



UNHCR

United Nations High Commissioner for Refugees
Haut Commissariat des Nations Unies pour les réfugiés

LEGAL AND PROTECTION POLICY

RESEARCH SERIES

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

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**PPLAS/2009/02
August 2009**

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This background 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), held at the United Nations in New York, 16-17 July 2009. It has benefited from the comments from many persons, including in particular Jane Connors, Rosa da Costa, Luisa Cremonese, Susan Harris-Rimmer, Karolina Lindholm-Billing, Mark Manly, Naoko Obi, Santhosh Persaud, Mignon van der Liet-Senders, and especially Gisela Thater. This post-seminar version has also benefited from the thoughtful comments of the participants.

The author would like to further thank her student researchers at the University of Nottingham, Claire Balding, Lydia Gény, Laura O'Donnell, and Emily Soothill, as well as Mariana Lavanchy, intern at UNHCR, who collectively reviewed ten years of annual reports of the Committee.

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Abbreviations

1951 Convention	Convention relating to the Status of Refugees 1951
1954 Statelessness Convention	Convention relating to the Status of Refugees 1954
1967 Protocol	Protocol relating to the Status of Refugees 1967
African Charter <i>or</i> ACHPR	African Charter on Human and Peoples' Rights 1981
ACHR	American Convention on Human Rights
CAT	Committee against Torture
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women 1979
CERD	Committee on the Elimination of All Forms of Racial Discrimination
CESCR	Committee on Economic, Social and Cultural Rights
Children's Committee Committee	Committee on the Rights of the Child Committee on the Elimination of All Forms of Discrimination against Women
CRC	Convention on the Rights of the Child 1989
CRPD	Committee on the Rights of Persons with Disabilities
CRPD	Convention on the Rights of Persons with Disabilities 2006
CRTD	Centre for Research and Training on Development
DEVAW	UN Declaration on the Elimination of Violence against Women
ECHR	European Convention on the Protection of Human Rights and Fundamental Freedoms 1950
ECtHR	European Court of Human Rights
ExCom	Executive Committee of the High Commissioner's Programme
HRC	Human Rights Committee
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights 1966
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination 1965
ICESCR	International Covenant on Economic, Social and Cultural Rights 1966
IMWC	International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families 1990
MWC	Committee on the Rights of Migrant Workers and Members of their Families
OHCHR	Office of the High Commissioner for Human Rights
OP-CEDAW	Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women 2000
OPCAT	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2002
SGBV	Sexual and Gender-Based Violence

UDHR	Universal Declaration of Human Rights 1948
UNCAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984
Women's Protocol to the ACHPR	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa 2000
WRC	Women's Refugee Commission

Executive Summary¹

Introduction

1. Discrimination on the basis of sex and inequality between men and women nullifies and impairs the enjoyment of rights and the full advancement of women and girls worldwide. Displacement arising from armed conflict, persecution and other serious human rights violations can intensify this discrimination and inequality. Sex discrimination and inequality can also be the, or a contributing, cause of displacement and a motivation for flight for many women and it can occur at all stages in the displacement cycle. Although all forcibly displaced persons face protection concerns, 'women and girls can be exposed to particular protection problems related to their gender, their cultural and socio-economic position, and their legal status.'² Displacement, whether internal or international, weakens existing community and family protection mechanisms, and exposes refugee and internally displaced (IDP) women and girls to a range of human rights violations, including sexual and gender-based violence (SGBV), abuse and exploitation. Similarly, many persons are at risk of statelessness because of gender-based discrimination in nationality laws and women who are already stateless face various protection problems, not least gender-based barriers to the recognition of nationality.

2. Much progress has been made within the United Nations system to advance the rights of displaced and stateless women and girls, including the elaboration of standards, policies and laws at national, regional and international levels. However, much remains to be done. Specifically, this paper is interested in how the fundamental principles of the 1979 *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)* apply within these two contexts. The rights to equality between women and men and non-discrimination on the basis of sex as laid down in the CEDAW are essential elements of the international protection regime for asylum-seeking, refugee, internally displaced and stateless women and girls as well as during processes of repatriation, local integration and resettlement. As such, CEDAW complements and reinforces the other parts of this framework, including the 1951 Convention Relating to the Status of Refugees as amended by its 1967 Protocol, the two statelessness conventions and other human rights treaties. This paper is drafted for the purposes of the holding of a joint seminar between the Committee on the Elimination of All Forms of Discrimination against Women (the Committee) and the United Nations High Commissioner for Refugees (UNHCR) in the hope of advancing collaboration and cooperation between these two entities on these important issues.

3. This paper centres on two main substantive parts: one on displacement and gender equality (Part 3), the other on the right to a nationality, questions of statelessness and gender equality (Part 4). These parts explain the many facets of the gender dimensions of and influences on displacement and statelessness, drawing out the impact of gender inequality on women's access to and enjoyment of their human rights in these contexts and identifying

¹ This executive summary has also been translated into French and Spanish. The English version is CEDAW/C/2009/II/WP.3, 1 July 2009, available at: <http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW.C.2009.II.WP.3.pdf>.

² UNHCR, *Conclusion on Women and Girls at Risk*, 6 October 2006, No. 105 (LVII) – 2006, available at: <http://www.unhcr.org/refworld/docid/45339d92.html>.

relevant CEDAW provisions at issue and how they apply. In addition to these two main parts, there is also a section that outlines the fundamental principles of the CEDAW (Part 2), as well as a section that reflects upon the institutional questions of how the Committee and the UNHCR may further enhance their collaboration and cooperation on these issues (Part 5). How these fundamental principles specifically apply to displaced and stateless women and girls is synthesised in the Conclusion and Recommendations in Part 6. Finally, the Annex contains definitions of some of the terminology in this area, such as sex, gender, gender mainstreaming, asylum-seekers, refugees, returnees, local integration, internally displaced persons, and stateless persons.

Key findings

4. Women's experiences of displacement, asylum, statelessness, return, local integration, and resettlement, are very much shaped by their unequal position of power vis-à-vis men. That is, gender inequality can frame the context in which women experience displacement, asylum and statelessness. Gender is not of course the only influence on how a woman or girl experiences displacement, asylum or statelessness. Discrimination may be compounded, *inter alia*, because of her legal status (or lack of or precarious legal status) in the asylum country, or because of inaccessible, or loss of, documentation needed to access local services, including housing, in internal displacement situations; her socio-economic position; trauma arising from armed conflict or persecution; prior subjection to violent conduct; loss of livelihood and family; age; or cultural, social and linguistic differences between themselves and their displacement country and/or community. Older women and women with disabilities may face a myriad of additional problems relating to their survival.

5. Given the post-Cold War and post-9/11 political context in which the institution of asylum and the protection of refugees is increasingly under threat, efforts to strengthen the international protection regime for displaced persons by any means possible is increasingly necessary. In a nutshell, this paper finds that the equality framework of the CEDAW strengthens the international protection regime. CEDAW's specific provisions prohibiting discrimination on the grounds of sex serve as an important complement to international laws on statelessness and refugees, in which express guarantees against such discrimination and inequality were omitted.

6. CEDAW, as one of several non-discrimination treaties at the international level, 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 CEDAW has been called the International Bill of Rights for Women. It sets out a range of civil, cultural, economic, political, and social 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. Despite the many feminist criticisms of international human rights law in general and the CEDAW in particular, and recognising that there is scope to improve the CEDAW itself and the work of the Committee, many of these rights are relevant and can be applied effectively to displaced and stateless women and girls.

7. Like other human rights treaties, the CEDAW applies to all women regardless of their nationality, citizenship or other legal status, including immigration or marital status. Women's rights elaborated in the CEDAW are not subject to distinctions based on legal status, but are instead focused on their equality and advancement. This is to be contrasted to the legal instruments available within the context of asylum and statelessness in which one

must satisfy strict legal criteria in order to benefit from the rights contained therein. In order to protect displaced and stateless women, therefore, governments must tackle the question of gender inequality; a fact well acknowledged by the UNHCR.

8. Some states have attempted to incorporate gender-sensitive applications of international standards into national protection mechanisms for displaced women, and to amend nationality laws that discriminate against women. A lot of this momentum can be attributed to parallel developments in international human rights law, in particular advances in women's rights. 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.' UNHCR's Agenda for Protection specifically calls on governments 'to consider acceding to' the CEDAW as a priority objective. The rights enumerated in the CEDAW have, for example, been influential in recognising gender-related forms of persecution as legitimate grounds for claiming refugee status, or that discriminatory nationality laws can result in statelessness. Cross-fertilization has occurred particularly with reference to gender-related violence, such as rape and sexual violence, female genital mutilation, and domestic violence, but there has also been progress in relation to economic empowerment and political participation in refugee settings.

9. This paper reiterates that under the CEDAW, the obligation to address all forms of discrimination against women requires a broad reading of equality that focuses on ending patriarchal domination and oppression and thereby opening up opportunities for equal participation and enjoyment of rights. More specifically the CEDAW obligates states to eradicate social and cultural norms and stereotypes that reinforce and provide convenient excuses to prop up patriarchal systems as well as negative, harmful and discriminatory laws, policies and practices. The paper thus emphasizes the need to eliminate discrimination both in national policies and laws, as well as discriminatory measures perpetuated through societal norms and views. Noting that much of the violence and discrimination experienced by displaced and stateless women, like other women, takes place in their homes, the paper underlines that discrimination must be addressed within both the public and private spheres; and in all fields, including in civil, cultural, economic, political and social.

10. The complementarity of the CEDAW as an equality-centred treaty with other human rights instruments is also highlighted. For instance, the paper notes with regard to the lower attendance rate in schools of displaced girls compared to their male counterparts, that both the CEDAW and the *1989 Convention on the Rights of the Child* (CRC) protect their right to education. Refugee girls do not only have the right to education as such (CRC Articles 22 and 28) but also on an equal basis with boys (CEDAW Article 10).

11. The paper further argues that the inter-linkages between displacement, poverty and discrimination are now well recognised. It notes that the Special Rapporteur on Violence against Women, Its Causes and Consequences has recently made clear that '[w]omen's physical security and freedom from violence are inextricably linked to the material basis of relationships that govern the distribution and use of resources and entitlements, as well as authority within the home, the community and the transnational realm.' The same is true in relation to the structures governing refugee and displacement settings. The Special Rapporteur further recognises that violence against refugee and IDP women is exacerbated by lack of

access to alternative housing, living in refugee camps, with limited privacy and close proximity to strangers.

Displacement and gender equality

12. Elaborating on the specific rights set forth by the CEDAW in the context of displacement, the paper notes that in addition to armed conflict, flight is often triggered, for example, by severe sex discrimination and gender-based persecution. Sex discrimination is often evident in refugee status determination procedures in many countries of asylum, in which the gendered nature of persecution may not be recognised or where sex/gender may not be seen as a legitimate ground for asylum. However, even before a woman or girl has access to asylum proceedings, there are many human rights factors that can prevent her from reaching her asylum destination. These can include restrictions on the freedom of movement of women in her country of origin, lack of access to necessary documentation, such as passports, because she is female legal requirements for permission from husbands to travel, or cultural factors that put women travelling alone or without male family members at risk of harassment and 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. Many of these same restrictions may also be imposed upon IDP women, who attempt to travel from rebel- to government-controlled zones, or vice versa.³ Thus, seeking asylum or being displaced is often a reflection of the human rights position of women (and others) in countries of origin. Thus the better the human rights in the country of origin, the less the need for international protection. In this way, the Committee performs a preventive service as part of its regular work in monitoring state party performance with their treaty obligations.

13. Failure to individually register all asylum-seekers and refugees can render them as ‘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. The paper finds that 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 often been denied freedom of movement and access to basic rights.⁴

14. 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. Many measures have been adopted to reduce this risk, such as distributing food and non-food items to women rather than men, in particular in camp settings. Nonetheless, these measures have yet to fully resolve the problem of family tensions and family-based violence. In fact, the introduction of such measures can exacerbate family violence if they are implemented without consultation with the community. Similar efforts to transport firewood to camps to reduce the need for women to walk long distances to collect it, which exposes them to the risk of sexual attack and banditry, have produced some important short-term benefits (reduction in such attacks), but they have done little to address the underlying causes

³ See, Part 3.2 Gender-related dimensions of asylum and discrimination in individual asylum procedures, discussing Arts. 1, 2 and 15, CEDAW.

⁴ See, Part 3.3.2 Individual registration, identity, and related rights, discussing Art. 3 and 15, plus 13(b), 14(g), 15(4), CEDAW.

of structural inequality.⁵ When refugee or IDP women return home to their countries of origin, for instance, the UNHCR is unlikely to be present to be able to take charge of firewood or water distribution systems. Although much has now been done to address the shortcomings in some of these programmes, the problems persist.

15. In response to the omission of a provision outlawing violence against women from CEDAW's catalogue of rights, the Committee adopted a General Recommendation recognising violence against women as a form of sex discrimination and therefore rightly within its mandate. This paper notes that it brings violence against women within the jurisdiction of international law and in many ways it has transformed the CEDAW from an anti-discrimination treaty into a gender-based violence treaty. Violence against women is squarely on the Committee's list of priorities and it routinely addresses this issue in respect of almost every state, including occasionally in the context of displacement. The paper finds that exposure to SGBV is frequently exacerbated in times of displacement, if not one of the greatest human rights violations occurring in refugee and IDP settings. In this context, and with the increased contribution of the UNHCR to the Committee's work via its confidential submissions, the Committee has identified immigrant and refugee women as being particularly at risk of violence and discrimination – both by members of the host community as well as within their own communities, including crimes of domestic violence and others related to 'honour'. Living in camps has been identified by the Committee as a factor that increases the risk of sexual and other forms of violence linked to lack of access to health care, education and economic opportunities.⁶

16. Changed social settings can place emotional strains on families, including those recovering from armed conflict and trauma. As the UNHCR notes: 'Being part of an intact family is particularly important during displacement, when all other aspects of a normal life have disappeared.' Girls can, for instance, be burdened with additional care responsibilities and can be increasingly exposed to exploitation and to traditional harmful practices, including forced marriages. This would be in direct breach of Article 16(2) of the CEDAW which prohibits the betrothal and marriage of children, or other forced marriages. This Article also provides the same right to freely choose a spouse and to enter into marriage as men.⁷

17. The Committee has regularly and increasingly highlighted trafficking but not yet within the specific context of displacement. The Committee has however held that Article 6 can include the obligation to afford protection under the 1951 Convention to trafficked women who seek asylum on grounds of gender-related persecution. 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.⁸

18. For refugees and other non-nationals, seeking redress for violations 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 due to questions 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. Alternatively, local authorities may

⁵ See, Part 3.3.1 Discriminatory social and cultural roles, responsibilities and practices impacting on protection and rights, discussing Arts. 1, 2(f), 5, plus 16, CEDAW.

⁶ See, Part 3.3.3 Violence against women, in particular sexual and gender-based violence, discussing Arts. 2, 5, 11, 12, and 16, CEDAW.

⁷ See, Part 3.3.8 Equality in family life, discussing Art. 16, CEDAW.

⁸ See, Part 3.3.4 Trafficking, Art. 6, CEDAW.

reject that they have authority over foreigners, sometimes due to being overwhelmed with their own domestic caseloads and at other times, due to sex, race or ethnic-based discrimination. 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 can hinder access to justice.⁹ Difficulties in accessing justice may also be due to the location of refugee and IPD settlements, which at times are far away from the local infrastructure.

19. This paper highlights that women must have equal access to income-generating and training opportunities as men, including access to micro-credit. There may be a justified need for the introduction of temporary special measures, as recognised in Article 4 of the CEDAW, targeting women for livelihood initiatives to enhance their self-reliance and integration prospects, especially female headed households.¹⁰

20. Factors that affect a women’s ability to find a durable solution, be it return and reintegration into her home community, resettlement to a third country or local integration in the country of asylum, implicate many of the same rights in the CEDAW as outlined above.¹¹ The paper finds in this regard that some repatriation programmes do not make allowances for women or girls who have valid protection reasons for not wishing to return home to remain in their host countries or communities, or do 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 and the subsequent formation of new governments or interim administrations; and may face legal and practical difficulties accessing property, land and housing upon return, especially under traditional legal systems that do not recognise women’s rights to inherit property on an equal basis as men. The UNHCR acknowledges that there are many gender-related factors that account for women’s unequal access to resettlement opportunities, including that violations of women’s rights may occur within the family and thus may be hidden from public view, and prejudice on behalf of UNHCR staff carrying out assessments who may believe that women and girls exaggerate claims of SGBV in order to secure resettlement or others who may not regard rape or sexual violence as a sufficient ground for resettlement due to its widespread prevalence.

The right to nationality and questions of statelessness

21. The importance of the right to a nationality is recognised in Article 9 of the CEDAW. The paper emphasises the impact of gender discriminatory nationality laws on women and their associated inability or difficulties to exercise other rights, including in relation to family, access to education, to equality before the law, freedom of movement, and so forth. It takes the view that women’s nationality is probably best approached as an issue of both statelessness and dual nationality arising from the conflict of nationality laws of different states as well as an issue of equality. Statelessness may be reduced by measures that reinforce women’s equality in nationality matters.

22. The paper concludes that although the international treaty framework on nationality rights are neutrally drafted and many require their application to comply with principles of

⁹ See, Part 3.3.5 Access to justice, discussing Arts. 1, 2(c), 3, and 15, CEDAW.

¹⁰ Arts. 3, 4, 10, 11, 13, 14, 15(2) and (3), 16, CEDAW (Social and economic deprivation and empowerment); Arts. 10, CEDAW (Education and literacy), Arts. 3, 7 and 8, CEDAW (Political participation).

¹¹ See, Parts 3.4 Gender-related dimensions of return and reintegration and 3.5 Gender-related dimensions of resettlement, discussing all provisions, including Arts. 1, 2, 3, 14(2)(f) and (g), and 16(h), CEDAW.

non-discrimination, the operation of citizenship laws in many countries nonetheless still directly or indirectly discriminate against women, and this exposes women to a greater extent than men to the risk of being rendered stateless. The CEDAW is particularly important in this regard, not least because the two statelessness conventions are not widely subscribed to.

Conclusions and recommendations

23. The paper identifies a number of recommendations relating to displacement and nationality rights, among them a call for the issuance of a general recommendation to be adopted by the Committee in order to consolidate the work done to date by both the Committee and the UNHCR. The ultimate aim of these efforts is to advance further displaced and stateless women's enjoyment of their rights. The paper indicates the ways in which the CEDAW treaty framework, machinery and procedures could be used to enhance the protection in some of the situations described above.

24. The perceived weaknesses of UNHCR's supervisory role of the 1951 Convention is discussed, including the fact that there is no periodic state reporting requirement equivalent to the treaty body system and the sometimes difficult position that UNHCR finds itself in as an intermediary between the authorities and the people it is mandated to protect. The paper highlights the importance of the independent monitoring role of the Committee in this regard. The recommendations made in this paper must however also be seen in the wider context of the need for strengthening of the enforcement mechanisms provided by international human rights law. Ultimately, without commitment and compliance at the national level, including in terms of policy, attitude, culture, capacity, and political will, women and girls will continue to experience discrimination.

25. This paper has identified five principal advantages of employing the fundamental principles of the CEDAW and of engaging with the Committee on these issues:

- First, the broad reading given to equality that focuses on ending patriarchal domination and oppression of women and opening up opportunities for equal participation and enjoyment of rights prioritises a gender equality agenda within displacement and statelessness contexts.
- Second, the obligation to eradicate social and cultural norms and stereotypes, which reinforce the perceived inferiority of women to men and provide convenient excuses to prop up patriarchal systems, calls upon governments and the UNHCR to take a longer term view of protection and assistance activities for displaced women and girls, and within the context of statelessness. The CEDAW requires more than merely eradicating the symptoms of women's inequality (e.g., reducing violence against women rates by transporting in firewood) but it requires also that the root causes of that violence be investigated and addressed, including importantly with women taking a leading role in designing and developing appropriate responses.
- Third, the obligation to eradicate gender inequality in both public and private spheres of life provides a mandate to address many issues that are often perceived as 'taboo', especially when dealing with non-nationals and associated ethnic or race dimensions, such as family violence, forced marriages, female genital mutilation, or crimes of 'honour'.

- Fourth, the close relationship recognised between civil and political rights on the one hand and economic, social and cultural rights on the other and their inclusion within a single instrument strengthens indivisibility arguments and the interconnections between, for example, poverty, violence and displacement.
- Fifth, the independent and impartial monitoring role the Committee performs in ensuring states parties to the CEDAW implement their treaty obligations opens up possibilities for public dialogue with states parties on issues of displacement and statelessness, avenues for redress for individual displaced or stateless women within the communications mechanism, or for the Committee to activate its inquiry function.

