Women, Nationality and Citizenship, Women2000 and Beyond*, June 2003.

The **definition of 'statelessness'** in the statelessness conventions refers only to *de jure* statelessness. It would thus cover most of the situations described above where nationality is affected by operation of law. However, **de facto statelessness** is also a particular issue for women (and for the UNHCR), such as women trafficked to work in the sex trade or in forced labour who may be unable to prove their nationality because their passports have been confiscated by their traffickers, brothel owners or pimps.<sup>246</sup> '[A] trafficked woman may have had her documents confiscated or stolen either on arrival to a third country or prior to transfer, often making it impossible to prove her status when attempting to re- enter her country of origin or habitual residence. If she is found by the authorities of a country to which she has been transported illegally she may be placed in detention pending identification and resolution of her situation.'<sup>247</sup> Containing provisions on both **nationality laws and trafficking** the CEDAW is well placed to deal with the inter-section of these issues. Experience shows that women and children make up the majority of trafficked cases and are, therefore, disproportionately affected by problems of statelessness in this regard.<sup>248</sup> The UNHCR has been particularly interested in the inter-linkages between trafficking and statelessness, calling upon:

States to cooperate in the establishment of identity and nationality status of victims of trafficking, many of whom, especially women and children, are rendered effectively stateless due to an inability to establish such status, so as to facilitate appropriate solutions to their situations, respecting the internationally

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<sup>246</sup> See, e.g., Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy, Addendum: Report on the Mission of the Special Rapporteur to Poland on the Issue of Trafficking and Forced Prostitution of Women (24 May to 1 June 1996), UN Doc. E/CN.4/1997/47/Add.1 (1996), at paras. 6, 44-45.

<sup>247</sup> *Final Report Concerning the Questionnaire on Statelessness Pursuant to the Agenda for Protection*, Department of International Protection, UNHCR, March 2004, para. 69.

<sup>248</sup> *Final Report Concerning the Questionnaire on Statelessness Pursuant to the Agenda for Protection*, Department of International Protection, UNHCR, March 2004, para. 69.

recognized human rights of the victims.<sup>249</sup>

**Undocumented migrants, including asylum-seekers**, may also be unable to prove their nationality and may be effectively stateless. Restrictions on freedom of movement, subjection to prolonged detention pending determination of proof of identity related to deportation or generally, and credibility issues in asylum determination procedures are all affected by an inability to produce documentation or to prove one's nationality.<sup>250</sup> Access to diplomatic protection is also closely associated with proof of identity.

Although statelessness is an international human rights issue, implicating centrally the right to a nationality or the arbitrary deprivation of nationality, it also leads to **many other human rights violations**. Stateless Rohingyas in Myanmar, for example, are unable to obtain marriage authorisation, interfering with their right to marry and found a family.<sup>251</sup> Stateless women in many countries are particularly at risk of trafficking, sexual and gender-based violence, and other forms of economic exploitation.<sup>252</sup> 'Slovenia's "erased citizens" are systematically denied access to health care and education on a par with citizens'<sup>253</sup>, with repercussions for women's reproductive health. The denial of birth registration also has ramifications for a

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<sup>249</sup> UNHCR, *Statelessness: Prevention and Reduction of Statelessness and Protection of Stateless Persons*, UN Doc. EC/57/SC/CRP.6, 14 Feb. 2006, para. 7(d).

<sup>250</sup> See, e.g., Vital Voices Global Partnership, *Stateless and Vulnerable to Human Trafficking in Thailand*, June 2007, 12.

<sup>251</sup> See, C. Lewa, 'North Arkan: An Open Prison for the Rohingya in Burma' (2009) 32 *Forced Migration Review* 11-13 (the article also refers to restrictions on freedom of movement, access to health care, and education). CEDAW, art. 16. See, also, ICCPR, art. 23; ICESCR, art. 10.

<sup>252</sup> Vital Voices Global Partnership, *Stateless and Vulnerable to Human Trafficking in Thailand*, June 2007, 12. See, also, Physicians for Human Rights, *No Status: Migrants, Trafficking and Exploitation of Women in Thailand*, June 2004 and Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Concluding Observations: Thailand*, para. 33, UN Doc. CRC/C/THA/CO/2, (March 17, 2006).

<sup>253</sup> I. Goris, J. Harrington and S. Köhn, 'Statelessness: What it is and Why it matters' (2009) 32 *Forced Migration Review* 4-6, at 4.

myriad of other human rights, including to equality before the law, to a name and to recognition of judicial personality.<sup>254</sup>

## VII. CONCLUSIONS AND RECOMMENDATIONS

The non-discrimination framework offered by the CEDAW reinforces the human rights of displaced and stateless women and girls. Women's rights elaborated in the CEDAW are not subject to distinctions based on immigration or other legal status, but are instead focused on their equality and advancement. Hence, they apply to all women regardless of their nationality or immigration status. Although refugees, IDPs and stateless persons face a myriad of human rights problems, women's experiences of displacement and statelessness are very much shaped by their unequal position of power vis-à-vis men (that is, gender inequality). As the UNHCR has stated: 'We must ... address gender inequality, if we are to protect [displaced and stateless] women and girls.'<sup>255</sup> Further cooperation and collaboration between the UNHCR and the Committee is therefore to be welcomed, not least because of the independent and impartial monitoring role the latter performs in ensuring states parties to the CEDAW implement their treaty obligations.

I would therefore encourage the UNHCR and the Committee to continue their dialogue on displacement and statelessness issues with the aim of increasing the uptake of the human rights of refugees, IDPs and stateless women and girls within the Committee's jurisprudence. This might include incorporating more systematically such matters in the List of Issues sent to state parties in advance of their periodic

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<sup>254</sup> Inter-American Court of Human Rights, *Case of Yean and Bosico Children v. The Dominican Republic*, 8 Sept. 2005.

<sup>255</sup> UNHCR, *Handbook on the Protection of Women and Girls*, 13.



reports (correlatively, this may require the UNHCR to reframe some of their interventions with the Committee, including the timing of them), as well as during the face-to-face meetings with states parties and within the concluding observations on the reports. It might further include the holding of briefing sessions by the UNHCR during these hearings on either thematic or country-specific topics, or the temporary secondment of a UNHCR staff member or expert adviser to the Committee or the OHCHR. The Committee would be further encouraged to issue two General Recommendations, one on displacement and gender equality, and the other on nationality rights, including incorporation of statelessness concerns. For its part, the UNHCR should consider making its confidential written submissions to the Committee public whenever appropriate; and to continue its tradition of mainstreaming gender issues within its own governance structures, albeit with more vigour in relation to statelessness. Although the ‘...artificial, even though politically convenient, dichotomy between refugee flows and human rights...’<sup>256</sup> that has underlined much of the UN’s treatment of refugee and stateless issues to date has been largely disassembled, there is still much to do and much to be gained for displaced and stateless women by further mutual cooperation and collaboration.

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<sup>256</sup> M. Stavropoulou, ‘Displacement and Human Rights: Reflections on UN Practice’ (1998) 20 *Hum. Rts. Qlty* 515, at 515. See, also, M. Stavropoulou, ‘The Right Not To Be Displaced’ (1994) 9 *Am. U. J. Int’l L. & Pol’y* 689.