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A CRITIQUE ON THE INTERNATIONAL LEGAL STANDARDS PERTAINING TO DISPLACED WOMEN IN THE CONTEXT OF ARMED CONFLICT

Wasantha Seneviratne *

ABSTRACT

Displacement creates numerous problems for women and exposes them to enormous risks. The main objective of this article is to identify the special vulnerability of displaced women engendered by armed conflict and to examine the applicable international legal standards which protect women in the context of conflict related displacement. This article focuses on their particular vulnerability considering the gendered dimension. Unlike refugee women, internally displaced women cannot apply for the protection embodied under international refugee law. Consequently, all internally displaced persons (IDPs), including women, have to look for the protection of the international law.

In discussing the legal standards pertaining to displaced women, relevant principles of international humanitarian law, human rights law and refugee law will be examined. Special emphasis will be devoted to discuss the relevant provisions included in the United Nations Guiding Principles pertaining to Internal Displacement, the London Declaration of International Law Principles on IDPs, UNHCR Guidelines on the Protection of Refugee Women, the Convention on Elimination of all forms of Discrimination against Women and its Protocol, four Geneva Conventions of 1949 and two Additional Protocols of 1977.

It will be concluded that since the Sovereign State is primarily responsible for the protection of its civilians, local authorities must safeguard the rights of displaced women. Displaced women, too, should be made aware of their legal rights and responsibilities.

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1. INTRODUCTION

The phenomenon of displacement is one of the most pressing challenges confronting the international community today. It has become an issue of major international concern, because of the serious human rights violations involved and also of the national and international security issues. Displacement occurs as the result of a number of happenings, such as armed conflict, internal strife, grave violation of human rights, political upheavals and persecution, for economic reasons and other natural or human-made disasters. The crisis of armed conflict induced displacement is the most common reason for displacement in the modern world.

Displaced people either cross the national borders and become refugees, or remain displaced within the borders as internally displaced persons. While refugees are covered by a number of international treaties and organizations and are enjoying comparative safety in countries of asylum or resettlement internally displaced persons (IDPs) are given no such protection.¹ As they have remained within their own country their government should be responsible for protecting and assisting them.

Displacement causes several problems and difficulties for women, especially in the context of armed conflict. Resultantly, their lives are endangered by the dreadful atrocities of armed conflict throwing them to unbearable sufferings. Displaced women are more vulnerable and more disadvantaged, because they share the common problems relating to protection and assistance experienced by all the displaced, but they also have problems and needs that are gender-specific.² This article will discuss the applicable international legal standards which protect women in the context of conflict related displacement and examine the strengths and weaknesses of the international legal standards that have been formulated on the issue.

¹ See Wasantha Seneviratne, "The Role of International Organizations in Conflict related Displacement", (2006) 18(2) *Sri Lanka Journal of International Law* 3

² The particular vulnerability of displaced women in times of conflict is believed to be related to their gender. Srilakshmi Gururaja, 'Gender Dimensions of Displacement' (2000) 12 FMR <<http://www.fmreview.org/fmr094.htm>> accessed 12 December 2007

The specific vulnerability of displaced women has been overlooked in the past, and they were considered either as civilians, or under the category of 'women and children' because of the inextricable relationship between them. However, the needs of these two categories are not identical, and the special vulnerability and unique legal status of displaced women have not been taken into consideration. Accordingly, this article aims to draw attention to the diverse ways in which women experience conflict related displacement and the protection afforded them by various international legal instruments. In discussing the legal standards pertaining to displaced women, relevant principles of international humanitarian law, human rights law and refugee law will be examined. At present, women and children constitute 75-80 percent of the displaced worldwide.³ In some situations, this percentage may rise to 90 percent when husbands or fathers die, or are taken prisoner or join as combatants.⁴ When the male in a family has been killed or died, or missing or engaged in fighting in the context of armed conflict, displaced women have to undertake additional responsibilities for the rest of the family, specifically for their children and elderly relatives. In such a situation they are forced to assume new and unaccustomed roles, such as becoming head of a household or the sole bread-winner in the family. Although their traditional role gets changed in times of conflict related displacement, their particular needs and problems are largely ignored and neglected. When their fathers or husbands or brothers are out of homes the insecurity and danger for the women and children left behind is very high, and fear of attack may cause them to flee.⁵ Displaced women are vulnerable to all forms of violence at every stage of their flight.⁶ There they may face further problems and difficulties, limitation to their means of supporting themselves and their families, and domestic violence occurs frequently. The distribution of food may be problematical, because women hardly ever get a chance to participate in the process and thus their special dietary needs are not met. In addition to being