26. In light of these findings, the paper recommends that the UNHCR and the Committee continue their dialogue. Further collaboration could particularly be explored in the areas of normative development, capacity building, and advocacy. This might include one or more of the following measures:

- incorporating more systematically displacement and statelessness matters within the Committee's jurisprudence as well as during the face-to-face meetings with states parties and within the concluding observations on state party reports.
- dedicating further discussion on how UNHCR might work with and contribute to the State party reporting to the CEDAW, such as by reframing its interventions to the Committee so that they follow the structure of the CEDAW, by working to ensure that displacement and statelessness issues are reflected already in the national reports, and by encouraging NGO and other partners to submit shadow reports to the Committee on the extent to which the state party under review complies with its Convention obligations.
- UNHCR should continue its practice of orally presenting its confidential comments to the Committee in closed meetings, and explore the possibility of organising briefing sessions between UNHCR thematic or country-focal points and the Committee in connection with the Committee's sessions. It might also involve the temporary secondment of a UNHCR staff member or expert adviser to the Committee or the OHCHR.
- disseminating information about the individual complaints procedure under the Optional Protocol to relevant stakeholders to ensure displaced and stateless women and girls are aware of and have access to this avenue of redress. This includes systematic analysis and distribution of decisions adopted by the Committee.
- dedicating further discussion on ways of improving the implementation of the Committee's concluding observations and recommendations at the field level, for instance, through training and capacity building.
- considering the possible issuance of a General Recommendation which would further facilitate the application of the principles of gender equality and non-discrimination on the basis of sex to the displacement and statelessness contexts.

27. Additionally, issues of displacement and statelessness, especially gender dimensions of these issues, should continue to be taken up throughout the UN system, including in the

work of the other human rights treaty bodies, as well as within the Special Procedures of the UN Human Rights Council, in particular the work of the Special Rapporteurs and the Universal Periodic Review. In many respects the UNHCR has led the way in its 'mainstreaming' of gender issues within its own work and the integration of the same throughout the UN system, but there arguably remains a need for further systemisation in its work in this regard. Non-governmental organisations also have an important role to play and would be encouraged in particular to identify some test cases for review under the individual communications procedure of the CEDAW.

28. The paper further recommends that, for its part, the UNHCR should re-consider making some of its confidential written submissions to the Committee public whenever appropriate (balancing, of course, the advantages and disadvantages of doing so, and that this may well vary depending on the country in question and the relations between the Office and the government); and to continue its tradition of mainstreaming gender issues within its own governance structures, albeit with more vigour in relation to statelessness.

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1. Introduction

Discrimination on the basis of sex and inequality between men and women nullifies and impairs the enjoyment of rights and the full advancement of women and girls¹² worldwide.¹³ Displacement arising from armed conflict, persecution and other serious human rights violations can intensify this discrimination and inequality. Sex discrimination and inequality can also be the, or a contributing, cause of displacement and a motivation for flight for many women and it can occur at all stages in the displacement cycle. Although all forcibly displaced persons face protection concerns, ‘women and girls can be exposed to particular protection problems related to their gender, their cultural and socio-economic position, and their legal status.’¹⁴ Similarly, many persons are at risk of statelessness because of gender-based discrimination in nationality laws and women who are already stateless face various protection problems, not least gender-based barriers to the recognition of nationality.¹⁵

Much has already been done within the United Nations system 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 can affect men and women differently and that protection responses and strategies must recognise and take account of these differences,¹⁶ which are discussed further in this paper. According to the Organization, ‘The protection of refugee women and children is a core activity and an organizational priority.’¹⁷ Internally displaced (IDP) women have also been incorporated into the Organization’s policy documentation and practical programmes.¹⁸ The Executive

¹² 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).

¹³ See, UN Department of Economic and Social Affairs, *The World’s Women 2005: Progress in Statistics*, ST/ESA/STAT/SER.K/17, 2006, available at: <http://unstats.un.org/unsd/Demographic/products/indwm/wwpub.htm>; UN General Assembly, *In-depth study on all forms of violence against women: report of the Secretary-General*, 6 July 2006, A/61/122/Add.1, available at: <http://www.unhcr.org/refworld/docid/484e58702.html>.

¹⁴ UNHCR, *Conclusion on Women and Girls at Risk*, 6 October 2006, No. 105 (LVII) – 2006, available at: <http://www.unhcr.org/refworld/docid/45339d922.html> (hereafter: ‘ExCom Conclusion No. 105’). All ExCom Conclusions referenced in this paper are available at: <http://www.unhcr.org/refworld/type/EXCONC.html>.

¹⁵ This paper is focused on sex discrimination and inequality within the context of internal and external displacement and statelessness. It deals with trafficking in women and girls and other forms of migration to the extent that they are linked to the situation of displacement and statelessness. It is noted in this regard that the Committee adopted a General Recommendation on women migrant workers in 2008. See, Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW), *General Recommendation No. 26: Women Migrant Workers*, 5 December 2008, available at: <http://www2.ohchr.org/english/bodies/cedaw/comments.htm>. All CEDAW General Recommendations referenced in this paper are available at the same URL or at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>.

¹⁶ UNHCR, *Policy on Refugee Women*, 1990, p. 4, available at: <http://www.unhcr.org/refworld/docid/3bf1338f4.html>.

¹⁷ UNHCR, *Agenda for Protection*, 3rd ed., 2003, p. 85, available at: <http://www.unhcr.org/refworld/docid/4714a1bf2.html> (hereafter: ‘UNHCR, *Agenda for Protection*’).

¹⁸ See, e.g., UNHCR, *Handbook for the Protection of Women and Girls*, January 2008, p. 12, available at: <http://www.unhcr.org/refworld/docid/47cfc2962.html> (hereafter: ‘UNHCR, *Handbook for the Protection of Women and Girls*’). 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

Committee of the High Commissioner's Programme (ExCom) has likewise adopted statements concerning the international protection of refugee and IDP women,¹⁹ as well as stateless women, albeit to a much lesser extent.²⁰ Some states have likewise attempted to incorporate gender-sensitive applications of international standards into national protection mechanisms for displaced women,²¹ and to amend nationality laws that discriminate against women.²²

A lot of this momentum can be attributed to parallel developments in international human rights law, in particular advances in women's rights.²³ As the Supreme Court of Canada observed in the *Ward* judgement: 'Underlying the [1951] Convention is the international community's commitment to the assurance of basic human rights without discrimination.'²⁴ 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 – 1985.²⁵ Refugee and displaced women were mentioned in all of the global women's conferences since 1980, albeit peripherally.²⁶ The Beijing Platform for Action, in particular, called on the UNHCR and the

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.' UN General Assembly, *UNHCR : resolution / adopted by the General Assembly*, 12 February 1999, A/RES/53/125, available at: <http://www.unhcr.org/refworld/docid/3b00f52c0.html>. Under the 'cluster approach', the UNHCR has 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 February 2007, available at: <http://www.unhcr.org/refworld/docid/45ddc5c04.html>.

¹⁹ See, e.g., ExCom Conclusion No. 105.

²⁰ See, e.g., UNHCR, *Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons*, 6 October 2006, No. 106 (LVII) – 2006 (hereafter: 'ExCom Conclusion No. 106'), which mentions the CEDAW and the non-discriminatory basis for nationality laws, pmbl 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, p. 33, available at: <http://www.unhcr.org/refworld/docid/436608b24.html>.

²¹ 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/419c74784.html> (hereafter: 'A. Edwards, Age and Gender Dimensions in International Refugee Law'); 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.

²² For latest state practice in relation to reduction of statelessness, see 'The Excluded: The Strange Hidden World of the Stateless', in *Refugees Magazine*, Issue 147, September 2007, available at: <http://www.unhcr.org/46d2e8dc2.html>. See also: Special Issue on Statelessness, in *Forced Migration Review*, No. 32, April 2009, available at: <http://www.fmreview.org/FMRpdfs/FMR32/FMR32.pdf>.

²³ See, A. Edwards, *Age and Gender Dimensions in International Refugee Law*, p. 47. See, also, R. Haines, 'Gender-Related Persecution', in Feller, Türk and Nicholson (eds.), *Refugee Protection in International Law*, pp. 319–350, available at: <http://www.unhcr.org/refworld/docid/470a33b50.html>. 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, April 2001, para. 17, available at: <http://www.unhcr.org/refworld/docid/3b20a3914.html> (hereafter: 'UNHCR, Interpreting Article 1 of the 1951 Convention').

²⁴ See *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993, available at: <http://www.unhcr.org/refworld/docid/3ae6b673c.html>.

²⁵ See, e.g., UNHCR, *Refugee Women and International Protection*, 18 October 1985, No. 39 (XXXVI) – 1985, available at: <http://www.unhcr.org/refworld/docid/3ae68c43a8.html>.

²⁶ 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

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.'²⁷ Cross-fertilization has occurred particularly with reference to gender-related issues, such as rape and sexual violence, female genital mutilation (FGM), and domestic violence,²⁸ but there has also been progress in relation to economic empowerment and political participation in refugee settings.²⁹

Neither the *1951 Convention relating to the Status of Refugees* as amended by its *1967 Protocol* nor the two statelessness conventions expressly contain provisions prohibiting discrimination on the basis of sex.³⁰ At the drafting conference of the 1951 Convention, a discussion of gender occurred only once, with a proposal by the Yugoslav delegate that 'sex' should be included in Article 3 of the 1951 Convention.³¹ However, the British delegate responded that 'the equality of the sexes was a matter for national legislation.'³² On this basis, the proposal was rejected.³³ Moreover, the President of the Conference doubted

displaced women and girls: World Conference on Women, Equality, Development and Peace, Copenhagen, 1980 A/CONF.94/35, 19 September 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, 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, 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 (hereafter: 'Beijing Declaration') (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 ...').

²⁷ Beijing Declaration, para. 231(h).

²⁸ See, D.E. Anker, 'Refugee Law, Gender, and the Human Rights Paradigm' (2002) 15 *Harvard Human Rights J.* 133, pp. 133–154.

²⁹ See, e.g., UN Human Rights Council, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Ms. Yakin Ertürk, Political Economy of Women's Human Rights*, A/HRC/11/6, 18 May 2009, available at: <http://www.unhcr.org/refworld/docid/4a3b50372.html> (hereafter: UN Special Rapporteur on Violence against Women, *Report on violence against women 2009*); UN Human Rights Council, *Report of the Independent Expert on the Question of Human Rights and Extreme Poverty, Ms. Magdalena Sepúlveda Carmona*, A/HRC/11/9, 27 March 2009, available at: <http://www.unhcr.org/refworld/docid/49f846ff2.html>.

³⁰ The definition of a 'refugee' in Article 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 Articles 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 (Article 5).

³¹ See proposal by Mr. Makiedo (Yugoslavia) in UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, *Conférence de plénipotentiaires sur le statut des réfugiés et des apatrides: Compte rendu analytique de la troisième séance, tenue au Palais des Nations, à Genève le mercredi 4 juillet 1951, à 10 heures 30*, 19 November 1951, A/CONF.2/SR.5, available at: <http://www.unhcr.org/refworld/docid/3ae68cd614.html> ('Il ne serait peut-être pas possible d'inclure toutes ces raisons dans l'article 3 mais il serait cependant souhaitable d'y faire figurer avant les mots: "en raison de sa race .." le mot "particulièrement" et après les mots "pays d'origine" les mots "ou de son sexe". Il ne faut pas oublier qu'une discrimination fondée sur le sexe pourrait entraîner une dispersion des familles.').

³² See *ibid.*, proposal by Mr. Hoare (UK) in UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, par. 37, ('la question de l'égalité des sexes relève des législations nationales').

³³ *Ibid.*, p. 10.

whether there would be any cases of persecution on account of sex.³⁴ Notably, too, the African Union *Convention governing the Specific Aspects of Refugee Problems in Africa*³⁵ has a wider non-discrimination clause, but it still does not include sex/gender.³⁶ At a minimum, however, the 1951 Convention recognises that the UN ‘shall endeavour[-] to assure to refugees the widest possible exercise of [human rights]’³⁷ and Article 5 clearly permits the application of other instruments to refugees that confer ‘rights and benefits’.³⁸ The 1954 *Convention relating to the Status of Stateless Persons* (1954 Statelessness Convention) contains identical provisions.³⁹ Moreover, it has been asserted that the prohibition on sex discrimination is part of customary international law.⁴⁰

Against this background, 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,⁴¹ 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, for example, been influential in recognising gender-related forms of persecution as legitimate grounds for claiming refugee status, or that discriminatory nationality laws can result in statelessness. As a codification of existing human rights standards, general rights to non-discrimination are included expressly in the *Guiding Principles on Internal Displacement*, in addition to noting that some female IDPs, such as expectant mothers, mothers with young children and female headed households, require ‘special protection and assistance’.⁴² The UN’s ‘gender mainstreaming’ policy has also contributed to the integration of gender equality as a goal of all organs of the UN.⁴³

³⁴ *Ibid.*, proposal by the President, Mr. Larsen (Denmark), par. 39, (*‘Le Président (...) ne croit vraiment pas que l’on puisse envisager des cas de persécutions en raison du sexe.’*)

³⁵ Organization of African Unity, *Convention Governing the Specific Aspects of Refugee Problems in Africa*, 10 September 1969, 1001 UNTS 45, available at: <http://www.unhcr.org/refworld/docid/3ae6b36018.html>. Adopted on 10 September 1969 by the Assembly of Heads of State and Government; entered into force 20 June 1974 (hereafter: ‘OAU Convention’).

³⁶ OAU Convention, art. 4: ‘Member States undertake to apply the provisions of this Convention to all refugees without discrimination as to race, religion, nationality, membership of a particular social group or political opinions.’

³⁷ CEDAW, PmbI para. 2.

³⁸ CEDAW, art. 5: ‘Nothing in this Convention shall be deemed to impair any rights and benefits granted by a Contracting State to refugees apart from this Convention.’

³⁹ 1954 Statelessness Convention, PmbI para. 2 and art. 5.

⁴⁰ *Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants*, OC-18/03, Inter-American Court of Human Rights (IACrHR), 17 September 2003, para. 101, available at: <http://www.unhcr.org/refworld/docid/425cd8eb4.html> (hereinafter: *Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants*).

⁴¹ See, *International Convention on the Elimination of All Forms of Racial Discrimination* 1965, G.A. res. 2106 (XX), 21 December 1965, 660 UNTS 195; entered into force 4 January 1969; *Convention on the Rights of Persons with Disabilities* 2006, GA res. 61/106, 13 December 2006; entered into force 3 May 2008.

⁴² *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.’ See: UN Commission on Human Rights, *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39. Addendum: Guiding Principles on Internal Displacement*, E/CN.4/1998/53/Add.2, 11 February 1998, available at: <http://www.unhcr.org/refworld/docid/3d4f95e11.html>.

⁴³ See, Annex for the official definition of ‘gender mainstreaming’.

Despite this recognition at the global level of the cross-fertilisation of these different streams of international law, the Committee on the Elimination of Discrimination against Women (the Committee), the key monitoring body overseeing the implementation of the CEDAW by states parties, has been slow to incorporate the interests and concerns of displaced and stateless women within its jurisprudence, although this has improved markedly in the last few years.⁴⁴ The Committee has, in particular, recognised that human rights are binding upon states parties in respect of all women within their jurisdictions, including displaced and stateless persons,⁴⁵ subject to explicit limited exceptions.⁴⁶ As the UN Special Rapporteur on the rights of non-citizens proclaimed: '[t]he narrow exceptions to the principle of non-discrimination that are permitted by international human rights law do not justify such pervasive violations of non-citizens' rights'.⁴⁷

As a starting point it is accepted that the rights contained in the CEDAW are applicable to displaced and stateless women and girls as human beings subject to international law. The rights to equality between women and men and non-discrimination on the basis of sex, as laid down in the CEDAW, are essential elements of the international protection regime for displaced and stateless women and girls. As such, the CEDAW complements and reinforces the other parts of this framework, including the 1951 Convention and its 1967 Protocol, the two statelessness conventions, and other human rights treaties. Given the post-Cold War and post-9/11 political context in which the institution of asylum and the protection of refugees is increasingly under threat, efforts to strengthen the international protection regime for displaced persons by any means possible is increasingly necessary. Reference has been made, more and more, to parallel and complementary international human rights standards.⁴⁸ International human rights law strengthens the gender equality goals of the UN system of international refugee protection, in which express guarantees against such discrimination and inequality were omitted. In addition, the institutional mechanisms of redress and oversight provided under the CEDAW, including state party reporting, General Recommendations, individual petitions, and inquiries, offer supplementary capacity to the UNHCR's mandate in supervising state compliance with human rights instruments in the areas of displacement and statelessness.

This paper is divided into six parts. Following this Introduction, Part 2 outlines the

⁴⁴ 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 inquiries, and its 'views' (decisions) on individual communications. These are explained further Pt 5.

⁴⁵ See, CEDAW, *General Recommendation No. 26: Women Migrant Workers*, 2008.

⁴⁶ 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 December 1966, 999 UNTS 171; entered into force 23 March 1976). 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 December 1966, 993 UNTS 3; entered into force 3 January 1976. 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 (hereafter: 'A. Edwards, 'Human Rights, Refugees, and the Right to "Enjoy" Asylum').

⁴⁷ UN Sub-Commission on the Promotion and Protection of Human Rights, *The rights of non-citizens: final report of the Special Rapporteur, David Weissbrodt, submitted in accordance with Sub-Commission decision 2000/103, Commission resolution 2000/104 and Economic and Social Council decision 2000/283*, 26 May 2003, E/CN.4/Sub.2/2003/23, para. 2, available at: <http://www.unhcr.org/refworld/docid/3f46114c4.html> (hereafter: '*Final Report of the Special Rapporteur, Mr. David Weissbrodt*').

⁴⁸ See, J. Fitzpatrick (ed.), *Human Rights Protection for Refugees, Asylum-Seekers, and Internally Displaced Persons: A Guide to International Mechanisms and Procedures* (New York: Transnational Publishers, 2002).

fundamental principles upon which the CEDAW is based, providing a framework for the two parts that follow. Parts 3 and 4 form the main substantive parts of the paper. They 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 5 moves on to outline the main monitoring mechanisms of the Committee, and to explore how they might supplement UNHCR's 'supervisory' role for the benefit of displaced and stateless women. Finally, the Conclusion identifies a number of recommendations on how the rights protection regime for displaced and stateless women could be enhanced by further reference to the CEDAW. For further information on definitions of terms employed throughout the paper, please consult the Annex.

2. The Convention on the Elimination of All Forms of Discrimination Against Women: Fundamental Principles

Building on universal principles that ‘all human beings are born equal in dignity and rights’⁴⁹ and ‘[belief in] the dignity and worth of the human person, the equal rights of men and women and of nations large and small’⁵⁰, the CEDAW is an anti-discrimination treaty that codifies and strengthens the rights of women. At present there are 186 states parties to the CEDAW, making it the second most widely ratified of all the human rights treaties,⁵¹ albeit there have been concerns about the large number of reservations to the treaty and to its principal provisions, although many of these have been gradually removed.⁵² This is to be compared to the 144 states parties each to the 1951 Convention and 1967 Protocol respectively, and the 63 states parties to the 1954 Statelessness Convention and 36 states parties to the 1961 *Convention on the Reduction of Statelessness*.⁵³

Like other human rights treaties, the CEDAW applies to all women regardless of their nationality, citizenship or other legal status, including immigration or marital status.⁵⁴ The CEDAW has been called the International Bill of Rights for Women.⁵⁵ It sets out a range of civil, cultural, economic, political, and social rights for women and covers a variety of situations in which women face discrimination, including in politics, the economy, the family, employment, education and health. Despite the many feminist criticisms of international human rights law in general⁵⁶ and the CEDAW in particular,⁵⁷ and recognising that there is

⁴⁹ UDHR, art.1.

⁵⁰ UN Charter, pmbl para. 2.

⁵¹ As of July 2009; see: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV8&chapter=4&lang=en. The most widely ratified is the 1989 *Convention on the Rights of the Child*.

⁵² For more on reservations in the context of the CEDAW, see, e.g., S. Mullally, *Gender, Culture and Human Rights: Reclaiming Universalism* (Oxford: Hart Publishing, 2006), Ch. 6; J.A. Minor, ‘An Analysis of Structural Weaknesses in the Convention on the Elimination of All Forms of Discrimination against Women’ (1994–95) 24 *Ga. J. Int’l and Comp. L.* 137; R. Cook, ‘Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women’ (1990) 3 *Va. J. Int’l L.* 642; B. Clark, ‘The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women’ (1991) 85 *Amer. J. Int’l L.* 281.

⁵³ As of July 2009; see: <http://treaties.un.org/Pages/Treaties.aspx?id=5&subid=A&lang=en>.

⁵⁴ See, UN General Assembly, *Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live : resolution / adopted by the General Assembly*, 13 December 1985, A/RES/40/144, available at: <http://www.unhcr.org/refworld/docid/3b00f00864.html>; HRC, *General Comment No. 15: The position of aliens under the Covenant*, 1986, available, along with other general comments, at: <http://www2.ohchr.org/english/bodies/hrc/comments.htm>; CERD *General Recommendation No. 11: Non-Citizens*, 1993, available, along with other recommendations, at: <http://www2.ohchr.org/english/bodies/cerd/comments.htm>; CERD, *General Recommendation No. 20: Non-Discriminatory implementation of rights and freedoms*, 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*, 1 September 2005, available at: <http://www.unhcr.org/refworld/docid/42dd174b4.html>.

⁵⁵ 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 2010).

⁵⁶ See, e.g., C. Bunch, ‘Women’s Rights as Human Rights: Toward a Re-Vision of Human Rights’ (1990) 12 *HRQ* 486; H. Charlesworth, C. Chinkin and S. Wright, ‘Feminist Approaches to International Law’ (1991) 85 *Amer. J. Int’l L.* 613; R.J. Cook, ‘Women’s International Human Rights Law: The Way Forward’ (1993)

scope to improve the CEDAW itself and the work of the Committee,⁵⁸ many of these rights are relevant and can be applied effectively to displaced and stateless women and girls 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.⁵⁹

Article 1 is similarly worded to international definitions of discrimination on other grounds.⁶⁰ 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.’⁶¹

This interpretation of discrimination 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.⁶² 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.⁶³ The CEDAW definition instead focuses on the eradication of policies and practices which have the ‘purpose or effect’ of ‘impairing or nullifying’ women’s human rights. In

15 *HRQ* 230; A. Gallagher, ‘Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System’ (1997) 19 *HRQ* 283.

⁵⁷ See, e.g., D. Otto, ‘A Post-Beijing Reflection on the Limitations and Potential of Human Rights Discourse for Women’, in K.D. Askin and D.M. Koenig (eds.), *Women and International Human Rights Law* (Ardsey, NY: Transnational Publishers, 1999), Vol. 1, pp. 115, 120, who argues that the CEDAW does not recognise or protect rights that are specific to women’s ‘gendered experience and corporeality’.

⁵⁸ See, e.g., 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.

⁵⁹ CEDAW, art. 1.

⁶⁰ 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), 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.’

⁶¹ CEDAW, *General Recommendation No. 25: Temporary Special Measures*(Art. 4(1)), 2004, HRI/GEN/1/Rev.7, 2004, available at <http://www.unhcr.org/refworld/docid/453882a7e0.html>, para. 5 (hereafter: ‘CEDAW, *General Recommendation No. 25*’).

⁶² W. McKean, *Equality and Discrimination under International Law* (Oxford: Clarendon Press, 1983), p. 3.

⁶³ 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), p. 29.

pursuit of equality, therefore, the CEDAW permits and provides for special (or differential) treatment of women. As Catharine MacKinnon argues: ‘The fundamental issue of equality is not whether one is the same or different; it is not the gender difference; it is the difference gender makes.’⁶⁴

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.⁶⁵

The Committee has held that ‘discrimination against women is a multifaceted phenomenon that entails indirect and unintentional as well as direct and intentional discrimination’.⁶⁶ 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’.⁶⁷ Both qualitative and quantitative equality are considered to be at the heart of the CEDAW.⁶⁸ 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, or age.⁶⁹ 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 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.⁷⁰

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, age, or immigration, or other status.⁷¹

⁶⁴ C.A. MacKinnon, ‘Making Sex Equality Real’, in C.A. MacKinnon, *Are Women Human? And Other International Dialogues* (Cambridge, MA: Harvard University Press, 2006), pp. 71, 74.

⁶⁵ CEDAW, *General Recommendation No. 25*, para. 8.

⁶⁶ CEDAW, *Concluding observations on Ukraine*, A/57/38 (Part II), para. 279 (2002); Kyrgyzstan, A/54/38/Rev.1 (Part I), 1999, para. 113. All CEDAW concluding observations referenced in this paper are available at: <http://www2.ohchr.org/english/bodies/cedaw/sessions.htm>.

⁶⁷ CEDAW, *Concluding observations on Bulgaria*, A/53/38/Rev.1 (Part I), 1998, para. 232.

⁶⁸ CEDAW, *General Recommendation No. 25*, para. 9.

⁶⁹ See, CEDAW, *Concluding observations on Spain (31st Session, para. 338): Annual Report 2004*, A/59/38, 2004, (regarding migrants); *Norway (para. 413): Annual Report 2003*, 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).

⁷⁰ CEDAW, *General Recommendation No. 25*, para. 12.

⁷¹ 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*, 40th Session, *Annual Report 2008*, 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

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’,⁷² the CEDAW prohibits discrimination in the public as well as in the private sphere. In requiring state parties to take *all appropriate measures in all fields* to ensure the full development and advancement of women for the purpose of guaranteeing them the exercise and enjoyment of their human rights and fundamental freedoms, Article 3 of the CEDAW provides the Committee a mandate over related fields of international law, including laws relating to refugees, displacement and statelessness.

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.⁷³ 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 inequality.⁷⁴ These provisions require governments to act to eradicate practices, customs and social stereotypes that reinforce the inferiority of women. They support 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.⁷⁵

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

discrimination’ (CEDAW, Concluding comments on Lithuania, 41st Session, *Annual Report 2008*, A/63/38 (2008), paras. 84–85).

⁷² CEDAW, art. 2.

⁷³ CEDAW, art. 4 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, CEDAW, *General Recommendation No. 25*.

⁷⁴ 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.

⁷⁵ 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.

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.⁷⁶

Beyond these core provisions are a group of provisions (Articles 6-16) which deal with 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 and that the CEDAW guarantees women's equal rights to political and public life as those enjoyed by men⁷⁷). 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 and grants women equal rights to men with regard to the nationality of their children. Being specifically relevant to the discussion of statelessness, the right to a nationality is discussed further under Part 4 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 expressly outlawing violence against women.⁷⁸ Moreover, the main provisions used in other human rights instruments to protect against particular forms of violence – such as rights to life, to liberty and security of person, and to be free from torture or cruel, inhuman or degrading treatment or punishment – were not transcribed into the CEDAW.⁷⁹ In response to this gap in the law, the Committee adopted two General Recommendations recognising violence against women as a form of sex discrimination, outlined below, and therefore rightly within its mandate, and the UN General Assembly agreed upon the *Declaration on the Elimination of Violence against*

⁷⁶ CEDAW, *General Recommendation No. 25*, para. 7.

⁷⁷ CEDAW, art. 7 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.'

⁷⁸ For a 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).

⁷⁹ For further discussion, A. 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.

Women.⁸⁰

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 impose 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.⁸¹ Elaborating upon its earlier position, the Committee adopted a more comprehensive General Recommendation in 1992 in which it dealt with individual treaty provisions and the links between sex discrimination and violence against women.⁸² The 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.⁸³

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 rights and freedoms on a basis of equality with men'.⁸⁴ 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.⁸⁵

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.⁸⁶

As to the definition of 'violence against women', the DEVAW has defined it as:

any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.⁸⁷

The Declaration further provides that: 'Violence against women shall be understood to encompass, but not be limited to, the following:

- (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
- (b) Physical, sexual and psychological violence occurring within the general community,

⁸⁰ UN Declaration on the Elimination of Violence against Women, A/RES/48/104, 23 February 1994, available at: <http://www.unhcr.org/refworld/docid/3b00f25d2c.html> (hereafter: 'DEVAW').

⁸¹ CEDAW, *General Recommendation No. 12: Violence against Women*, 1989, HRC/GEN/1/Rev.7.

⁸² CEDAW, *General Recommendation No. 19: Violence against Women*, 1992, HRI/GEN/1/Rev.7.

⁸³ *Ibid.*, para. 4.

⁸⁴ *Ibid.*, para. 1.

⁸⁵ *Ibid.*, para. 6.

⁸⁶ *Ibid.*, para. 7.

⁸⁷ DEVAW, art. 1.

including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
(c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.⁸⁸

Appearing also in the Beijing Platform for Action⁸⁹ and most recently reconfirmed by the UN General Assembly in its 2006 resolution on violence against women,⁹⁰ this is the leading definition relied upon in international discourse.

Although the approach of the Committee of conceptualising violence against women as a form of sex discrimination is something less than a general prohibition on violence against women,⁹¹ the Committee has held that '[g]ender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence'.⁹² At a minimum, it brings violence against women within the jurisdiction of international law and in many ways it has transformed the CEDAW from an equality-centred 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.⁹³

In its 1992 General Recommendation, the 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'.⁹⁴ 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.⁹⁵ 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'.⁹⁶ Moreover, the Committee asserted that '[t]hese attitudes also contribute to the propagation of pornography

⁸⁸ DEVAW, art. 2.

⁸⁹ Beijing Declaration, para. 113.

⁹⁰ UN General Assembly, *Intensification of efforts to eliminate all forms of violence against women : resolution / adopted by the General Assembly*, 30 January 2007, A/RES/61/143, available at: <http://www.unhcr.org/refworld/docid/45fe45762.html>, para. 3.

⁹¹ That is, neither the DEVAW nor the Committee's General Recommendation outlaws violence against women per se in an equivalent manner as racially-related violence, for example, art. 5(b) of ICERD, which provides: 'The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.' See, D. Otto, 'Violence against Women: Something Other than a Human Rights Violation?' (1993) 1 *Aust. Fem. L. J.* 159 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.

⁹² CEDAW, *General Recommendation No. 19: Violence against Women*, 1992, HRI/GEN/1/Rev.7, para. 6.

⁹³ 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, A/58/38 (2003); Fiji (26th Session, para. 58) (high incidence of ethnic and gender based violence against women in periods of civil unrest), Sri Lanka (26th 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, A/57/38 (2002).

⁹⁴ CEDAW, *General Recommendation No. 19: Violence against Women*, 1992, HRI/GEN/1/Rev.7, para. 11.

⁹⁵ *Ibid.*, para. 11.

⁹⁶ *Ibid.*, para. 11.

and the depiction and other commercial exploitation of women as sexual objects, rather than as individuals. This in turn contributes to gender-based violence.’⁹⁷

⁹⁷ *Ibid.*, para. 12.

3. 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.⁹⁸ Like all women, displaced women face many barriers to the equal enjoyment of their 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 because of her legal status, or a lack of or precarious legal status, in the asylum country. In internal displacement settings, sex discrimination may be multiplied owing to loss of documentation needed to access local services, including social housing. Other factors that intersect with being displaced include socio-economic position, especially poverty; trauma arising from armed conflict or persecution; prior subjection to or witness of violent conduct; loss of livelihood and family; age; ability; or cultural, social and/or linguistic differences between herself and her displacement country and/or community. Discrimination against women can occur at all stages in the displacement cycle.⁹⁹

3.1 Discrimination, armed conflict and displacement (Arts. 1, 2 and 3, CEDAW)

Armed conflict is one of the major causes of displacement. It is now well studied that civilian casualties far exceed those suffered by the military in modern armed conflict,¹⁰⁰ and that large numbers of women and children have been maimed by small arms circulating within civilian society.¹⁰¹ In this context, the UN Security Council has acknowledged that ‘civilians, particularly women and children, account for the vast majority of those adversely affected by armed conflict, including as refugees and internally displaced persons...’¹⁰² The Committee on the Elimination of Racial Discrimination (CERD) has also noted:

Certain forms of racial discrimination may be directed toward women specifically because of their gender, such as sexual violence committed against women members of particular racial or ethnic groups in detention or during armed conflict.¹⁰³

The Committee has likewise made reference to armed conflict as a leading cause of discrimination and violence against women, including criticism of governments for failing to provide sufficient support for victims of violence arising from armed conflict, including the

⁹⁸ 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’).

⁹⁹ See, further, S.F. Martin, *Refugee Women* (2nd ed., Lexington Books, 2004); E.K. Baines, *Vulnerable Bodies: Gender, The UN, and the Global Refugee Crisis* (Ashgate, 2004).

¹⁰⁰ A. Fetherston and C. Nordstrom, *Overcoming Conceptual Habitus in Conflict Management: UN Peacekeeping and Warzone Ethnography* (Canberra: Peace Research Centre, Australian National University, 1994, Working Paper No. 147), cited in H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, 2000), p. 251.

¹⁰¹ Amnesty International, *Under Fire: The Impact of Guns on Women’s Lives*, AI Index: ACT 30/001/2005, available at: <http://www.amnesty.org/en/library/asset/ACT30/001/2005/en/9751740d-d53a-11dd-8a23-d58a49c0d652/act300012005en.html>.

¹⁰² UN Security Council, *Resolution 1325 (2000) [on women and peace and security]*, 31 October 2000, pmbl para. 4, available at: <http://www.unhcr.org/refworld/docid/3b00f467e.html>.

¹⁰³ CERD, General Comment No. XXV: *Gender Related Dimensions of Racial Discrimination*, HRI/GEN/1/Rev.7, 20 March 2000, available at: <http://www2.ohchr.org/english/bodies/cerd/comments.htm> (hereafter: ‘CERD, General Comment No. XXV’).

need for enhanced access to justice (discussed further below).¹⁰⁴ In its concluding observations on Angola, for example, it noted the inter-linkages between 30 years of civil war, the destruction of the socio-economic infrastructure, 4 million internally displaced persons and refugees, considerable increase in households headed by women, and the majority of the population living in extreme poverty. The Committee raised concern that widespread poverty and the poor socio-economic conditions in which they live are among the causes of the violation of women's human rights and discrimination against them.¹⁰⁵

3.2 Gender-related dimensions of asylum and discrimination in individual asylum procedures (Arts. 1, 2 and 15, CEDAW)

In addition to armed conflict, flight is often triggered, for example, by severe sex discrimination and gender-based persecution.¹⁰⁶ Sex discrimination against women claimants is often evident in refugee status determination procedures in many countries of asylum, in which the gendered nature of persecution may not be recognised or where sex/gender may not be seen as a legitimate ground for asylum. These gendered dimensions of asylum procedures may further be compounded by discrimination and abuse on other grounds, such as ethnicity, religion, age, and class. Women also leave their countries of origin for other reasons, including owing to their own or their husbands' political activities, or for fear for their children's safety and security. In relation to the former, women can present as principal asylum claimants because of their own political activities, leading in some instances to torture, arbitrary detention, or other restrictions on freedom of movement. Feminism too, for example, has been recognised as a 'political opinion' within the 1951 Convention refugee definition.¹⁰⁷ Women are also targeted by the authorities on account of the political affiliations or opinions of their husbands, even though they may not share them or they may be unaware of those activities. Women have also presented asylum claims based on fears relating to one's children, including that they will be genitally mutilated, forced into marriage, or subjected to community ostracism and exclusion for being the second or third children born in contravention of strict family planning policies.¹⁰⁸

Moreover, women's access to asylum procedures and related services may be hindered by gender-related forms of discrimination or other gender-related factors. Even if her claim to asylum, for example, relates to racially- or politically-motivated persecution (that is, non-gender-related 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 interviewing techniques and interview settings, or lack of child care facilities making attendance at and active participation in interviews more difficult for women with children, due to their caring responsibilities.¹⁰⁹

¹⁰⁴ CEDAW, *Concluding observations on Burundi*, 40th session, A/63/38, (2008), pp. 26–27.

¹⁰⁵ CEDAW, *Concluding observations on Angola*, 31st session, A/59/38 (2004), para. 135.

¹⁰⁶ See, A. 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.

¹⁰⁷ *Fatin v. Immigration and Naturalization Service*, Respondent No. 92-3346, US Court of Appeals for the Third Circuit, 12 F. 3d 1233, 21 May 1993, available at: <http://www.unhcr.org/refworld/docid/3ae6b6d0.html>.

¹⁰⁸ In relation to the latter, see, e.g., *Chen Shi Hai v. The Minister for Immigration and Multicultural Affairs*, [2000] HCA 19, 13 April 2000, available at: <http://www.unhcr.org/refworld/docid/3ae6b6df4.html>.

¹⁰⁹ See, by analogy, CERD's *General Recommendation No. XXV*, in which the CERD notes that

In its concluding observations on state party reports, the Committee has called on governments to implement gender-sensitive asylum procedures, and has congratulated some governments for adding ‘gender’ to the list of grounds for asylum in national asylum laws.¹¹⁰ This coincides with the general position at international law and the leading jurisprudence in many national jurisdictions that has recognised various forms of gender-related persecution as grounds for asylum, including female genital mutilation,¹¹¹ forced marriage,¹¹² community or family ostracism or re-victimisation arising out of being trafficked for sexual exploitation purposes,¹¹³ rape and sexual violence,¹¹⁴ domestic violence where the state is unable or unwilling to protect the female applicant because of discriminatory government policies,¹¹⁵ the imposition of the death penalty arising from charges of adultery in discriminatory justice systems,¹¹⁶ or political persecution for holding feminist views or failing to conform to gender-

‘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.’ See, also, J. Freedman, *Female Asylum-Seekers and Refugees in France*, UNHCR, PPLAS/2009/01, June 2009, available at: <http://www.unhcr.org/refworld/docid/4a535e112.html>, in which the total lack of child care facilities was considered a handicap for female asylum-seekers including in one case where a woman’s interview was cut short because of her children crying and not rescheduled (p. 27). The French version, *Les femmes en quête d’asile et réfugiées en France*, is available at: <http://www.unhcr.org/refworld/docid/4a535e112.html>.

¹¹⁰ See, e.g., CEDAW, Concluding Comment on Lebanon, 41th Session, *Annual Report 2008*, 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, 41st Session, *Annual Report 2008*, 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, 40th Session, *Annual Report 2008*, 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).

¹¹¹ *In re Fauziya Kasinga*, 3278, US Board of Immigration Appeals, 13 June 1996, available at: <http://www.unhcr.org/refworld/docid/47bb00782.html>; *Khadija Ahmed Mohamed v. Alberto R. Gonzales, Attorney General*, A79-257-632; 03-72265; 03-70803, US Court of Appeals for the Ninth Circuit, 10 March 2005, p. 157, available at: <http://www.unhcr.org/refworld/docid/423811c04.html>; *Secretary of State for the Home Department (Respondent) v. K (FC) (Appellant)*; *Fornah (FC) (Appellant) v. Secretary of State for the Home Department (Respondent)*, [2006] UKHL 46, UK: House of Lords, 18 October 2006, available at: <http://www.unhcr.org/refworld/docid/4550a9502.html> (hereafter: ‘Fornah’). Note, too, that the UNHCR recently issued a *Guidance Note on Refugee Claims relating to Female Genital Mutilation*, May 2009, available at <http://www.unhcr.org/refworld/docid/4a0c28492.html>.

¹¹² *Ali Kamaleddin, Fatemeh Zokaei-Alamdari v. Immigration and Naturalization Service*, Fed. R. App. P. 34(a); 9th Cir. R. 34-4, US Court of Appeals for the Ninth Circuit, 4 April 1994, available at: <http://www.unhcr.org/refworld/docid/3ae6b69624.html>; *Fornah*.

¹¹³ *SB (PSG – Protection Regulations – Reg 6) Moldova v. Secretary of State for the Home Department (UK)* [2008] UKAIT 00002, UK: Asylum and Immigration Tribunal / Immigration Appellate Authority, 26 November 2007, available at: <http://www.unhcr.org/refworld/docid/47837c902.html>.

¹¹⁴ *Olimpia Lazo-Majano v. Immigration and Naturalization Service*, A 24 345 083, US Court of Appeals for the Ninth Circuit, 9 June 1987, available at: <http://www.unhcr.org/refworld/docid/3ae6b7120.html>; *Raquel Martí de Mejía v. Perú*, Case 10.970, Inter-American Commission on Human Rights (IACHR), 1 March 1996, available at: <http://www.unhcr.org/refworld/docid/3ae6b71c6.html>.

¹¹⁵ *Rosalba Aguirre-Cervantes a.k.a. Maria Esperanza Castillo v. Immigration and Naturalization Service*, US Court of Appeals for the Ninth Circuit, 21 March 2001, available at: <http://www.unhcr.org/refworld/docid/3f37adc24.html>; *Islam (A.P.) v. Secretary of State for the Home Department*; *R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, Session 1998-1999, UK: House of Lords, 25 March 1999, available at: <http://www.unhcr.org/refworld/docid/3dec8abe4.html>; *Minister for Immigration and Multicultural Affairs v. Khawar*, [2002] HCA 14, Australia: High Court, 11 April 2002, available at: <http://www.unhcr.org/refworld/docid/3deb326b8.html>.

¹¹⁶ *Jabari v. Turkey*, ECtHR, Appl. No. 400035/98, 11 July 2000.

prescribed norms and mores.¹¹⁷ Gender prejudice can also impact on how women's asylum claims are determined where the persecution derives from a non-state actor, including studies showing that decision-makers often ignore the specific difficulties some women face in being required to relocate internally in their countries of origin in order to avoid the harm. Such difficulties may include cultural and social prohibitions on women travelling or living alone, being able to survive economically without family support, or at risk of harassment, exploitation and violence.¹¹⁸

However, even before she has access to asylum proceedings, there are many human rights factors that can prevent a woman reaching her asylum destination. These can include restrictions on the freedom of movement of women in her country of origin,¹¹⁹ lack of access to necessary documentation, such as passports, because she is female,¹²⁰ legal requirements for permission from husbands to travel,¹²¹ or cultural factors that put women travelling alone or without male family members at risk of harassment and 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.¹²² Many of these same restrictions may also be imposed upon IDP women, who attempt to travel from rebel- to government-controlled zones, or vice versa. Thus, seeking asylum or being displaced are often a direct reflection of the human rights position of women (and others) in countries of origin. The better the human rights in the country of origin, the less the need for international protection. In this way, the Committee thus performs a preventive service as part of its regular work in monitoring state party performance with their treaty obligations.

3.3 Discrimination and inequality during refuge or displacement

Women often suffer discrimination and related human rights abuses during asylum/refuge or displacement, as outlined below.

3.3.1 Discriminatory social and cultural roles, responsibilities and practices impacting on protection and rights (in particular Arts. 1, 2(f), 5, plus 16, CEDAW)

Articles 2(f) and 5(a) of the CEDAW require 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

¹¹⁷ See: *Fatin v. Immigration and Naturalization Service*, 12 F.3d 1233, US Court of Appeals for the Third Circuit, 20 December 1993, available at: <http://www.unhcr.org/refworld/docid/3ae6b6d60.html> (her claim was ultimately unsuccessful but the Court of Appeals did recognise that 'feminism' was a political opinion for the purposes of the 1951 Convention); *Refugee Appeal No. 2039/93 Re MN*, New Zealand: Refugee Status Appeals Authority, 12 February 1996, available at: <http://www.unhcr.org/refworld/docid/3ae6b741c.html>; *CRR, Sections réunies, Mlle Elkebir Nauta*, 237939, France: Commission des Recours des Réfugiés (CRR), 22 July 1994, available at: <http://www.unhcr.org/refworld/docid/3ae6b64514.html>.