³ Roberta Cohen, 'Protecting Internally Displaced Women and Children', in Wendy David (eds), *Rights Have No Borders* (Geneva: Norwegian Refugee Council/Global IDP Survey 1998) 47

⁴ Ibid.

⁵ Charlotte Lindsay, 'Women and War' (2000) 839 *International Review of the RedCross* 565

⁶ See Generally UNHCR, 'Guidelines on the Protection of Refugee Women', UNHCR, Geneva, July 1991.

displaced, many women suffer severe trauma such as being widowed, or detained, or separated from loved ones. They might be subjected to all forms of violence including sexual and domestic violence, injury and sexual exploitation. The attitude of the local population against them can be hostile and access to justice and equal treatment may become unobtainable. As economic opportunities would be unavailable their survival can be complicated and rather difficult.⁷ Due to the limited scope of this study all these issues cannot be dealt with in detail, but relevant legal standards applicable to displaced women to overcome some of these problems will be discussed in this article.

1.1 Gender Dimension of Displacement

Society apportions different roles and responsibilities to men and women, and these are socially and culturally determined.⁸ However, displacement changes these established gender roles, and thus displaced women may face problems specific to their gender. Nevertheless, it is important to understand that gender is about relations between men and women,⁹ and when developing legal instruments, policies and programmes for the displaced, the phenomenon of displacement must be recognized as a gendered process.¹⁰ The differences of the impact of displacement on men and women need to be taken into account.

When analyzing the gender dimension of displacement, it is necessary to look at gender in terms of human rights, to go beyond terminology such as 'vulnerable group' and 'victim', and substitute it with a more positive rights-based analysis.¹¹

⁷ Wasantha Seneviratne, 'International Legal Standards relating to the Crime of Sexual Violence against Women in Armed Conflict' (2007) Unpublished article.

⁸ Lindsay (n 5).

⁹ See 'Women 2002: Gender Dimensions of Ageing', United Nations Division for the Advancement of Women, April 2002, < <http://www.un.org/womenwatch/daw/public/ageing-final.pdf> >, accessed 12 October 2007.

¹⁰ Brenda Cossman, 'Engendering Displacement: Mainstreaming the Concerns and Issues of Internally Displaced Women', Conference on Displacement and Democracy, (1993). Sri Lanka Foundation Institute, Colombo.

¹¹ See 'The Report of the Expert Meeting on Gender Dimensions of Internal Displacement', 14-15 June 1999, New York, U.S.A., <<http://www.unicef.org/emerg/genmtg699.htm>>, accessed 15 September 2007.

Equal protection of the human rights of women and men is very important in enhancing the status of displaced women, and it is vital to provide the appropriate remedies for their particular problems.

2. LEGAL STANDARDS PERTAINING TO DISPLACED WOMEN

Unlike refugee women, internally displaced women cannot apply for the protection embodied under international refugee law. Since they remain within the national borders, their own State is responsible for their protection and assistance. Nevertheless, the sovereign authorities are often unable or unwilling to accept responsibility for them. Consequently, all IDPs, including internally displaced women, have to look for the protection of the international law. However, so far no binding international instrument has been created to cater for the special concerns of IDPs other than the recently developed soft law instruments.