¹¹⁸ C. Bennett, *Relocation, Relocation: The Impact of Internal Relocation on Women Asylum Seekers*, November 2008, published by Asylum Aid UK, available at: http://www.asylumaid.org.uk/data/files/publications/89/Relocation_Relocation_research_report.pdf. See, also, A. Edwards, 'Age and Gender Dimensions of International Refugee Law'.

¹¹⁹ CEDAW, art. 15(4).

¹²⁰ CEDAW, art. 3.

¹²¹ See, by analogy, CEDAW, General Recommendation No. 26: Women Migrant Workers, CEDAW/C/2009/WP.1/R.

¹²² *Women, Peace and Security*, Study Submitted by the Secretary-General pursuant to Security Council Resolution 1325 (2000), 2002, paras. 93–108, available at c.

them, as noted above in Part 2.¹²³ The obligation contained in the CEDAW is not simply for states parties to respond to the *consequences* of discrimination, but ‘to take all appropriate measures ... to modify the social and cultural patterns of conduct of men and women ...’,¹²⁴ That is, to also address the *causes* of discrimination and inequality. Read together, Articles 5(a) and 2(f) have been interpreted to establish an *immediate obligation*.¹²⁵ 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.’¹²⁶ Articles 5(b) and 16(c) further recognise the common responsibility of men and women in the upbringing and development of their children.

It is well-documented that the gender-prescribed allocation of roles and responsibilities to 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 refugee camps, including from landmines, banditry or sexual attack.¹²⁷ Distribution systems that allocate food and non-food items to the ‘head of the household’, commonly interpreted by default 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.¹²⁸ Many measures have been adopted to reduce this risk by UNHCR and by states parties, such as distributing food and non-food items to women rather than men. Nonetheless, these measures have yet to fully resolve the problem of family tensions and family-based violence. In fact, the introduction of such measures can exacerbate family violence if they are implemented without consultation with the community. In many cases, a violent husband will simply take control of these essentials as soon as his wife returns to the family home. A further potential negative consequence of these measures is that they also add further burdens on women who must bear the added responsibility for collecting the material assistance. Thus, some short-term solutions to gender inequality 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 exposes them to the risk of sexual attack and banditry, have produced some important short-term benefits (reduction in such attacks), but they have done little to address the underlying causes of structural inequality. When refugee or IDP women return home to their countries of origin, for instance, the UNHCR is unlikely to be present to be able to take charge of firewood or water distribution systems. Although much has now been done to address the shortcomings in some of these programmes,¹²⁹ the

¹²³ CEDAW, General Recommendation No. 19: Violence against Women, 1992, para. 11.

¹²⁴ CEDAW, art. 5(a).

¹²⁵ H.J. Steiner and P. Alston, *International Human Rights in Context: Law, Politics and Morals* (2nd ed., Oxford University Press, 2000), p. 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.

¹²⁶ CEDAW, General Recommendation No. 24: Women and Health (Article 12) (1999), para. 12 (b).

¹²⁷ *Women, Peace and Security*, Study Submitted by the Secretary-General pursuant to Security Council Resolution 1325, 2002, paras. 93–108, available at: <http://www.unhcr.org/refworld/docid/4a54bc0f19.html> (hereafter: ‘*Women, Peace and Security*’).

¹²⁸ UNHCR, *Sexual and Gender-Based Violence Against Refugees, Returnees and Internally Displaced Persons. Guidelines for Prevention and Response*, May 2003, available at: <http://www.unhcr.org/refworld/docid/3edcd0661.html> (hereafter: ‘UNHCR, *SGBV Guidelines*’); UNHCR, *Handbook for the Protection of Women and Girls*.

¹²⁹ Women’s Commission for Refugee Women and Children (WRC), *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 WRC, *Beyond Firewood: Fuel Alternatives and Protection Strategies for Displaced Women and Girls*, March 2006, available at:

problems persist.

Displacement and associated armed conflict often 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, the sick and the injured, and they may be doing so without male support or security.¹³⁰ Such responsibilities can restrict or prevent women from being able to engage in activities 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 as well as fathers or other male 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 (discussed below),¹³¹ but also on an equal basis with boys.¹³² In addition to the CEDAW and the guarantee of rights to public elementary education for refugee children in the 1951 Convention on the same basis as nationals,¹³³ the *1989 Convention on the Rights of the Child* contains a specific provision on the rights of refugee children,¹³⁴ and the associated committee has recognised the particular needs of unaccompanied and separated children, including that their situation of vulnerability may be exacerbated by gender.¹³⁵ In addition, female- and child-headed households are at heightened risk of harassment and violence.

Meanwhile, older women face a myriad of additional problems relating to their survival owing to infirmity, disability, or lack of mobility.¹³⁶ Whilst older people in many societies are valued as increasingly important members of society as they age, in other communities they can be looked upon as burdens and victims. In some countries and communities, older women have also been accused of witchcraft and persecuted as a result.¹³⁷ In refugee and IDP settings where survival is the preoccupying goal, it may be the case that older women are left behind or abandoned as the family moves, they may become chronically dependent upon assistance,

<http://www.womenscommission.org/pdf/fuel.pdf> (recommending alternative fuel sources, but not addressing broadly the role of women in food preparation and fuel sourcing).

¹³⁰ See, e.g., UNHCR and OHCHR (A. Edwards), *Daunting Prospects. Minority Women: Obstacles to their Return and Integration*, 1 April 2000, available at: <http://www.unhcr.org/refworld/docid/3ae6b3394.html> (hereafter: ‘UNHCR and OHCHR (A. Edwards), *Daunting Prospects*’).

¹³¹ CRC, art. 28; 1951 Convention, art. 22; 1954 Statelessness Convention, art. 22.

¹³² CEDAW, art. 10.

¹³³ 1951 Convention, art. 22.

¹³⁴ CRC, art. 22.

¹³⁵ CRC, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, CRC/GC/2005/6, 1 September 2005, available at: <http://www.unhcr.org/refworld/docid/42dd174b4.html>, in which it is noted that unaccompanied or separated girls are at greater risk of sexual and gender-based violence, including domestic violence (para. 3) and that the principle of non-discrimination in art. 2 may require different measures of protection deriving from age or gender to be implemented (para. 18). The General Comment also calls for gender-appropriate asylum determination procedures that are age sensitive (Pt VI).

¹³⁶ For more on age-related aspects of asylum see: A. Edwards, *Age and Gender Dimensions in International Refugee Law*.

¹³⁷ See, UN Commission on Human Rights, *Report of the Special Rapporteur on violence against women, its causes and consequences, Cultural Practices in the Family that are Violent towards Women*, E/CN.4/2002/83, 31 January 2002, available at: <http://www.unhcr.org/refworld/docid/3d6ce3cc0.html>, in which she cites examples of witchcraft in South Africa, India and Nepal. See also, a recent study on witchcraft in refugee settings, suggesting in part that older women are among the groups most targeted as alleged witches: J. Schnoebelen, *Witchcraft allegations, refugee protection and human rights: a review of the evidence*, January 2009, New Issues in Refugee Research, Working Paper No. 169, UNHCR, available at <http://www.unhcr.org/4981ca712.html>.

or they may be less able to adapt to changing circumstances. These specific difficulties may be compounded by lifelong gender-related disadvantages, such as illiteracy.¹³⁸

Men and adolescent boys residing in camps and settlements, in comparison to women, frequently 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.'¹³⁹ There is evidence that domestic violence actually increases in post-conflict societies, and by analogy in refugee and IDP settings, although there is limited academic displacement-specific research on this issue.¹⁴⁰ In addition to traditional negative attitudes that view women as chattels or as inferior to men, reasons for an increase in domestic violence during displacement has been variously attributed to trauma, including post-traumatic stress disorder, increased alcoholism and use of drugs, and abrupt changes in social and family roles and relations. Enforced idleness is also prevalent in countries that ban asylum-seekers from taking up employment as a form of deterrence, the impact of which on women, men and families has also been little studied to date.¹⁴¹

Displacement can conversely lead to the re-assertion or legitimisation of traditional practices as male leaders perceive their community's existence to be under threat. These practices can include child or forced marriages owing to, for example, beliefs that an unaccompanied girl or single adult woman is unsafe without male protection, increased polygamy because of a shortage of prospective husbands owing to the secondary and onward migration of young men out of the camps or their being away fighting, or the exploitation of fostered children especially girls by their foster families, being effectively held as child slaves.¹⁴² 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.¹⁴³

¹³⁸ UNHCR, *The Protection of Older Persons and Persons with Disabilities*, EC/58/SC/14, 6 June 2007, available at: <http://www.unhcr.org/refworld/docid/4693775c1c.html>.

¹³⁹ *Women, Peace and Security*, para. 101, referring to a Human Rights Watch study that found that "all married Burundian women interviewed had been subjected to domestic violence (...) as refugees": Human Rights Watch, *World Report 1999 – Women's Human Rights* (New York, 1999), available at: <http://www.hrw.org/legacy/worldreport99/women/women2.html>. See, also, S. Turner, *Angry Young Men in Camps: International Assistance and Changing Hierarchies of Authority amongst Burundian Refugees in Tanzania*, New Issues in Refugee Research, Working Paper No. 9, UNHCR, June 1999, available at: <http://www.unhcr.org/3ae6a0c38.html>.

¹⁴⁰ See, e.g., A. Szczepanikova, 'Gender Relations in a Refugee Camp: A Case of Chechens Seeking Asylum in the Czech Republic' (2005) 18 *J. Ref. Studies* 281-298; 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; 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 pp. 14–15, 18, available at: http://www.unifem.org/attachments/products/213_chapter01.pdf; UN Sub-Commission on the Promotion and Protection of Human Rights, *Systematic rape, sexual slavery and slavery-like practices during armed conflict: Final report submitted by Ms. Gay J. McDougall, Special Rapporteur*, E/CN.4/Sub.2/1998/13, 22 June 1998, available at: <http://www.unhcr.org/refworld/docid/3b00f44114.html>.

¹⁴¹ WRC, *Masculinities: Male Roles and Male Involvement in the Promotion of Gender Equality*, September 2005, available at: http://www.womenscommission.org/pdf/masc_res.pdf; WRC, *Engaging Men and Boys in Refugee Settings to Address Sexual and Gender-Based Violence*, September 2008, available at: http://www.womenscommission.org/pdf/masc_gbv.pdf.

¹⁴² 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).

¹⁴³ 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

3.3.2. *Individual registration, identity, documentation, and related rights, such as access to bank loans, mortgages and other financial assistance, to agricultural credit and loans, and to freedom of movement (Art. 3 and 15, plus 13(b), 14(g), 15(4), CEDAW)*

Failure to individually register all asylum-seekers and refugees can render them as ‘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. There are also several relevant provisions in the 1951 Convention: Article 26 guarantees to refugees lawfully in the territory the right to choose their place of residence and to move freely within the territory, subject to any regulations application to aliens generally in the same circumstances; Article 27 requires states parties to issue identity papers to any refugee in their territory who does not possess a valid travel document; and Article 28 requires states parties to issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside the territory subject only to compelling reasons of national security or public order that may require otherwise. Access to identity documentation is a prerequisite to being recognised as a person before the law and in order to access and to enjoy many associated rights. Without documentation women can be rendered unequal vis-à-vis their husbands or other male family members and this can reinforce their unequal position in society at large. Accessing assistance and services and enjoying basic rights, including freedom of movement and family reunification, is often dependent on proof of identity.¹⁴⁴ 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 sometimes been denied freedom of movement and access to other basic rights.¹⁴⁵ Access to associated rights such as bank loans, mortgages and other financial assistance, as well as agricultural credit and loans, as provided for in Articles 13(b) and 14(g) of the CEDAW, is also impaired by displaced women’s lack of identity documentation.

In addition, undocumented refugee and IDP women and their children are made more vulnerable to being rendered stateless (discussed below under 4.),¹⁴⁶ they are less likely to be able to claim or inherit property upon return, or to seek support for children from estranged husbands or partners. They also face the risk of being arrested and detained by police because they do not have proper documents (see below), and they risk *refoulement* being unable to prove their refugee status.¹⁴⁷ In spite of efforts to guarantee registration of all refugees – men and women alike¹⁴⁸ – 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

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).

¹⁴⁴ 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).

¹⁴⁵ See, also, CRC, arts. 7–8.

¹⁴⁶ See, UNICEF Innocenti Research Centre, *Birth Registration: Right from Start*, Innocenti Digest 9, March 2002, available at: <http://www.unicef-irc.org/publications/pdf/digest9e.pdf>.

¹⁴⁷ UNHCR, *Handbook on Registration*, Provisional Release, September 2003, p. 12, available at: <http://www.unhcr.org/refworld/docid/3f967dc14.html> (hereafter: ‘UNHCR, *Handbook on Registration*’).

¹⁴⁸ Registration and documentation is the second of the High Commissioner’s Five Commitments to Refugee Women; see: UNHCR, *Report of the High Commissioner’s Five Commitments to Refugee Women*, EC/55/SC/CRP.17, 13 June 2005, available at <http://www.unhcr.org/refworld/docid/49997af91a.html>.

registration exercises and procedures.¹⁴⁹

Even in situations where each individual refugee is registered, the issuance of single ration cards designated to each family as a group can replay many of the old problems associated with family registration. During research conducted in 2008 in Uganda, several refugee women who were separated or divorced from their husbands complained that their husbands would return each month after the food distribution to reclaim their share or more of the food as well as take possession of the ration card, which they held as a bargaining chip and the continued exercise of power and intimidation over the woman, even though they were no longer married or living together. Where registration of and correlative assistance for newly arriving asylum-seekers is ceased or suspended for various reasons, single female asylum-seekers or single women with children can suffer the most. Some female Rwandan asylum-seekers in Uganda where registration had been halted for six months reported that they felt forced to marry or live with registered refugee men in order to benefit from their rations, to have a place to live, and to avoid complete destitution; meanwhile existing refugee families felt under threat by newly arriving single women who they saw as attempting to break up families in order to secure their own survival.¹⁵⁰

Closely related to the guarantee of freedom of movement is the prohibition under international law on the arbitrary deprivation of liberty.¹⁵¹ Detention of asylum-seekers and refugees is increasing in occurrence in many States. Detention of asylum-seekers and refugees can occur because they lack identity documentation so they are unable to prove who they are or their right to be in the territory, as outlined above, or it can form part of general government policies on migration management and deterrence of illegal immigration. According to the UNHCR, detention of asylum-seekers and refugees is 'inherently undesirable' and is considered even more undesirable for single women, children, and persons with special medical or psychological needs.¹⁵² In particular, women asylum-seekers should not be detained alongside male detainees, unless they are close family members; they should not be detained in the same centres as those housing general criminals; and pregnant women and nursing mothers, both of whom have special needs, should not be detained. Provision of appropriate health care needs, including gynaecological and obstetrical care, should be available; as well as their supervision and care by female staff, or at least a balanced ratio of female staff.¹⁵³

3.3.3 Violence against women, in particular sexual and gender-based violence (in particular Arts. 2, 5, 11, 12, and 16, CEDAW)

Displacement, whether internal¹⁵⁴ or international, weakens existing community and family protection mechanisms, and exposes refugee and IDP women and girls to a range of human

¹⁴⁹ UNHCR, *Handbook on Registration*, p. 13.

¹⁵⁰ Research trip by the author to Nakivale Refugee Camp, Uganda, July 2008.

¹⁵¹ See, in particular, ICCPR, art. 9.

¹⁵² UNHCR, *Revised Guidelines on the Applicable Standards and Criteria relating to the Detention of Asylum-Seekers*, February 1999, para. 1, available at: <http://www.unhcr.org/refworld/docid/3c2b3f844.html>.

¹⁵³ *Ibid.*, Guideline 8.

¹⁵⁴ On the gender dimensions of internal displacement, see Women's Refugee Commission (WRC), *The Gender Dimensions of Internal Displacement: Concept Paper and Annotated Bibliography*, November 1998, available at: http://www.forcedmigration.org/sphere/pdf/watsan/WCRWC/unicef_idpgender_1998.pdf.

rights violations, including sexual and gender-based violence (SGBV) and exploitation.¹⁵⁵

Exposure to SGBV is frequently 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 of refugee women and girls was reported as a problem in 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 assault; 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.¹⁵⁶ 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.¹⁵⁷

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 camps and settlements.¹⁵⁸ Other issues include the lack of separate latrines for males and females, ensuring that latrine doors close properly, and there are appropriate places to dispose of feminine hygiene products,¹⁵⁹ and latrines must be accessible and well lit at night.¹⁶⁰ Amongst other human rights concerns, a woman's right to privacy and dignity is directly at issue.¹⁶¹

Self-settled refugee women or those living in urban areas also face risks of SGBV, especially in developing host countries where international or national assistance is limited or non-existent, or where camp confinement policies are in operation and so living outside designated areas is prohibited. In these situations, women and their families often end up living in poor areas and slums, and being outside the normal protection framework, they are at heightened risk of sexual exploitation, engagement in survival sex or prostitution, or detained as illegal aliens or in violation of confinement policies, with its own concerns for women's safety.¹⁶²

Violence against women, as noted above, is squarely on the Committee's list of priorities. In this context, and with the increased contribution of the UNHCR to the Committee's work via its confidential submissions, the Committee has identified immigrant and refugee women as being particularly at risk of violence and discrimination – both by members of the host community as well as within their own communities, including crimes of domestic violence

¹⁵⁵ 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', February 2002, as referred to in: *Women, Peace and Security*.

¹⁵⁶ R. da Costa, *The Administration of Justice in Refugee Camps: A Study of Practice*, March 2006, UNHCR, PPLA/2006/01, available at: <http://www.unhcr.org/refworld/docid/4417f9a24.html>. The countries in the study were: Bangladesh, Côte d'Ivoire, Ethiopia, Guinea, Kenya, Mexico, Nepal, Pakistan, Sierra Leone, Tanzania, Thailand, Yemen, and Zambia.

¹⁵⁷ *Ibid.*

¹⁵⁸ UNHCR, *SGBV Guidelines*; UNHCR, *Handbook for the Protection of Women and Girls*.

¹⁵⁹ UNHCR, *Guidelines on Refugee Women*, 1995; *Women, Peace and Security*, para. 103.

¹⁶⁰ UNHCR, *SGBV Guidelines*; UNHCR, *Handbook for the Protection of Women and Girls*, Pt. 5.3.

¹⁶¹ The right to privacy is recognised in many human rights instruments, in particular ICCPR, art. 17.

¹⁶² See, WRC, *UNHCR Policy on Refugee Women and Guidelines on Their Protection: An Assessment of Ten Years of Implementation*, Pt 4.4.8, noting in particular that UNHCR's 1997 Policy on Urban Refugees says very little about the particular situation of refugee women. At the time of writing, the policy on urban refugees is in the process of being updated.

and others related to ‘honour’.¹⁶³ Living in camps has been identified by the Committee as a factor that increases the risk of sexual and other forms of violence linked to lack of access to health care, education and economic opportunities.¹⁶⁴ As noted above, refugee women living in cities and urban areas too are exposed to violence, harassment, abuse, xenophobia, and exploitation, and correlative lack of enjoyment of other rights, especially where they may exist in a protection vacuum. In addition to legislation outlawing all forms of violence against women, the Committee has called upon governments to provide victims of violence with ‘gender-sensitive support ... [including measures] to enhance access to justice for victims, including victims of armed conflict, and to take steps to provide them with legal, medical and psychological support.’¹⁶⁵ These efforts by the Committee are undoubtedly important, but much more remains to be done. Prior to 2008, for example, the Committee had rarely, if ever, identified the specific protection needs of refugee and other immigrant women in relation to protection from and redress for SGBV. The call by the Special Rapporteur on Violence against Women, Its Causes and Consequences to develop ‘indicators’ for state responses to violence against women could be further developed, for instance, to ensure that violence against women during displacement forms part of that discourse.¹⁶⁶

3.3.4 Trafficking (Art. 6, CEDAW)

Related to 3.3.3 above, a lack of secure livelihood opportunities can force women to have recourse to prostitution,¹⁶⁷ or to engage in survival sex.¹⁶⁸ Women also therefore become at risk of being trafficked into sexual slavery or forced or exploitative labour. Under Article 6 of the CEDAW, states parties must take ‘all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.’ The term ‘prostitution’ under the CEDAW must be given a wide reading in order to account for all forms of sexually exploitative activity, including the engagement in the provision of sexual services for the purposes of survival, such as in exchange for food, clothing or other relief items. Obligations under Article 6 have been held by the Committee 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.

With a specific provision to guide its work, the Committee has regularly and increasingly highlighted trafficking as an issue but it has not yet done so within the specific context of

¹⁶³ CEDAW, Concluding observations on Sweden, 40th session, A/63/38 (2008), paras. 388–389; Tanzania, 41st session, A/63/38 (2008), para. 144.

¹⁶⁴ CEDAW, Concluding observations on Nigeria, 41st session, A/63/38 (2008), paras. 340–341.

¹⁶⁵ CEDAW, Concluding observations on Burundi, 40th session, A/63/38 (2008), paras. 136–137.

¹⁶⁶ See, UN Human Rights Council, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Yakin Ertürk: indicators on violence against women and State response*, 29 January 2008, A/HRC/7/6, available at: <http://www.unhcr.org/refworld/docid/47cd6c442.html>.

¹⁶⁷ UN Commission on Human Rights, *Addendum to the Report of the Representative of the Secretary-General on Internally Displaced Persons on Profiles in Displacement: Follow-up Mission to Colombia*, 11 January 2000, E/CN.4/2000/83/Add.1, available at: <http://www.unhcr.org/refworld/docid/45377aaf20.html>.

¹⁶⁸ For the purposes of this paper, ‘prostitution’ is defined as the provision of sexual services for payment, usually in an organised manner and usually regulated by law in many national jurisdictions (whether it is legalised or illegal); whereas ‘survival sex’, which may include prostitution, can also include temporary marriages, provision of one-off sexual services, or other forms of sexual activity provided in exchange for food, clothing and other relief aid: ‘UN Spotlights “Survival Sex” Among Iraqi Refugees’, AFP, 14 November 2007, available at: <http://afp.google.com/article/ALeqM5haiMkhrQqvmjbmIYICbkCnll0KSA>.

displacement.¹⁶⁹ The Committee has however held that Article 6 can include the obligation to afford protection under the 1951 Convention to trafficked women who seek asylum on grounds of gender-related persecution.¹⁷⁰ This supports the UNHCR's two-pronged approach to trafficking in which it has recognised the links between displacement and risk of trafficking, and between trafficking and the need for asylum.¹⁷¹ Reduction in humanitarian assistance or the limited availability of international resettlement places, discussed below, can similarly encourage sexual exploitation, bribery, and corruption by government officials, humanitarian workers, and other displaced persons in positions of authority.¹⁷²

3.3.5 Equality before the law, access to courts and to justice (Arts. 1, 2(c), 3, and 15, CEDAW)

Follow-up services and redress mechanisms for victims of violence or exploitation are often lacking in refugee and IDP settings, or are difficult to access for non-nationals; as are appropriate mechanisms to assert and secure their rights judicially. The Committee has stated that Article 1 of the CEDAW includes equal protection under the law;¹⁷³ and although it has not yet interpreted the CEDAW's own guarantee of 'equality before the law' in Article 15 of the CEDAW to include questions of access to justice, including criminal prosecution, the Committee has called on states parties to establish effective complaints procedures and remedies for violence against women, support services for victims and their families, and criminal investigation, prosecution and punishment through reference to many of its other provisions, in particular Articles 2, 3, 5, 10(c), 6, 11, 12, 14, and 16.¹⁷⁴ In other words, implicit in the range of rights is a right to an effective remedy; and the general guarantees to non-discrimination require equal protection under the law – whether civil or criminal. In practice, accessing justice, guaranteed in particular by Articles 1, 2, 3 and 15 of the CEDAW, and free access to the courts provided for in Article 16 of the 1951 Convention, is far from

¹⁶⁹ See, e.g., CEDAW, *Report of the Committee on the Elimination of Discrimination against Women: Thirty-second Session (10–28 January 2005)*, 18 March 2005, A/60/38 (Part I), referring to Somalia, Lao, Croatia and Paraguay, available at: <http://www.unhcr.org/refworld/docid/44182ca04.html>.

¹⁷⁰ CEDAW, Concluding observations on Finland (40th Session, para. 389): Annual Report 2008, A/63/38 (2008); Paraguay (32nd Session, para. 283), Israel (33rd Session, paras. 149–150): Annual Report 2005, A/60/38 (2005); Spain (31st 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); CEDAW, *Report of the UN Committee on the Elimination of Discrimination against Women, Thirtieth Session (12–30 January 2004)* (hereafter: 'CEDAW Report, Thirtieth Session') and *Thirty-first Session (6–23 July 2004)*, 23 July 2004, A/59/38, available at: <http://www.unhcr.org/refworld/docid/417672b14.html>.

¹⁷¹ UNHCR, *Guidelines on International Protection No. 7: 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*, HCR/GIP/06/07, 7 April 2006, para. 18, available at: <http://www.unhcr.org/refworld/docid/443679fa4.html>. See, also, R. Piotrowicz, 'Victims of People Trafficking and Entitlement to International Protection' (2005) 24 *Aust. YB Int'l L.* 159–179, available at: <http://ijrl.oxfordjournals.org/cgi/content/full/een013v1>.

¹⁷² 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*, February 2002, available at: <http://www.unhcr.org/3c7cf89a4.html>.

¹⁷³ CEDAW, General Recommendation No. 19: Violence against Women (1992), para. 7(f).

¹⁷⁴ 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 (41st 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 (41st 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, A/63/38 (2008).

straightforward for any victim of SGBV or other human rights violation, but it can be particularly difficult for non-national women because of both racial and gender prejudice, including for asylum-seekers and refugees.

National criminal law systems may, for example, legalise marital rape or provide exemptions from prosecution for rapists who agree to marry the victim. The UN Human Rights Committee has, for example, linked laws which allow a rapist to have his criminal responsibility extinguished or mitigated if he marries the victim as interfering with a woman's right to free and full consent to marriage.¹⁷⁵ It is also a question of discrimination and justice. Other countries may support a compensation rather than a justice culture. Under some systems of sharia law, for instance, women alleging rape are at risk of prosecution for adultery should they be unsuccessful and could face death or imprisonment. Other countries 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 alleged victims, such as protection against intimidation, access to legal advice, or safeguards against community, social or family ostracism as a result of making a complaint.¹⁷⁶

For refugees and other non-nationals, seeking redress for violations 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 due to questions 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.¹⁷⁷ Alternatively, local authorities may reject that they have authority over foreigners, sometimes due to being overwhelmed with their own domestic caseloads and at other times, due to sex, race or ethnic-based discrimination.¹⁷⁸ 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 can hinder access to justice. Asylum systems that operate non-suspensive appeals can further block any real chance of obtaining justice in a criminal case, and faced with deportation or expulsion, some victims are denied the right to justice or access to the courts. The right to access the courts in Article 16 of the 1951 Convention must be interpreted to include human rights claims, in which refugees 'shall have free access to the courts of law on the territory of all Contracting States'.

¹⁷⁵ HRC, General Comment No. 31: Nature of the General Legal Obligations Imposed on States Parties to the Covenant (2004), para. 24.

¹⁷⁶ See, UN Commission on Human Rights, *Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2001/49: Cultural practices in the family that are violent towards women*, 31 January 2002, E/CN.4/2002/83, available at: <http://www.unhcr.org/refworld/docid/3d6ce3cc0.html>; *A Framework for Model Legislation on Domestic Violence*, E/CN.4/1996/53/Add. 2, 2 February 1996; UN Human Rights Council, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Yakin Ertürk, Indicators on violence against women and State response*, 29 January 2008, A/HRC/7/6, available at: <http://www.unhcr.org/refworld/docid/47cd6c442.html>.

¹⁷⁷ 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 (revised September 2007)*, 1 November 2004, available at: <http://www.unhcr.org/refworld/docid/3ae6b35e0.html> (hereafter: UNHCR, 'Resettlement Handbook').

¹⁷⁸ Da Costa, *The Administration of Justice in Refugee Camps: A Study of Practice*. Even in situations in which the international community assumes the role of overseeing and monitoring the local police, such as in Bosnia and Herzegovina under the International Police Task Force, cultural and social prejudices can prevent action being taken or can thwart investigations: UNHCR and OHCHR (A. Edwards), *Daunting Prospects*.

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.'¹⁷⁹ 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.¹⁸⁰ Difficulties in accessing justice may also be due to the location of refugee and IDP settlements, which at times are far away from the local infrastructure. Models for improved access to justice have included mobile courts visiting some refugee settings.¹⁸¹

In the context of internal displacement, women may have been raped or physically assaulted or otherwise threatened or intimidated 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.¹⁸² 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,'¹⁸³ 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.

Traditional justice systems that operate in many refugee camps, at times to fill a vacuum left because of the absence of an official justice system or because it is ineffective, may constitute serious violations of individual human rights in their own right and raise grave protection concerns.¹⁸⁴ For civil or property-related infractions or disagreements, traditional justice systems can provide effective systems of redress, but generally they must be carefully assessed for compliance with human rights standards, especially in relation to women's rights, and around rights relating to family and marriage. 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

¹⁷⁹ *Ibid.*, p. 7.

¹⁸⁰ UN High Commissioner for Refugees, *Tool Boxes on EU Asylum Matters. Tool Box 2: The Instruments*, September 2003, available at: <http://www.unhcr.org/refworld/docid/466946c72.html>.

¹⁸¹ UNHCR, *Prevention and Response to Sexual and Gender-Based Violence in Refugee Situations: Inter-Agency Lessons Learned Conference Proceedings*, 17–19 March 2001, p. 22, referring to the mobile courts in Kenya, available at: <http://www.unhcr.org/refworld/docid/4649d45b2.html>.

¹⁸² UN Office of the High Commissioner for Human Rights, *Access to Justice for Victims of Sexual Violence [in Sudan]*, Report of the United Nations High Commissioner for Human Rights, 29 July 2005, available at: <http://www.unhcr.org/refworld/docid/46cc4a650.html>.

¹⁸³ CEDAW, General Recommendation No. 19: Violence against Women (1992), para. 7(c).

¹⁸⁴ Da Costa, *The Administration of Justice in Refugee Camps: A Study of Practice*, p. 8.

against their physical safety, general well-being, and even survival.¹⁸⁵

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.¹⁸⁶

3.3.6 Health and reproductive health (Arts. 4(2), 10(h), 12, 13(a), and 14(b), CEDAW)

Women’s right to health and to reproductive health in particular are often compromised in displacement, in contravention of Article 12 of the CEDAW, which guarantees equality in access to health facilities.¹⁸⁷ 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.’¹⁸⁸ 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.’¹⁸⁹ At times there is inadequate or non-existent provision of sexual and reproductive health services in displacement, let alone during an emergency. According to the United Nations Population Fund, the leading cause of death of women of childbearing age is reproductive health issues. Added to this, the stress and disruption of war and displacement can cause premature births or births on the run without even the most basic items for hygienic delivery.¹⁹⁰

Proper information about family planning, including for women who have been raped, availability of care and services during pregnancy and after birth, information and 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.¹⁹¹ Articles 10(h) and 12 provide in particular that women must enjoy equality of health care services, including those related to family planning; and Article 14(b) contains a specific near-identical provision to emphasise this need for rural women. In addition, inadequate provision of sanitation materials during menstruation for adolescent girls has resulted in higher drop out rates or girls not attending school and women missing the

¹⁸⁵ *Ibid.*

¹⁸⁶ 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).

¹⁸⁷ 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 1 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.’

¹⁸⁸ CEDAW, General Recommendation No. 24: Women and Health (Article 12) (1999), para. 6.

¹⁸⁹ *Ibid.*, para. 16.

¹⁹⁰ United Nations Population Fund (UNFPA), *Protecting Reproductive Health in Times of Crisis*, available at: <http://www.unfpa.org/emergencies/rh.htm>.

¹⁹¹ See, UNHCR, *Handbook for the Protection of Women and Girls*, Pt 5.5.2. See further: World Health Organisation, United Nations Fund for Population Activities and UNHCR, *Reproductive Health in Refugee Situations. An Inter-Agency Field Manual*, 1999, available at: <http://www.unhcr.org/refworld/docid/403b6ceb4.html>. A new version of the field manual is forthcoming in 2009.

distribution of assistance,¹⁹² in contravention of, *inter alia*, Article 10 of the CEDAW generally in relation to access to education.

3.3.7 Social and economic deprivation and empowerment (Arts. 3, 4, 10, 11, 13, 14, 15(2) and (3), 16, CEDAW); Education and literacy (Art. 10, CEDAW); Political participation (Arts. 3, 7 and 8, CEDAW)

Although displacement is normally portrayed as a setting of risk for women, it can also be a site of empowerment, self-reliance, and opportunity.¹⁹³ Girls may have 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.¹⁹⁴ 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, or due to the influence of the rules and norms of the host communities, which may be more liberal for women.

The inter-linkages between displacement, poverty and discrimination is now well recognised. The Special Rapporteur on Violence against Women, Its Causes and Consequences has recently made clear that '[w]omen's physical security and freedom from violence are inextricably linked to the material basis of relationships that govern the distribution and use of resources and entitlements, as well as authority within the home, the community and the transnational realm.'¹⁹⁵ The same is true in relation to the structures governing refugee and displacement settings. The Special Rapporteur recognises that violence against refugee and IDP women is exacerbated by lack of access to alternative housing, living in refugee camps, with limited privacy and close proximity to strangers.¹⁹⁶

The UNHCR for its part has been actively working to improve the participation and leadership of women in livelihood activities, noting that the marginalisation of women and their economic and political disenfranchisement can lead to exploitation, survival sex, abuse and/or trafficking, as already observed in various contexts above.¹⁹⁷ Women must have equal access to income-generating and training opportunities as men, including access to micro-credit. There may also be a justified need for the introduction of temporary special measures, as recognised in Article 4 of the CEDAW, targeting women for livelihood initiatives to enhance their self-reliance and integration prospects, especially female headed households.

¹⁹² 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 WRC, Geneva, 20–22 June 2001; UNHCR, *Report of the High Commissioner's Five Commitments to Refugee Women*, EC/55/SC/CRP.17, 13 June 2005, available at: <http://www.unhcr.org/refworld/docid/49997af91a.html>.mignon

¹⁹³ See, e.g., R. Winthrop, *Pakistan's Displaced Girls and Women – An Opportunity for Education*, The Brookings Institution, 16 June 2009. http://www.brookings.edu/opinions/2009/0611_pakistan_education_winthrop.aspx.

¹⁹⁴ 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/wll>.

¹⁹⁵ UN Special Rapporteur on Violence against Women, *Report on violence against women 2009*, p. 2.

¹⁹⁶ *Ibid.*, para. 43.

¹⁹⁷ See documentation on UNHCR's *Women Leading for Livelihoods*, available at: <http://www.unhcr.org/wll>.

Included in this respect are calls for prompt family reunification processes for refugees and other displaced persons or others in need of international protection, and ensuring that girls are able to access fully education, including secondary and tertiary.¹⁹⁸ The Committee for its part has called on governments to furnish it with data on the educational achievements of immigrant girls at all levels, which would impliedly include refugees and asylum-seekers.¹⁹⁹ It has also called for the predominantly female refugee population in Armenia, for example, to be included in poverty reduction programmes.²⁰⁰ In addition, the CEDAW states that women enjoy the right to choose their profession and employment, the right to equal remuneration, and to protection against dismissal for maternity or marital reasons, which equally apply to displaced women.²⁰¹

Underlying women's full enjoyment of their human rights is the need to increase their involvement and participation in all aspects of planning and management of refugee life, including the organisation of camps and settlements, the layout of shelters and facilities, and the distribution and delivery of goods and services.²⁰² Refugee women living in urban situations must also be given opportunities to associate and to organise, by way of self-help, mutual support, and to articulate protection concerns. The role of non-governmental organisations can be invaluable in this respect. Training on human rights and women's rights for all camp leaders and management committees must be ensured.

3.3.8 Equality in family life (Art. 16, CEDAW)

As already noted above, family relations can be severely tested in situations of displacement. Families can be separated by the chaos of flight, by the death of family members, as well as when usually fathers, brothers and sons are recruited into the military or armed groups and go to fight. Changed social settings can place emotional strains on families, including those recovering from armed conflict and trauma. As the UNHCR notes: 'Being part of an intact family is particularly important during displacement, when all other aspects of a normal life have disappeared.'²⁰³ As already noted, girls can be burdened with additional care responsibilities, and can be increasingly exposed to exploitation and harmful traditional practices, including forced marriage, arising or exacerbated due to the fact of being displaced. For example, with many young men away fighting, there may be a perception of fewer potential suitors and so communities may internalise a 'need' to reinvigorate traditional practices of forced or child marriages. These practices breach Article 16(2) of the CEDAW which prohibits the betrothal and marriage of children, as well as the right of women (and men) to freely choose a spouse and to enter into marriage of their own free will (Article 16(b)). In situations of family separation, family tracing and reunification become crucial and implicate general human rights to family life and unity under the ICCPR²⁰⁴ and the ICESCR,²⁰⁵ as well as particularly under the *Convention on the Rights of the Child*, which includes special protections and assistance for children separated from their families and

¹⁹⁸ UNHCR, *Handbook for the Protection of Women and Girls*, Pt. 4.3.3.

¹⁹⁹ CEDAW, Concluding observations on France, 40th session, A/63/38 (2008), paras. 324–325. See, also, Finland, 41st session, A/63/38 (2008), paras. 187–188.

²⁰⁰ CEDAW, Concluding observations on Armenia, exceptional session, A/57/38 (2002), para. 61.

²⁰¹ CEDAW, art. 11.

²⁰² *Women, Peace and Security*, para. 107.

²⁰³ UNHCR *Handbook for the Protection of Women and Girls*, p. 125.

²⁰⁴ ICCPR, art. 23.

²⁰⁵ ICESCR, art. 10.

family reunification.²⁰⁶

3.4 Gender-related dimensions of return and reintegration (all provisions, including Arts. 1, 2, 3, 14(2)(f) and (g), and 16(h), CEDAW)

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 and implicate many of the same rights in the CEDAW, such as lack of identity papers, poverty, domestic violence, or the inability to repossess property arising from discriminatory property or inheritance laws.²⁰⁷ 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.²⁰⁸ Article 16(h) further provides for 'the same rights for both spouses in respect of ownership, acquisition, management, administration, enjoyment and disposition of property...'.²⁰⁹ In addition to the Committee, the Committee on the Elimination of Racial Discrimination (CERD) has issued several General Comments relevant to refugee and IDPS, including calling for non-discrimination in the context of return and reintegration.²¹⁰

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*²¹¹ called attention to the plight of children separated from their families and their exploitation as soldiers and captives of war, less has been studied about girl soldiers although there have been studies about girls accompanying armed forces and groups as domestic servants and for sexual purposes.²¹² The social reintegration of girls affected by armed conflict has not received the same attention as those of boys. Some repatriation programmes do not make allowances for women or girls who may have valid protection reasons for not wishing to return home;²¹³ 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

²⁰⁶ CRC, arts. 2, 5, 8, 9, 10, 16, 20, 21, and 22. For more on rights to family life under international law in the context of refugees, see A. Edwards, 'Human Rights, Refugees, and the Right to "Enjoy" Asylum'.

²⁰⁷ 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, available at: <http://www.fmreview.org/FMRpdfs/FMR07/fmr7.8.pdf>.

²⁰⁸ CEDAW, art. 14(2)(f) and (g).

²⁰⁹ On discrimination in relation to property and land, see, e.g., CEDAW, Concluding observations on Lao (32nd Session, para. 93) and Burkina Faso (33rd Session, para. 348): *Annual Report 2005*, 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*, A/58/38 (2003).

²¹⁰ CERD, General Comment No. 22 (1996): Article 5 and Refugees and Displaced Persons, no UN Doc., 24 August 1996.

²¹¹ *Impact of armed conflict on children : note / by the Secretary-General*, 26 August 1996, A/51/306, available at: <http://www.unhcr.org/refworld/docid/3b00f2d30.html>, transmitting the report of the expert of the Secretary-General, Ms. Graça Machel, submitted pursuant to General Assembly resolution 48/157.

²¹² J.A. Benjamin and K. Fancy, *The Gender Dimensions of Internal Displacement: Concept Paper and Annotated Bibliography* (Women's Refugee Commission, November 1998), p. 20. See, though, R. Brett, *Girl Soldiers: Challenging the Assumption* (Quaker UN Office, 5 November 2002), available at: http://www.quno.org/geneva/pdf/Girl_Soldiers.pdf. See also: *Principles and Guidelines on Children Associated with Armed Forces and Groups* ('Paris Principles'), February 2007, available at: http://www.child-soldiers.org/childsoldiers/Paris_Principles_March_2007.pdf.

²¹³ See, UNHCR and OHCHR (A. Edwards), *Daunting Prospects*, which recommended that women and girls with legal and protection concerns and not wishing to return home be given alternatives.

involved in peace negotiation processes and the subsequent formation of new governments or interim administrations.²¹⁴ Likewise, lack of local integration possibilities affects one's free choice concerning return.

3.5 Gender-related dimensions of resettlement (Arts. 1, 2 and 3, CEDAW)

Although there are now well-established categories for 'women at risk' within national resettlement programmes, women remain under-represented in the total number of persons resettled to third countries and quotas in special programmes for women remain unfilled.²¹⁵ The UNHCR acknowledges that there are many gender-related factors that account for women's unequal access to resettlement opportunities. This can arise because violations of women's rights often occur within the family and thus may be hidden from public view. It is also linked to prejudice on the part of UNHCR staff carrying out assessments who may believe that women and girls exaggerate claims of SGBV in order to secure resettlement, or rape or sexual violence may not be regarded as a sufficient ground for resettlement due to its widespread prevalence.²¹⁶ In fact, early UNHCR guidance previously defined 'women at risk' as being without male family members, which failed to take account of the fact that women may be at risk of legal and physical protection problems or be unable to integrate locally whether they are with or without male family members. The UNHCR has now amended its definition. Women in polygamous marriages also face difficulties due to the prohibition on polygamy in many receiving countries.

Finding solutions to these problems is not easy. Moreover, women and girls at times have simply been overlooked for resettlement. The resettlement of the Lost Boys of the Sudan, for example, lauded as an important scheme by many, was simultaneously criticised for ignoring the needs of the 'Lost Girls'.²¹⁷ As noted above, the perceived value on resettlement and the correlative few places can lead to corruption and bribery, and may lead to sexual exploitation and engagement in survival sex by refugee women to secure a future for themselves and their children. General rights to non-discrimination on the basis of sex and equality in all fields require that the management and operation of resettlement also falls onto the agenda of the Committee.

²¹⁴ UNHCR, *Handbook for the 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, available at: http://www.unifem.org/resources/item_detail.php?ProductID=17. See, also, UN Peacebuilding Commission, *Report of the Peacebuilding Commission on its 1st session*, 25 July 2007, A/62/137 – S/2007/458, available at: <http://www.unhcr.org/refworld/docid/473041df2.html>; 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, available at: http://www.peacewomen.org/un/women_reform/PBC/NGO/Roundtable_5_June_07.pdf; J.F. Klot, Independent Expert Paper, *Women and Peacebuilding*, 29 January 2007, commissioned by UNIFEM and the Peacebuilding Support Office, available at http://www.un.org/spanish/peace/peacebuilding/WorkingGrouponLessonsLearned/WGLLbackgroundpaper2_9.01.08.pdf.

²¹⁵ UNHCR, *Resettlement Handbook*.

²¹⁶ *Ibid.*, p. 167.

²¹⁷ 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>.

4. 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.²¹⁸ Women are entitled to enjoy these rights on the basis of equality with men.²¹⁹ In addition, the *Convention on the Nationality of Married Women 1957*²²⁰ establishes independent nationality of married women and the Article 9 of the CEDAW provides for equal rights with men to acquire, change or retain one's nationality and to confer nationality on their children.²²¹ Meanwhile there are two main international instruments dealing with the related issue of statelessness, the *Convention on the Status of Stateless Persons 1954*²²² and the *Convention on the Reduction of Statelessness 1961*,²²³ and various regional instruments.²²⁴ The United Nations General Assembly and the ExCom have repeatedly encouraged states to accede to the statelessness

²¹⁸ UDHR, art. 15; ICERD, art. 5(d)(iii); ICCPR, art. 24(3) (in relation to the right of a child to acquire a nationality, but not a general right); CRC, art. 7(1); IMWC, art. 29 ('every child of a migrant worker shall have the right to a name, to registration of birth and to a nationality'); Convention on the Rights of Persons with Disabilities, art. 18; American Convention on Human Rights, art. 20; Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms (1995), art. 24; European Convention on Nationality, para. 4(a); 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.'

²¹⁹ 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.'

²²⁰ *Convention on the Nationality of Married Women 1957*, GA res. 1040 (XI), 29 January 1957; entered into force 11 August 1958.

²²¹ CEDAW, art. 9.

²²² *Convention on the Status of Stateless Persons 1954*, 360 UNTS 117; entered into force 6 June 1960.

²²³ *Convention on the Reduction of Statelessness 1961*, 989 UNTS 175; entered into force 13 December 1975. See further: International Law Commission, *Draft Articles on Nationality of Natural Persons in relation to the Succession of States*, 1999, available at: http://untreaty.un.org/ilc/texts/instruments/english/commentaries/3_4_1999.pdf.

²²⁴ E.g., *European Convention on Nationality*, ETS No. 166, 6 November 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.

conventions.²²⁵ The Human Rights Council,²²⁶ special procedures to the Human Rights Council and the former Commission on Human Rights²²⁷ and regional organizations²²⁸ have also called for accession. 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.²²⁹

Nationality has been classified as the ultimate right, or **'the right to have rights'**.²³⁰ Although this statement is no longer accurate as the general imperative of human rights law is to grant rights to all human beings,²³¹ distinctions are nonetheless frequently made with respect to non-nationals in the territory of a state party.²³² 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

²²⁵ UN General Assembly, *Office of the United Nations High Commissioner for Refugees : resolution / adopted by the General Assembly*: 27 January 2009, A/RES/63/148, available at: <http://www.unhcr.org/refworld/docid/4989619e2.html>; 24 January 2008, A/RES/62/124, available at: <http://www.unhcr.org/refworld/docid/47b2fa642.html>; 25 January 2007, A/RES/61/137, available at: <http://www.unhcr.org/refworld/docid/45fa902d2.html>; 9 February 1996, A/RES/50/152, available at: <http://www.unhcr.org/refworld/docid/3b00f31d24.html>. ExCom Conclusion No. 106; UNHCR, *General Conclusion on International Protection*, 10 October 2003, No. 95 (LIV) – 2003 (hereafter: 'ExCom Conclusion No. 95'); UNHCR, *Conclusion on International Protection*, 5 October 2001, No. 90 (LII) – 2001 (hereafter: 'ExCom Conclusion No. 90'); UNHCR, *Conclusion on International Protection*, 9 October 1998, No. 85 (XLIX) – 1998; UNHCR, *General Conclusion on International Protection*, 11 October 1996, No. 79 (XLVII) – 1996; UNHCR, *General Conclusion on International Protection*, 11 October 1991, No. 65 (XLII) – 1991; UNHCR, *General Conclusion on International Protection*, 10 October 1988, No. 50 (XXXIX) – 1988.

²²⁶ UN Human Rights Council, *Human Rights and arbitrary deprivation of nationality*, 26 March 2009, Resolution 10/9, available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/10session/edited_versionL.11Revised.pdf; UN Human Rights Council, *Human rights and arbitrary deprivation of nationality*, 27 March 2008, A/HRC/RES/7/10, available at: <http://www.unhcr.org/refworld/docid/49997add1d.html>.

²²⁷ UN Human Rights Council, *Report of the independent expert on minority issues, Gay McDougall*, 28 February 2008, A/HRC/7/23, available at: <http://www.unhcr.org/refworld/docid/47d685ea2.html>. See also, *Final Report of the Special Rapporteur on Non-Citizens, Mr. David Weissbrodt*.

²²⁸ Asian-African Legal Consultative Organization (AALCO), *Resolution on the Half-Day Special Meeting on 'Legal Identity and Statelessness'*, 8 April 2006, RES/45/SP.I, available at: <http://www.unhcr.org/refworld/docid/44eaddc54.html>. Organisation of American States, Resolutions of the General Assembly, AG/RES. 2047 (XXXIV-O/04), AG/RES. 1971 (XXXIII-O/03) and AG/RES. 1892 (XXXII-O/02). Council of Europe, Recommendation R (1999) 18 of the Committee of Ministers to Member States on the Avoidance and Reduction of Statelessness. International Conference on the Great Lakes Region, Dar es-Salaam Declaration on Peace, Security and development in the Great Lakes region.

²²⁹ UNHCR, *Agenda for Protection*, October 2003, Third edition, Goal 1, Objective 12, available at: <http://www.unhcr.org/refworld/docid/4714a1bf2.html>.

²³⁰ See, H. Arendt, *The Origins of Totalitarianism* (New York: Harcourt Brace & Co., 1st ed., 1951; 1979), as referred to in A. Macklin, 'Who Is the Citizen's Other? Considering the Heft of Citizenship', p. 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.').

²³¹ Cf. CERD, General Recommendation No. 20: Discrimination against Non-Citizens (2004).

²³² Further discussion of the treatment of non-nationals under international law see: A. Edwards and C. Ferstman (eds.), *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge University Press, 2009); S. Farrior, 'International Human Rights Treaties and the Rights of Female Refugees and Asylum Seekers', in A.F. Bayefsky (ed.), *Human Rights and Refugees, Internally Displaced Persons and Migrant Workers* (Leiden and Boston: Martinus Nijhoff Publishers, 2006) 284–320.

membership of the state, and rights to economic, social, and cultural protection.²³³ 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 equality and without discrimination.

Stateless persons are often not considered to be persons before the law.²³⁴ ‘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.’²³⁵ ‘[N]ationality is critical to full participation in society.’²³⁶

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.²³⁷ Gradually, however, international law began to treat women’s nationality as a **question of equality**.²³⁸ In fact, it is probably best approached as an issue of both. Gender discrimination in nationality law creates risks of statelessness. As discriminatory laws sometimes put women at greater risk of being rendered stateless, statelessness is also a question of gender equality. Conversely, statelessness may be reduced by measures that reinforce women’s equality in nationality matters.²³⁹

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.²⁴⁰ Other states have argued that objections to dual nationality trump concerns over gender equality.²⁴¹ Many of the problems the Committee describes in relation to nationality rights, for example, are also problems of statelessness but they are not (yet) 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 1999-2008 carried out for the purposes of this paper, ‘statelessness’ is mentioned explicitly only twice, in relation to Kuwait

²³³ A. Macklin, ‘Who Is the Citizen’s Other? Considering the Heft of Citizenship’, *Theoretical Inquiries in Law*, 8 (2007), pp. 333–334. See, also, D. Weissbrodt, *The Human Rights of Non-Citizens*, (Oxford University Press, 2008), Ch. 4 (hereafter: ‘D. Weissbrodt, *The Human Rights of Non-Citizens*’).

²³⁴ M. Manly and S. Persaud, ‘UNHCR and Responses to Statelessness’ (2009) 32 *Forced Migration Review* 7–10, available at: <http://www.fmreview.org/FMRpdfs/FMR32/FMR32.pdf>.

²³⁵ CEDAW General Recommendation No. 21: Equality in Marriage and Family Relations (1994), p. 2.

²³⁶ *Ibid.*

²³⁷ 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), p. 25 (hereafter: ‘ILA, Committee on Feminism and International Law’).

²³⁸ *Ibid.*, p. 25.

²³⁹ *Ibid.*, p. 31.

²⁴⁰ *Ibid.* See, e.g. prior to 29 January 2008 when the Government of the Republic of Turkey withdrew its reservations, Turkey had 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.

²⁴¹ 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, p. 33.

in 2004 and in relation to Lebanon in 2008.²⁴² In comparison, discriminatory nationality laws are mentioned in many reports.²⁴³

The UNHCR estimates that there are 12 million stateless persons worldwide.²⁴⁴ Statistics are not (yet) collated however by sex. Global but incomplete and therefore not representative statistics by UNHCR indicate that 50 per cent of stateless persons are women. However, informal statistics for some countries indicate that in those countries that operate discriminatory nationality laws, women make up between 51-78 per cent of the stateless population.²⁴⁵ Additional research is needed to gauge how many women are affected by statelessness. 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,²⁴⁶ and this exposes women to a greater extent than men to the risk of being rendered stateless.²⁴⁷ The CEDAW is particularly important in this regard, not least because the two statelessness conventions are not widely subscribed to, as pointed out in Part 2 of this paper.

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 persons being rendered stateless by virtue of gender discriminatory nationality laws,²⁴⁸ 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

²⁴² CEDAW Report, *Thirtieth Session, 2004* (expressing 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), CEDAW Report, *Fortieth Session, 2008*, A/63/38, para. 201 (recommending that Lebanon accede to the statelessness conventions).

²⁴³ See, e.g., CEDAW, Concluding observations on Saudi Arabia, Burundi, Lebanon, Morocco, Sweden, Tanzania, Nigeria, and Yemen: Annual Report 2008, A/63/38, 2008.

²⁴⁴ UNHCR, Statistical Yearbook 2007, Geneva, December 2008, p. 34. 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> (hereafter: Refugees International, *Nationality Rights for 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*, March 2004, available at: <http://www.unhcr.org/refworld/docid/405f09834.html>.

²⁴⁵ 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 populations are women.

²⁴⁶ 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, pp. 12-13.

²⁴⁷ Refugees International, *Nationality Rights for All*, i.

²⁴⁸ None of the 7 ExCom Conclusions relating to statelessness address women's particular concerns. See, UNHCR, *Prevention and Reduction of Statelessness and the Protection of Stateless Persons*, 20 October 1995, No. 78 (XLVI) – 1995 (hereafter: 'ExCom Conclusion No. 78'); ExCom Conclusion No. 90, ExCom Conclusion No. 95, UNHCR, *Conclusion on the return of persons found not to be in need of international protection*, 10 October 2003, No. 96 (LIV) – 2003; UNHCR, *General Conclusion on International Protection*, 8 October 2004, No. 99 (LV) – 2004; UNHCR, *General Conclusion on International Protection*, 7 October 2005, No. 102 (LVI) – 2005; ExCom Conclusion No. 106.

establishment of identity and nationality status of victims of trafficking.²⁴⁹ 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.’²⁵⁰ The 2006 Conclusion on Statelessness refers to the CEDAW in its preambular paragraphs²⁵¹ 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 ...’²⁵² 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 many 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 conclusion²⁵³), 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.’²⁵⁴ The UNHCR has nonetheless 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.²⁵⁵

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.²⁵⁶ However, equality guarantees and non-discrimination principles limit the discretion of each state in this regard, not least as overarching principles of custom.²⁵⁷ There are two bases of nationality: *jus sanguinis* and *jus soli*, which each give rise to different manifestations of the statelessness problem.

4.1 *Jus sanguinis*: Discrimination against women in the conferral of nationality to children and related issues

***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. The UNHCR estimates that approximately one-third of all states have some form of restriction on nationality by birth, although there is no official list.²⁵⁸ Discrimination in this

²⁴⁹ ExCom Conclusion No. 90, para. 22 (o)–(s). See, also, UNHCR, *Final Report Concerning the Questionnaire on Statelessness*.

²⁵⁰ ExCom Conclusion No. 95, para. (x).

²⁵¹ ExCom Conclusion No. 106, pmb1 para. 5.

²⁵² *Ibid.*, para. (j).

²⁵³ ExCom Conclusion No. 78, pmb1 para. 2. (‘Concerned that statelessness, including the inability to establish one’s nationality, may result in displacement.’)

²⁵⁴ ExCom Conclusion No. 105, para. (j)(iii).

²⁵⁵ UNHCR, *Statelessness: Prevention and Reduction of Statelessness and Protection of Stateless Persons*, EC/57/SC/CRP.6, 14 February 2006, para. 5(b) and (c), available at: <http://www.unhcr.org/refworld/docid/4a54bbdbd.html> (hereafter: ‘UNHCR, *Prevention and Reduction of Statelessness and Protection of Stateless Persons*’).

²⁵⁶ *Nottebohm Case (Liechtenstein v. Guatemala)*; *Second Phase*, International Court of Justice (ICJ), 6 April 1955, p. 23, available at: <http://www.unhcr.org/refworld/docid/3ae6b7248.html>.

²⁵⁷ *Advisory Opinion on Juridical Condition and Rights of the Undocumented Migrants*, para. 101.

²⁵⁸ Communication with UNHCR Statelessness Unit on 17 July 2009 (on file with the author).

regard is prohibited under Article 9(2) CEDAW which stipulates that ‘States Parties shall grant women equal rights with men with respect to the nationality of their 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.²⁵⁹ Very few women are aware of the impact **marriage to a non-national** will have on their rights and those of their children.²⁶⁰ Sometimes, nationality legislation of the father’s country of nationality does not allow him to pass on his nationality to his children, for instance where the country pursues a *jus soli* approach and the child is born abroad. If the mother cannot pass on her nationality, the child may be stateless. According to the UNHCR, it calculated that at least 33 countries at the end of 2008 did not have legislation compliant with Article 9(2), almost all of which are parties to the CEDAW.²⁶¹

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 may be rendered without nationality or even identity.²⁶² It may also give rise to problems of access to, and custody of, children if the marriage is terminated by divorce or death.²⁶³ Women in abusive relationships may be forced to choose between staying with their husband or losing their children.²⁶⁴ As ‘foreigners’, her children may be denied a whole range of rights, including health care, education, and other social services.²⁶⁵ This is why marriage registration, as required by Article 16(2) of CEDAW, is essential as it allows women not to depend on their husbands when they need to provide proof that the child has acquired his or her father’s nationality. Also, if a woman marries a stateless person or has children outside marriage with a man of her own nationality, then her children could be born stateless.²⁶⁶

²⁵⁹ See, *Unity 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, p. 19. See, also, Centre for Research and Training on Development (CRTD), Gender, Citizenship and Nationality Programme, *Denial of Nationality: The Case of Arab Women*, Summary of Regional Research, February 2004, available at: <http://www.pogar.org/publications/gender/nationality/crtdesum.pdf> (hereafter: ‘*Denial of Nationality: The Case of Arab Women*’), 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.

²⁶⁰ *Denial of Nationality: The Case of Arab Women*, p. 20. See, also, UNDP, Regional Bureau for Arab States, *Women are Citizens Too: The Laws of the State, the Lives of Women*, which synthesises lessons learned from a pilot initiative on Gender and Citizenship in the Arab world, launched in December 2001.

²⁶¹ Communication with UNHCR Statelessness Unit on 17 July 2009 (on file with the author). The countries include: Bahamas, Bahrain, Barbados, Benin, Botswana, Brunei, Burundi, Fiji, Guinea, Iraq, Jordan, Kenya, Kiribati, Kuwait, Lebanon, Libya, Madagascar, Malaysia, Mauritania, Morocco (amended but woman/man must be married in accordance with Family Code), Nepal, Oman, Qatar, Saudi Arabia, Senegal, Somalia, Sudan, Swaziland, Syria, Tanzania, Tunisia, United Arab Emirates, and Vanuatu. Note: information suggests that Bahrain has or is on verge of amendment; Bangladesh has amended its law but the text has not been seen by UNHCR.

²⁶² *Denial of Nationality: The Case of Arab Women*, p. 21, referring to Syria and Lebanon, and Kuwait and Iraq, respectively.

²⁶³ UN Division for the Advancement of Women, *Women, Nationality and Citizenship, Women2000 and Beyond*, June 2003, p. 4, available at: <http://www.un.org/womenwatch/daw/public/jun03e.pdf> (hereafter: ‘*Women2000 and Beyond*’).

²⁶⁴ *Ibid.*

²⁶⁵ *Denial of Nationality: The Case of Arab Women*, p. 22.

²⁶⁶ D. Weissbrodt, *The Human Rights of Non-Citizens*, p. 87.

Children born of rape, whose father is unknown or a foreigner, may not have any nationality.²⁶⁷

Jus sanguinis laws not only produce statelessness, they can **perpetuate statelessness from one generation to the next**.²⁶⁸ Stateless children face a myriad of problems relating to the ability to exercise their human rights,²⁶⁹ but their statelessness can impact on the rights of their mothers also, including for example rights to family life and unity,²⁷⁰ to freedom of movement,²⁷¹ to voluntary repatriation,²⁷² or to leave any territory, including her own, accompanied by her children.²⁷³ Equal rights to nationality and non-discriminatory nationality laws envisaged in Article 9 of the CEDAW would eradicate many of these issues.

4.2 *Jus soli* and indirect discrimination

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.²⁷⁴ Thus although it is not directly discriminatory against women, it may give rise to cases of indirect discrimination. Although very few states operate 'pure' *jus soli* nationality laws, many still have various restrictions on the passage of nationality via *jus sanguinis*. Moreover, many traditional *jus soli* countries, such as some Member States of the European Union, have repealed their *jus soli* nationality laws, in part as a punitive response to female asylum-seekers

²⁶⁷ UNHCR, *Handbook for the Protection of Women and Girls*, p. 187

²⁶⁸ D. Weissbrodt, *The Human Rights of Non-Citizens*, p. 88.

²⁶⁹ *Parliamentary Handbook*, pp. 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 art. 24, para. 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.'

²⁷⁰ 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.'

²⁷¹ 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 formal 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...'

²⁷² See, UNHCR, *Handbook for the Protection of Women and Girls*, Pt 4.3.1 and UNHCR, *Handbook – Voluntary Repatriation: International Protection*, 1 January 1996, available at: <http://www.unhcr.org/refworld/docid/3ae6b3510.html> (provides some references to citizenship status and rights of children).

²⁷³ ICCPR, art. 12.

²⁷⁴ ILA, *Committee on Feminism and International Law*, p. 15.

falling pregnant within their territory, or arriving pregnant, and having the right to remain in the territory at least until the child attained majority by virtue of their child having acquired nationality on the basis of *jus soli*.

4.3 Discrimination against women in the acquisition, loss and choice of nationality

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.²⁷⁵ 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.'²⁷⁶ A woman who is abandoned or widowed may be refused the right to return to her country on grounds that she is not a national despite the right to return to one's country which is guaranteed in Article 12(4) ICCPR. 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.²⁷⁷

In many countries female nationals cannot benefit from facilitated naturalization for their foreign husbands on an equal footing with male nationals as regards their foreign spouses. This creates risks of statelessness for their children, in particular if under the country's legislation women cannot confer nationality to her children. It also perpetuates statelessness where it prevents a stateless husband from acquiring his wife's nationality.

Similarly, if a woman seeks to **change her nationality**, including because she wishes to marry a foreign national, she may be required to renounce her former nationality 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.²⁷⁸ That is, she may be rendered stateless by 'administrative delay'.

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

²⁷⁵ 1954 Statelessness Convention, art. 32; 1951 Convention, art. 34.

²⁷⁶ ILA, Committee on Feminism and International Law, p. 66, as restated in D. Weissbrodt, *The Human Rights of Non-Citizens*, p. 89.

²⁷⁷ ILA, Committee on Feminism and International Law, p. 17.

²⁷⁸ See, UNHCR, *Handbook for the Protection of Women and Girls*, p. 186.

nationality.²⁷⁹ 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.²⁸⁰

Moreover, Article 7 of the 1961 Convention on the Reduction of Statelessness requires that voluntary renunciation of nationality not be permitted unless the person has acquired or has an assurance of acquiring another nationality. In cases of assurance, if nationality is not subsequently acquired, it is asserted here that renunciation should be considered void *ex tunc*. The corollary of this is that the naturalisation state should not require that a person renounce their nationality before being able to apply for the new nationality. In addition, States should adopt provisions for the reacquisition of nationality by people left stateless due to a lack of such safeguards.

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 the language.²⁸¹ In addition, other naturalization requirements such as proof of economic self-sufficiency or housing may also be more difficult to meet – especially if they are female-headed households with little income, or dependent on their partner/husband financially. Even if they are regrouped for this purpose as a family, the woman remains tied to her husband in order to acquire citizenship.²⁸² 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.²⁸³ ‘Where such women are economically, socially, culturally, and even linguistically dependent on their husbands, they may be vulnerable to violence and abuse.’²⁸⁴

4.4 *De facto* statelessness

The **definition of ‘statelessness’** in the statelessness conventions refers only to *de jure* statelessness, as outlined in the Annex to this paper. It would thus cover most of the situations described above where nationality is affected by operation of law, and where persons are at risk of being rendered stateless by operation of the law. However, **de facto statelessness** is also a particular issue for women (and for the UNHCR), such as women trafficked to work in

²⁷⁹ Convention on the Reduction of Statelessness 1961, art. 5.

²⁸⁰ UNHCR and Inter-Parliamentary Union, *Nationality and Statelessness: A Handbook for Parliamentarians*, Geneva, 2005, p. 33.

²⁸¹ See, e.g., Council of Europe Parliamentary Assembly Recommendation No. 1261 (1995), para. 3, referred to in ILA, Committee on Feminism and International Law, p. 20.

²⁸² See, Da Costa, *Rights of Refugees in the Context of Integration: Legal Standards and Recommendations*, POLAS/2006/02, June 2006, available at: <http://www.unhcr.org/refworld/docid/44bb9b684.html> (hereafter: ‘Da Costa, *Refugees in the Context of Integration*’).

²⁸³ See, e.g., Amnesty International, *France: Violence against Women: A Matter for the State*, AI Index: EUR 21/001/2006, 8 February 2006, Part. 2.5, available at: <http://www.amnesty.org/en/library/asset/EUR21/001/2006/en/1dc6fb9b-d468-11dd-8743-d305bea2b2c7/eur210012006en.html> (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).

²⁸⁴ UNHCR, *Handbook for the Protection of Women and Girls*, p. 187, referring to *Women2000 and Beyond*.

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.²⁸⁵ '[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.'²⁸⁶

The ExCom expressed its concern at the links between trafficking and statelessness in its conclusion 90 LII (2001):

(s) Strongly condemning the trafficking of persons, especially women and children, which represents a grave violation of their human rights; expressing concern that many victims of trafficking are rendered effectively stateless due to an inability to establish their identity and nationality status...

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.²⁸⁷ 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 recognized human rights of the victims.²⁸⁸

Where a girl's birth is not registered, she is at a similar risk of being unable to prove her nationality if questioned by authorities. Birth certificates provide proof for the acquisition of nationality based on both parentage (*jus sanguinis*) and place of birth (*jus soli*).

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.²⁸⁹ 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 prohibition on the arbitrary deprivation of nationality, it also leads to **many other human rights violations**. The CERD has called on states parties to respect general rights of non-citizens, including mention of discriminatory treatment of female non-

²⁸⁵ See, e.g., UN Commission on Human Rights, *Report on the mission of the Special Rapporteur to Poland on the issue of trafficking and forced prostitution of women*, 10 December 1996, E/CN.4/1997/47/Add.1, paras. 6 and 44–45, available at: <http://www.unhcr.org/refworld/docid/3ae6b0db8.html>.

²⁸⁶ UNHCR, *Final Report Concerning the Questionnaire on Statelessness*.

²⁸⁷ *Ibid.*

²⁸⁸ *Ibid.*, para. 7(d).

²⁸⁹ See, e.g., Vital Voices Global Partnership, *Stateless and Vulnerable to Human Trafficking in Thailand*, June 2007, p. 12, available at: http://www.vitalvoices.org/files/docs/Vital_Voices_-_Stateless_and_Vulnerable_to_Human_Trafficking_in_Thailand.pdf (hereafter: '*Stateless and Vulnerable to Human Trafficking*').

citizen spouses married to citizens.²⁹⁰ The latter General Comment also refers to the facilitation of citizenship to particular groups, including in the context of non-citizen children, in order to reduce statelessness.²⁹¹ Muslim residents in Northern Rakhine State in Myanmar, for example, are only with great difficulty able to obtain marriage authorisation, interfering with their right to marry and found a family.²⁹² Stateless women in many countries are particularly at risk of trafficking, sexual and gender-based violence, and other forms of economic exploitation.²⁹³ ‘Slovenia’s “erased citizens” are systematically denied access to health care and education on a par with citizens’²⁹⁴, with repercussions for women’s reproductive health. The denial of birth registration also has ramifications for a myriad of other human rights, including to equality before the law, to a name, and to recognition of judicial personality.²⁹⁵

²⁹⁰ CERD, General Comment No. 30 (2004): Discrimination against Non-Citizens, no UN Doc., 1 October 2004, para. I.8, available at: <http://www.unhcr.org/refworld/docid/45139e084.html>. The CERD has also issued a specific General Comment on gender-related dimensions of racial discrimination, but it does not specifically refer to refugees or displaced persons, although it does apply to them: CERD, *General Comment No. 25*.

²⁹¹ CERD, General Comment No. 30 (2004).

²⁹² See, C. Lewa, ‘North Arakan: An Open Prison for the Rohingya in Burma’ (2009) 32 *Forced Migration Review* 11–13, available at: <http://www.fmreview.org/FMRpdfs/FMR32/FMR32.pdf> (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.

²⁹³ *Stateless and Vulnerable to Human Trafficking*, p. 12. See, also, UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations, Thailand*, 17 March 2006, CRC/C/THA/CO/2, available at: <http://www.unhcr.org/refworld/docid/45377ed00.html>.

²⁹⁴ I. Goris, J. Harrington and S. Köhn, ‘Statelessness: What it is and Why it matters’, (2009) 32 *Forced Migration Review* 4–6, available at: <http://www.fmreview.org/FMRpdfs/FMR32/FMR32.pdf>. The ‘erased citizens’ are former or current residents in the Yugoslav state of Slovenia who were removed from the registry of Slovenian citizenship after the break-up of the former Yugoslavia (where citizenship was held at two levels: Yugoslav and the province), and were effectively deprived of their citizenship of Slovenia by administrative removal.

²⁹⁵ *Case of the Yean and Bosico Children v. The Dominican Republic*, Inter-American Court of Human Rights (IACtHR), 8 September 2005, available at: <http://www.unhcr.org/refworld/docid/44e497d94.html>.

5. The CEDAW Committee and the UNHCR: Towards Closer Collaboration

The CEDAW establishes a committee of 23 independent experts that monitors implementation of the CEDAW by states parties.²⁹⁶ The Committee commenced its work in 1982. It sits on a part-time basis in Geneva and New York, meeting normally three times per year for periods of three weeks per session.²⁹⁷ It has four main functions, which are outlined below.

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.²⁹⁸ Initial reports are due within one year after the entry into force of CEDAW for the state party concerned, with follow-up reports due four years after the initial report, or whenever the Committee so requests.²⁹⁹ 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 obligations.³⁰⁰ 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,³⁰¹ although there is considerable variation in the form in which reports are presented.³⁰²

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 organisations (NGOs), academic institutions, and the press.³⁰³ 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 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.

²⁹⁶ CEDAW, Pt V.

²⁹⁷ 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). In 2009, the Committee is meeting only once owing to the General Assembly resolution granting additional meeting time to the Committee stated that it should hold five sessions for the period 2008–2009, with two of these sessions in NY. It will resume three sessions in 2010.

²⁹⁸ CEDAW, art. 18.

²⁹⁹ CEDAW, art. 18 (initial report after 1 year and then every 4 years or whenever requested).

³⁰⁰ CEDAW, art. 18.

³⁰¹ 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*, HRI/GEN/2/Rev.5, 29 May 2008, available at: <http://www2.ohchr.org/english/bodies/icm-mc/docs/8th/HRI.GEN.2.Rev5.doc>.

³⁰² 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, June 2005, available at: <http://www.ohchr.org/Documents/Publications/FactSheet30en.pdf>, p. 28 (hereafter: 'OHCHR, Fact Sheet No. 30').

³⁰³ OHCHR, *Fact Sheet No. 30*, p. 30. In fact, the CEDAW provides explicitly for the receipt of such information (CEDAW, art. 22).

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).³⁰⁴ To date, the Committee has issued a total of 26 General Recommendations on various provisions of the treaty and related themes.³⁰⁵ It has not issued a General Recommendations on either displacement or the right to a nationality (art. 9). Nonetheless, other General Recommendations and Concluding observations can provide evidence of an evolution in the interpretation of relevant provisions and thus offer guidance with regard to the same.

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’).³⁰⁶ To date, the CEDAW has decided upon 11 individual communications (six were declared inadmissible; four found a violation; and one found no violation). Two of these decisions involved female asylum-seekers; both however were declared inadmissible.³⁰⁷ None of the other decisions involved issues of displacement or statelessness.

The fourth function of the Committee, also established by the OP-CEDAW, is an optional procedure to allow the Committee to **conduct an inquiry** when it receives 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.³⁰⁸

³⁰⁴ CEDAW, art. 21.

³⁰⁵ 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.

³⁰⁶ UN General Assembly, *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women : resolution / adopted by the General Assembly*, 15 October 1999, A/RES/54/4, available at: <http://www.unhcr.org/refworld/docid/3b00f29a24.html>.

³⁰⁷ The first case involved a female Pakistani asylum-seeker in the UK, who refused to return to Pakistan as she feared for her life at the hands of her former husband, who had a history of violence and who had sought her out on two previous occasions forcing her to move twice, and for the future and education of her two sons. She had been denied asylum on the basis that it was considered she could internally relocate further away from her husband in Pakistan and would thereby reduce the risk of persecution to below the ‘well-founded fear’ threshold. The Committee declared her application inadmissible for failing to exhaust domestic remedies as she had not raised sex discrimination within the asylum procedures as a possible grounds for judicial review (see, CEDAW, *N.S.F. v. United Kingdom of Great Britain and Northern Ireland*, CEDAW/C/38/D/10/2005, 12 June 2007, available at: <http://www.unhcr.org/refworld/docid/47975af40.html>). The second relevant case involved a Chinese asylum-seeker who alleged that she had been trafficked to The Netherlands for the purposes of prostitution. She had suffered years of abuse, rape and forced prostitution in China prior to being trafficked abroad, and was illiterate. At the time of claiming asylum she was pregnant and still a minor. Among other submissions, she claimed that the Dutch immigration policy blames the victim of trafficking for being unable to supply information about her route to The Netherlands and for failing to furnish identity documents. She also claimed that it failed to provide her with specialised legal advice as a minor as well as adequate protection and support. Her communication was declared inadmissible by the Committee because she had not yet exhausted domestic remedies. See, CEDAW, *Zhen Zhen Zheng v. The Netherlands*, CEDAW/C/42/D/15/2007, 17 February 2009, available at: <http://www.unhcr.org/refworld/docid/4a3f2ed72.html>.

³⁰⁸ 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*

Unlike many of the other treaty bodies,³⁰⁹ there is no inter-state complaints mechanism.

In contrast, 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.³¹⁰ In addition, the UNHCR has 'supervisory responsibility' over the application of the provisions of the 1951 Convention and/or its 1967 Protocol.³¹¹ The UNHCR is also mandated by the General Assembly as the lead agency with respect to conflict-induced IDPs.³¹² How to enhance the supervisory capacity of the UNHCR has been under discussion for some time,³¹³ and the Organization has been seeking more and more to cooperate and to collaborate with other UN agencies and bodies to facilitate its work.

Mexico, CEDAW/C/2005/OP.8/MEXICO, 27 January 2005, available at: <http://www.unhcr.org/refworld/docid/4a54bc0e1a.html>.

³⁰⁹ 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).

³¹⁰ 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*, pp. 614–666, 618–627.

³¹¹ 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, *Prevention and Reduction of Statelessness and Protection of Stateless Persons*.

³¹² On UNHCR's mandate over conflict-driven IDPs, see UNHCR, *Handbook for the Protection of Women and Girls*, p. 12.

³¹³ 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, 'Supervising the 1951 Convention', pp. 657–658), an international refugee court (see, Justice A.M. North and Joyce Chiara, *Towards Convergence in the Interpretation of the Refugee Convention – A Proposal for the Establishment of an International Refugee Court*, paper presented to the International Association of Refugee Law Judges, Stockholm, April 2005, available at: <http://law.anu.edu.au/CIPL/Conferences&SawerLecture/05%20ANZSIL%20Papers/North.pdf>), or at least to discuss the issue of supervision (J.C. Hathaway, 'Taking Oversight of Refugee Law Seriously', in a series of working papers drafted in light of the 50th anniversary of the 1951 Convention, published at: <http://www.icva.ch/doc00000501.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, October 2002, available at: <http://www.unhcr.org/3dae74b74.html>. 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, p. 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.'

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 – a major gap in UNHCR’s mandate – although states parties have been requested from time to time to communicate on particular issues to the UNHCR³¹⁴ and such information forms part of its annual protection reporting (which remain confidential) and other public statements.³¹⁵

The CEDAW’s public, systematic and periodic state reporting mechanism offers, therefore, a supplementary review process over complementary substantive issues, not least its public reports, direct dialogue with states, and independent and impartial reviews. Maria Stavropoulou commented in 1998 that 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 ... [noting that] at [that] time [it] remain[ed] underutilized as [a forum] for the protection of refugees and displaced persons.’³¹⁶ Since then, however, there has been enhanced collaboration and cooperation between the UNHCR and the Committee in monitoring the implementation of human rights obligations in respect of displaced and stateless women,³¹⁷ not least driven by the Committee’s move to Geneva and its servicing by the OHCHR. In 2008, for example, the UNHCR submitted comments to the Committee in respect of approximately 70 percent of the states parties under consideration.³¹⁸ Correspondingly, the Committee explicitly mentioned issues of asylum, asylum-seekers, refugees, displacement, repatriation, and resettlement in seven out of 16 reports under consideration (or 44 per cent). Of those countries under review, each is host to refugees, otherwise has serious issues of internal displacement, or concerns regarding *refoulement* and other human rights protections, so there are clearly some remaining gaps in its treatment of these issues.³¹⁹ A decade earlier the same terms had been used in an equivalent number of

³¹⁴ See, e.g., UN Sub-Commission on Human Rights, res. 2000/21, *Detention of Asylum-Seekers*, 27th meeting, 18 August 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*, February 1999, para. 1.

³¹⁵ Kälin, ‘Supervising the 1951 Convention’, p. 624. I have previously recommended to the UNHCR that its annual protection reports be made public; or alternatively that its five-yearly *State of the World’s Refugees* study be framed as a review of state party performance: A. Edwards, ‘Book Review: UNHCR, *State of the World’s Refugees*’ (2007) 19 Int’l J. Ref. L. 595–598. Likewise, the Organization might like to consider how it could engage further with the Universal Periodic Review process of the UN Human Rights Council.

³¹⁶ M. Stavropoulou, ‘Displacement and Human Rights: Reflections on UN Practice’ (1998) 20 *Hum. Rts. Qlty* 515, p. 540.

³¹⁷ 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; C. Beyani, ‘The Role of Human rights Bodies in Protecting Refugees’, in A.F. Bayefsky (ed.), *Human Rights and Refugees, Internally Displaced Persons and Migrant Workers* (Leiden and Boston: Martinus Nijhoff Publishers, 2006), pp. 269–281; J. Fitzpatrick (ed.), *Human Rights Protection for Refugees, Asylum-Seekers, and Internally Displaced Persons: A Guide to International Mechanisms and Procedures* (New York: Transnational Publishers Inc., 2002).

³¹⁸ Information supplied by UNHCR, 12 June 2009.

³¹⁹ The countries under review in 2008 were Saudi Arabia, Bolivia, Burundi, *Lebanon*, *Morocco*, Luxembourg, France, *Sweden*, Slovakia, Lithuania, *United Republic of Tanzania*, Finland, Iceland, *UK*, *Nigeria*, and *Yemen*. The terms were applied in relation to those countries highlighted in italics. See, CEDAW, Annual Report, A/63/38 (2008).

reports (six out of 14 reports or 42 per cent).³²⁰ These figures indicate that the Committee has not yet fully integrated the concerns of the UNHCR in its review of state party reports. Qualitatively, however, the depth of analysis has improved with time. In its consideration of the 2008 state party reports, for example, the Committee called on states parties to the CEDAW, *inter alia*, to strengthen their cooperation with the UNHCR,³²¹ welcomed cooperation agreements signed between the UNHCR and states parties,³²² and recommended states parties to the CEDAW to accede to relevant refugee protection instruments, in particular the 1951 Convention and/or 1967 Protocol.³²³ In comparison, statelessness was mentioned only twice - in 2004 (in relation to Kuwait) and in 2008 (in relation to Lebanon) - but not otherwise from 1999 until 2008. Loss of nationality and discriminatory nationality laws were however raised under Article 9 of the CEDAW in almost all concluding observations throughout the same period.

The preparation of this paper and the holding of a joint seminar are further steps in the process of closer collaboration and harmonization. In addition, there is presently discussion that refugee and displaced women be included explicitly under the 'Indicators to promote and monitor the implementation of human rights' relating to violence against women being drawn up by the OHCHR to assist states to implement their human rights obligations.

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'.³²⁴

Moreover, the individual complaints procedure of the CEDAW grants to displaced and stateless persons one possible avenue to access redress.³²⁵ Apart from writing a letter of complaint to the UNHCR or exercising rights in domestic legal settings, no formal complaints procedures exist under the 1951 Convention and/or its 1967 Protocol, or under the statelessness conventions. However, in relation to the latter, by General Assembly resolutions 3274 (XXIV) and 31/36, the UNHCR is mandated to fulfil the functions referred to in Article 11 of the 1961 Convention on the Reduction of Statelessness, i.e. to act as a body to which a person claiming the benefit of the 1961 Convention may apply for the examination of her claim and for assistance in presenting it to the appropriate authority.

Asylum-seekers and refugees are now regular users of the petitions procedures available

³²⁰ The countries under consideration in 1999 were Algeria, Kyrgyzstan, Liechtenstein, *Greece*, Thailand, China, *Colombia*, Belize, *Georgia*, *Nepal*, *Ireland*, Chile, *Spain*, and the UK. The terms were applied in relation to those countries highlighted in italics. CEDAW, Annual Report, A/54/38/Rev.1 (Supp.) (1999).

³²¹ E.g., Morocco, 40th session, para. 257, Yemen, 41st session, para. 356; Tanzania, 41st session, para. 145: CEDAW, Annual Report 2008, A/63/38 (2008).

³²² E.g., Morocco, 40th session, para. 257, Yemen, 41st session, para. 356; Tanzania, 41st session, para. 145: CEDAW, Annual Report 2008, A/63/38 (2008).

³²³ E.g., Lebanon, 40th session, para. 201: CEDAW, Annual Report 2008, A/63/38 (2008).

³²⁴ See, Kälin, 'Supervising the 1951 Convention', pp. 626–627, who refers to a range of decisions of various national courts.

³²⁵ Clearly some regional courts may be better positioned to do so given the binding nature of their decisions. However, the treaty bodies may offer advantages in terms of specific provisions, whether the state in question is a party to the regional human rights instruments, or owing to the specific approach taken by the committee in question.

under the other international and regional human rights treaties.³²⁶ In contrast, the Committee has so far only decided upon two communications out of 11 (or approximately 18%) from asylum-seekers, both rejected on admissibility grounds (as outlined above), suggesting an under-utilisation of these mechanisms by displaced and stateless women. Further consideration needs to be given to how a woman's legal or immigration status – as a refugee, asylum-seeker or stateless person, for example – may impact on her ability to exhaust domestic remedies prior to seeking international redress. She may, for example, be unable to access free legal advice as a failed asylum-seeker or non-national; any appeals may not have suspensive effect; and the threat of deportation or expulsion or her actual removal may negatively impact on her ability to access the courts.

Under the individual communication procedure it is likely that more cases will be made by rejected female asylum-seekers who have been denied refugee status on the basis of a refusal to recognise her fear of gender-related forms of persecution, because sex/gender has not been recognised as a ground to asylum in the relevant domestic procedure, or that any assessment that she could relocate internally did not take adequate account of gender factors.³²⁷ It is also possible to envisage cases being brought by women refugees living in states parties in which there are inadequate protections against violence, including violence linked to ethnic, religious or economic discrimination. Other potential cases include those where there are no domestic procedures to determine statelessness and/or to challenge discriminatory domestic nationality laws.

As a field-based agency, the UNHCR's 'international protection' activities are aimed at 'ensuring the basic rights of refugees, and ... their physical safety and security',³²⁸ beginning 'with securing admission, asylum, and respect for basic human rights, including the principle of *non-refoulement*' and ending 'only with the attainment of a durable solution, ideally through the restoration of protection by the refugee's own country.'³²⁹ According to the UNHCR, 'Protection includes ensuring that the specific needs of refugee women, particularly victims of violence, and of children, especially those separated from their families, are met.'³³⁰ Performing both an assistance delivery function at the same time as a supervisory one requires the UNHCR to monitor and supervise the activities of governments, often in countries where it works hand-in-hand with the authorities, or where it in fact fulfils the primary role of protecting refugees.³³¹ This can at times put the UNHCR in difficult political

³²⁶ See, B. Gorlick, 'Human Rights And Refugees: Enhancing Protection Through International Human Rights Law', UNHCR New Issues in Refugee Research Working Paper No. 3, 15 October 2000, available at: <http://www.unhcr.org/3ae6a0cf4.html>; O. Andrysek, 'Gaps in International Protection and the Potential for Redress through Individual Complaints Procedures' (1997) 9 *Int'l J. Ref. L.* 392.

³²⁷ The Committee has recommended to states parties to the CEDAW, for example, to introduce gender-sensitive asylum procedures on several occasions: e.g. Lebanon (40th Session, paras. 200-201), UK (41st Session, paras. 295-296), Sweden (40th Session, para. 361): Annual Report 2008, A/63/38 (2008); Australia (para. 22), Malawi (paras. 35-36), Malaysia (paras. 27-28); China (paras. 33-34): Annual Report 2006, A/61/38 (2006); Italy (32nd Session, paras. 332-333), Ireland (33rd Session, paras. 364 and 367): Annual Report 2005, A/60/38 (2005).

³²⁸ UNHCR, *Note on International Protection*, A/AC.96/930, 7 July 2000, available at: <http://www.unhcr.org/refworld/docid/3ae68d6c4.html>, para. 2. See also: UNHCR, *Note on International Protection*, A/AC.96/830, 7 September 1994, available at: <http://www.unhcr.org/refworld/docid/3f0a935f2.html> (hereafter: 'UNHCR, *Note on International Protection* 1994'), para. 12.

³²⁹ UNHCR, *Note on International Protection* 1994, para. 12.

³³⁰ *Ibid.*

³³¹ 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.

positions, and can compromise the protection available to refugees. In the context of IDPs, the UNHCR's position and mandate is even more reliant upon the enabling environment provided by the state itself.³³² Third party supervision can thus be helpful, and in some circumstances, necessary, to reduce the impact of the UNHCR's own conflict of interest on the protection of displaced persons.³³³

Although the Committee has undertaken only one inquiry mission to date, this mechanism represents a further opportunity for monitoring the rights of displaced and stateless women where they are subject to grave or systematic violations of their human rights. At a minimum, the Committee is able to enter into dialogue with the state party in question, and may be able to conduct a visit subject to the consent of the state party concerned. Closer liaison between the UNHCR and the Committee may give rise in the future to the identification of situations of displacement and/or statelessness, which have a disproportionate and substantial impact on women and girls, and which may necessitate additional pressure from an independent monitoring mechanism. Non-governmental organisations, too, have a role to play in identifying situations or cases of grave or systematic abuse against displaced or stateless women and girls.

Finally, there are many circumstances in which the state in question may not be a party to the relevant refugee and/or statelessness conventions, but may be a party to the CEDAW and therefore the language of human rights can open up of 'protection space'.³³⁴ Furthermore, where the UNHCR is unable for political, security or strategic reasons to make headway with the government concerned into the particular protection problem at issue, additional pressure by outside monitoring mechanisms may be advantageous.³³⁵

³³² On debates regarding whether the UNHCR should be involved in IDPs and difficulties in this regard, see numerous articles in (2007) 20(3) *J. Ref. Studies*.

³³³ On conflict of interest, see further Kälin, 'Supervising the 1951 Convention'.

³³⁴ UNHCR, *Presentation by Erika Feller, Director, Department of International Protection, UNHCR, to the 10th Annual Humanitarian Conference of Webster University, Geneva, 17–18 February 2005: Migrants and Refugees: The Challenge of Identity and Integration*, 17 February 2005, available at: <http://www.unhcr.org/refworld/docid/42b96a3d2.html>.

³³⁵ Although this paper is focused on the CEDAW Committee, this additional pressure may also take the form of any of the other UN mechanisms, whether the other treaty bodies, the special procedures of the UN Human Rights Council, or the Security Council.

6. Conclusions and Recommendations

The equality framework offered by the CEDAW reinforces the human rights of displaced and stateless women and girls, as well as those returning home or integrating into host communities or resettlement countries, and those at risk of being rendered stateless. 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 non-nationality) or immigration status. This is to be contrasted to the legal instruments available within the context of asylum and statelessness in which one must satisfy strict legal criteria in order to benefit from the rights contained therein.

Although displaced and stateless persons, as well as those returning home or resettling abroad, face a myriad of human rights problems, women's experiences of displacement, asylum, statelessness, return, local integration, and resettlement, are very much shaped by their unequal position of power vis-à-vis men. That is, gender inequality can frame the context in which women experience displacement, asylum and statelessness. Gender is not of course the only influence on how a woman or girl experiences displacement, asylum or statelessness. It can include many other inter-sectional characteristics such as ethnicity, race, religion, poverty, socio-economic status, legal status, marital status, age, disability, sexuality, family situation, or trauma or past persecution. Gender is nonetheless a central feature of the experience of displacement or statelessness for women and girls, and in fact, each of these other listed characteristics can also be impacted upon by gender.

As the UNHCR has stated: 'We must ... address gender inequality, if we are to protect [displaced and stateless] women and girls.'³³⁶ Whilst recognising that much has already been achieved in the twenty years since the first UNHCR policy on refugee women, much remains to be done. Mindful of their own structural limitations, this paper has identified five principal advantages of employing the fundamental principles of the CEDAW and of engaging with the Committee on these issues:

- First, the broad reading given to equality that focuses on ending patriarchal domination and oppression of women and opening up opportunities for equal participation and enjoyment of rights prioritises a gender equality agenda within displacement and statelessness contexts. It moves away from the Aristotelian model of simply treating like alike and thus avoids many of the pitfalls normally associated with models of formal equality. It reminds us of the gender equality goal of 'gender mainstreaming' initiatives, which is sometimes lost.
- Second, the obligation to eradicate social and cultural norms and stereotypes, which reinforce the perceived inferiority of women to men and provide convenient excuses to prop up patriarchal systems, calls upon governments and the UNHCR to take a longer term view of protection and assistance activities for displaced women and girls, and within the context of statelessness. In essence, it requires the underlying causes of discrimination against women to be addressed, which does not always occur in

³³⁶ UNHCR, *Handbook for the Protection of Women and Girls*, p. 13.

displacement contexts because of the ad hoc, emergency or temporary nature of the activities. The CEDAW requires more than merely eradicating the symptoms of women's inequality (e.g., reducing violence against women rates by transporting in firewood) but it requires also that the root causes of that violence be investigated and addressed, including importantly by women taking a leading role in designing and developing appropriate responses.

- Third, the obligation to eradicate gender inequality in both public and private spheres of life provides a mandate to address many issues that are often perceived as 'taboo', especially when dealing with non-nationals and associated ethnic or race dimensions, such as family violence, forced marriages, female genital mutilation, or crimes of 'honour'.
- Fourth, the close relationship recognised between civil and political rights on the one hand and economic, social and cultural rights on the other and their inclusion within a single instrument strengthens indivisibility arguments and the interconnections between, for example, poverty, violence and displacement. It calls for a holistic approach to protection in the context of displacement and statelessness, necessitating in the latter context consideration of not only *de jure* statelessness but also *de facto* statelessness (or lack of an effective nationality).
- And finally, the independent and impartial monitoring the Committee performs in ensuring states parties to the CEDAW implement their treaty obligations opens up possibilities for public dialogue with states parties on issues of displacement and statelessness (at times a dialogue that UNHCR can only hope to have behind closed doors), avenues for redress for individual displaced or stateless women within the communications procedures, or for the Committee to activate its inquiry function.

Further cooperation and collaboration between the UNHCR and the Committee is therefore to be welcomed and supported. The UNHCR and the Committee should continue their dialogue on displacement and statelessness issues to ensure the cross-fertilisation between these distinct yet complementary streams of international law to improve the human rights of displaced and stateless women and girls. Reiterating the view taken in this paper, the rights codified in the CEDAW are essential elements of the international protection regime for displaced and stateless women and girls. Measures to be taken might include one or more of the following:

For the Committee:

- incorporating more systematically displacement and statelessness matters within its jurisprudence, including through the List of Issues sent to state parties in advance of their periodic reports; as explicit themes on the 'Indicators to promote and monitor the implementation of human rights' currently being drawn up by the OHCHR in order to assist states to implement their human rights obligations; during the face-to-face meetings with states parties and within the concluding observations on state party reports; and inserting language in current draft General Recommendations on relevant themes.
- With the aim of consolidating and advancing the steps already taken by the Committee and the UNHCR to apply the principles of gender equality and non-

discrimination on the basis of sex to the displacement and statelessness contexts, issuing a General Recommendation on the same. Ideally, two separate recommendations would be issued given the distinct, yet overlapping human rights issues relating to displacement on the one hand and nationality and statelessness on the other.

For both the Committee and the UNHCR:

- dedicating further discussion on how the UNHCR might work with and contribute to the state party review function of the Committee, such as by reframing its interventions to the Committee so that they follow the structure of the CEDAW, rather than highlighting, as they do now, a range of positive and negative practices of the state party. It might also require changing the timing of some of these interventions, for example, to coincide with the issuing of List of Issues, rather than the later hearing of reports. And it may involve encouraging NGO and other partners to submit shadow reports or briefings to the Committee to the extent to which the state party under review complies with its Convention obligations.
- continuing the practice of UNHCR orally presenting its confidential comments to the Committee in closed meetings, and further exploring the possibility of organizing briefing sessions between UNHCR thematic or country ‘focal points’ and the Committee. The temporary secondment of a UNHCR staff member or expert adviser to the Committee or the OHCHR might also prove instrumental.
- holding further discussions on ways of improving the implementation of the Committee’s concluding observations and recommendations at the field level, for instance, through training and capacity building.
- disseminating information about the individual complaints procedure under the Optional Protocol to relevant stakeholders to ensure displaced and stateless women and girls are aware of and have access to this avenue of redress. This would also need to include the systematic analysis and distribution of decisions adopted by the Committee. It could also entail provision of further guidance and training as how to frame such claims from a sex discrimination or equality perspective, relevant to the provisions of CEDAW.

For UNHCR:

- For its part, the UNHCR should re-consider making some of its confidential written submissions to the Committee public whenever appropriate (balancing, of course, the advantages and disadvantages of doing so, and that this may well vary depending on the country in question and the relations between the Office and the government); and to continue its tradition of mainstreaming gender issues within its own governance structures, albeit with more vigour in relation to statelessness.

Other actors:

- UNHCR, UN Country Teams, National Human Rights Institutions and/or NGOs should try to systematically highlight relevant CEDAW Country Observations and

recommendations in their submissions to the OHCHR Compilation and Stakeholders report for the Universal Periodic Review.

- NGOs should utilise the CEDAW mechanisms more concertedly in their refugee protection work and in the context of statelessness, including identifying strong test cases for the individual communication procedure, as well as situations of grave or systematic violations of rights that would be suitable to inquiry by the Committee. In addition, to participate in the dissemination and education of displaced and stateless women and girls about the CEDAW mechanisms.

All these recommendations should be viewed within the wider context of the need to strengthen the enforcement mechanisms provided by international human rights law in general. Displacement and statelessness, including their gender dimensions, should continue to be ‘mainstreamed’ throughout the UN system, including in the work of the other human rights treaty bodies, as well as within the Special Procedures of the UN Human Rights Council, in particular the work of the Special Rapporteurs and the Universal Periodic Review.

Although the ‘...artificial, even though politically convenient, dichotomy between refugee flows and human rights...’³³⁷ that has underlined much of the UN’s treatment of refugee and statelessness issues to date has been largely dismantled, there is still much to do and much to be gained for displaced and stateless women and girls by further mutual collaboration and cooperation.

³³⁷ M. Stavropoulou, *Displacement and Human Rights: Reflections on UN Practice* (1998) 20 *Hum. Rts. Qlty*, p. 515. See, also, M. Stavropoulou, ‘The Right Not To Be Displaced’ (1994) 9 *Am. U. J. Int’l L. & Pol’y* 689.

Annex: Definitions and Terminology

This Annex sets out some of the definitions of terms employed throughout this paper, namely: sex, gender, ‘gender mainstreaming’, asylum-seekers, refugees, returnees, local integration, internally displaced persons, and stateless persons.

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.³³⁸

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.³³⁹

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.³⁴⁰ (my emphasis)

³³⁸ See, UNHCR, *Handbook for the Protection of Women and Girls*, p. 12.

³³⁹ UNHCR, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/02/01, 7 May 2002, para. 3, available at: <http://www.unhcr.org/refworld/docid/3d36f1c64.html> (hereafter: ‘UNHCR, *Guidelines on Gender-Related Persecution*’).

³⁴⁰ UN, *World Survey on the Role of Women in Development*, 1999, ix, referred to in CEDAW, *General Recommendation No. 25*. 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.

In comparison to the definitions employed by the UNHCR, the Committee's definition explicitly emphasises the unequal power relations between men and women that inform and influence the statuses, roles, responsibilities, and identities of women and men (i.e. gender inequality). It thus highlights that these socially and culturally constructed identities, statuses, 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.³⁴¹

'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'.³⁴² The UNHCR has also endorsed the 'gender mainstreaming' agenda but has expanded this to become an 'Age, Gender and Diversity Mainstreaming' agenda, defined as: 'The meaningful participation of all persons of concern to UNHCR, of all ages and backgrounds, in the design, implementation, monitoring and evaluating 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.'³⁴³

A '**refugee**' is defined in Article 1A(2) of the 1951 Convention as amended by its 1967 Protocol³⁴⁴, 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.³⁴⁵

³⁴¹ For feminist analyses and critiques 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.

³⁴² See, UN Economic and Social Council (ECOSOC), *Mainstreaming the Gender Perspective Into All Policies and Programmes in the United Nations System. Report of the Secretary-General*, 12 June 1997, E/1997/66, para. available at: <http://www.unhcr.org/refworld/docid/464ae2652.html>.

³⁴³ 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*, p. 377 (Glossary).

³⁴⁴ Protocol relating to the Status of Refugees 1967, 606 UNTS 267; entered into force 4 October 1967.

³⁴⁵ UNHCR, *Guidelines on Gender-Related Persecution*, para. 6.

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.³⁴⁶ An almost identical definition of a ‘refugee’ is incorporated in the 1950 Statute of the Office of the United Nations High Commissioner for Refugees (Statute),³⁴⁷ with the exception that ‘membership of a particular social group’ is not included as an asylum ground.³⁴⁸ 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.’³⁴⁹ 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.³⁵⁰

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.’³⁵¹ The European Union has also expanded the category of persons recognised as in need of international protection (albeit not as refugees but as beneficiaries of ‘subsidiary protection’) by reference to serious human rights violations, namely torture or cruel, inhuman or degrading treatment or punishment, subjection to the death penalty, and indiscriminate violence arising from international or internal armed conflict.³⁵² Human rights violations have thus become central features of the definition of who is a refugee in many contexts.

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

³⁴⁶ 1951 Convention, art. 1F(a).

³⁴⁷ Statute of the UNHCR, GA res. 428(V), A/1775 (14 December 1950).

³⁴⁸ UNHCR Statute, art. 6(A)(ii).

³⁴⁹ OAU Convention, art. 1(2).

³⁵⁰ UNHCR, *Interpreting Article 1 of the 1951 Convention*, para. 21.

³⁵¹ *Cartagena Declaration on Refugees*, adopted by the Colloquium of the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984, Part III, p. 3, available at: <http://www.unhcr.org/refworld/docid/3ae6b36ec.html>. See, also, *San José Declaration on 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 December 1994, available at: <http://www.unhcr.org/refworld/docid/4a54bc3fd.html>; *Mexico Declaration and Plan of Action to Strengthen the International Protection of Refugees in Central America*, Mexico City, 16 November 2004, available at: <http://www.unhcr.org/refworld/docid/424bf6914.html>.

³⁵² European Council *Directive on 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* (hereafter: ‘EU Qualifications Directive’), arts. 2(f) and 15 available at: <http://www.unhcr.org/refworld/docid/4157e75e4.html>.

status.³⁵³ 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,³⁵⁴ refugee status is declaratory rather than determinative: that is, a person does not become a refugee because of recognition, but is recognised because she is a refugee.³⁵⁵ 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.³⁵⁶ 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 particular refugee and the state party in which he or she is present.’³⁵⁷ That is, not all rights contained in the 1951 Convention apply to refugees immediately upon recognition, and only a few overtly apply to asylum-seekers.³⁵⁸ This distinction is not however relevant to the application of international human rights law (including under the CEDAW), which applies in principle to all persons under the jurisdiction of a state party to a relevant instrument or in any state based on international customary rules on the basis of their shared humanity (with limited exceptions) and according to principles of non-discrimination, as discussed in the body of this paper.

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.³⁵⁹

³⁵³ D. Weissbrodt, *The Human Rights of Non-Citizens*, pp. 110–111. See, also, UNHCR, *Master Glossary of Terms*, June 2006, Rev.1, available at: <http://www.unhcr.org/refworld/docid/42ce7d444.html> (hereafter: ‘UNHCR Master Glossary’), which defines asylum-seekers as: ‘... an individual who is seeking international protection. In countries with individualized procedures, an asylum-seeker is someone whose claim has not yet been finally decided upon by the country in which he or she has submitted it. Not every asylum-seeker will ultimately be recognized as a refugee, but every refugee is initially an asylum-seeker.’

³⁵⁴ Although it is generally accepted in international law that neither Article 14 of the UDHR or the 1951 Convention impose obligations on states to ‘grant’ asylum or refugee status, a number of regional instruments have arguably altered this position, in which obligations ‘to grant’ asylum are evident: see, *American Convention on Human Rights* (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’); *African Charter on Human and Peoples’ Rights* (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’); EU Qualifications Directive, art. 1 (‘The purpose of this Directive is to lay down minimum standards for the qualification of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted’).

³⁵⁵ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, para. 28, 1979, re-edited 1 January 1992, available at: <http://www.unhcr.org/refworld/docid/3ae6b3314.html>.

³⁵⁶ See, A. Edwards, *Human Rights, Refugees, and the Right to “Enjoy” Asylum*.

³⁵⁷ J.C. Hathaway, *The Rights of Refugees Under International Law* (Cambridge University Press, 2005), p. 154. See, also, G.S. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (3rd ed., Oxford University Press, 2008), pp. 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.’

³⁵⁸ These include non-discrimination, non-penalization for illegal entry or stay in cases of threat to life or freedom and *non-refoulement*: 1951 Convention, arts. 3, 31 and 33 respectively.

³⁵⁹ *Guiding Principles on Internal Displacement*, introductory para. 2.

As this paper is prepared in the context of UNHCR's mandate, it concentrates on 'internal displacement' arising from armed conflict, although some of the material and findings may also be applicable to persons displaced for reasons other than armed conflict, who are clearly also within the mandate of the Committee.

The terms '**displaced persons**', '**displaced women**' and '**displacement**' are also used as short-hand 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.³⁶⁰ 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 multifaceted and ongoing process, of which self-reliance is but one part.'³⁶¹ According to the UNHCR, this process has three inter-related yet 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 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.³⁶²

³⁶⁰ 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)*, HCR/GIP/03/03, 10 February 2003, available at: <http://www.unhcr.org/refworld/docid/3e50de6b4.html>. The UNHCR *Master Glossary* defines 'returnee' as: 'Refugees who have returned to their country or community of origin.'

³⁶¹ UNHCR, *Local Integration*, Global Consultations on International Protection, EC/GC/02/6, 25 April 2001, paras. 5-8 (footnotes omitted), available at: <http://www.unhcr.org/refworld/docid/3d6266e17.html> (hereafter: 'UNHCR, *Local Integration*'). See also: Da Costa, *Refugees in the Context of Integration*.

³⁶² UNHCR, *Local Integration*, *ibid.*

Finally, a **stateless person** is ‘a person who is not considered as a national by any State under the operation of its law.’³⁶³ This definition describes a situation of *de jure* statelessness, and does not extend to include *de facto* statelessness. However, some legal scholars (and the UNHCR, which refers to persons not having ‘an effective nationality’³⁶⁴) 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.’³⁶⁵ In this situation, the term *de facto* statelessness is often used.

It is also possible for stateless persons to be refugees as defined under the second limb of Article 1A(2) of the 1951 Convention.³⁶⁶ In fact, it was initially incorrectly assumed that all *de facto* stateless persons were, and would conceivably be refugees and therefore benefit from the protection of the 1951 Convention.³⁶⁷ This neglected the fact that not all persons in a situation of *de facto* statelessness are subject to persecution or have left their country of nationality.

³⁶³ *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.

³⁶⁴ UNHCR, *Prevention and Reduction of Statelessness and Protection of Stateless Persons*, para. 2. See also: UNHCR, *Statelessness: An Analytical Framework for Prevention, Reduction and Protection*, 2008, available at: <http://www.unhcr.org/refworld/docid/49a28afb2.html>. Note that the UNHCR has not elaborated a definitive definition of ‘*de facto* statelessness.’

³⁶⁵ D. Weissbrodt, *The Human Rights of Non-Citizens*, p. 84. See, further, C.A. Batchelor, ‘Stateless Persons: Some Gaps in International Protection’ (1995) 7 *Int’l J. Ref. L.* 232.

³⁶⁶ The second sentence of Art. 1A(2) provides: ‘or who, not having a nationality and being outside the country of his [or her] former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.’

³⁶⁷ C.A. Batchelor, ‘Statelessness and the Problem of Resolving Nationality Status’ (1998) 10 *Int’l J. Ref. L.* 156, p. 172.