2.1 UN Guiding Principles on Internal Displacement

The UN Guiding Principles are considered a major achievement in the process of establishing a generally accepted normative framework for the protection of IDPs worldwide.

These Guiding Principles¹² are intended to cover the three phases of the normative needs and rights of internally displaced people: to be protected from arbitrary displacement, to have access to protection and assistance during displacement, and to be assured of durable solutions through safe return and reintegration or alternative settlement against arbitrary displacement. Accordingly, these Principles cover the main three phases of internal displacement, and provide important provisions pertaining to protection and assistance of IDPs. They set forth not only the rights of IDPs, but also the obligations of governments and other appropriate actors, such as international organizations and insurgent groups. As displacement

¹² References to 'Guiding Principles' throughout the article are to the UN Guiding Principles on Internal Displacement.

today most often occurs in situations of internal armed conflict, it is especially important that all other authorities, groups and persons are also guided by these Principles. They should respect basic standards of human conduct as reflected in these Principles, especially when engaged in armed conflicts.¹³

These Principles restate the existing norms of human rights and humanitarian law, as well as refugee law by analogy, all of which are relevant to IDPs.¹⁴ They are based on the assumption that IDPs have the same rights and obligations as other persons living in their own State, but draw attention to the importance of realizing those rights in a way that addresses the particular needs of IDPs.¹⁵ GPs¹⁶ aim to provide practical guidance to all those dealing with IDPs.¹⁷

In addition to the general protection provided by these principles to all IDPs, the issues and concerns of internally displaced women have been specifically integrated into these UN Guiding Principles on internal displacement. For example, Principle 19(2) particularly provides that special attention should be paid to the health needs of displaced women, including access to female health care services and appropriate counselling for victims of sexual and other abuses. Unsuitable or inaccessible health services can be obstacles to good health for women and their families, especially in a camp setting. This provision is useful in drawing attention to the health needs of displaced women in conformity with Article 12 of the

¹³ Walter Kälin, *Guiding Principles on Internal Displacement: Annotations*, 9 Washington D.C.: The American Society of International Law 2000) 2

¹⁴ Francis Deng, *The Global Challenge of Internal Displacement*, (2001) 5 *Washington University Journal of Law & Policy* 148, Roberta Cohen, and Francis Deng, *Masses in Flight: The Global Crisis of Internal Displacement*, (Washington D.C.: Brookings Institution Press, 1998) 148

¹⁵ Roberta Cohen, 'The Guiding Principles on Internal Displacement', (1999) 18(1) *Refugee Survey Quarterly* 13

¹⁶ References to 'GPs' throughout this study are to Guiding Principles.

¹⁷ They guide the Special Representative on IDPs in carrying out his mandate, and provide him with a means for assessing specific situations of displacement. They should guide States faced with the crisis of internal displacement, as well as all other authorities, groups and persons. See Walter Kälin, *The Guiding Principles on Internal Displacement: Introduction*, (1998) 10 (3) *International Journal of Refugee Law* 562

International Covenant on Economic, Social and Cultural Rights, which states that States Parties are obliged to recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

Principle 18(3) states further that special efforts should be made to ensure the full participation of women in the planning and distribution of the basic supplies mentioned in Principle 18(2)¹⁸. This also is significant in enhancing the status of displaced women, because many of their difficulties are exacerbated by the fact that men are usually in charge of refugee camps, or are responsible for making decisions about planning and resource allocation. As a result, the needs of displaced women are overlooked. Indeed, excluding women from decision-making mechanisms is a violation of their human rights.

Principle 20 (3) stipulates that women and men should have the equal right to obtain all documents necessary for the enjoyment and exercise of their legal rights, and to have the right that such documentation is issued in their own names. In some cases, refugee registration cards and other essential documents are issued only to husbands and fathers.¹⁹ This provision is a progressive step in eliminating prevailing discrimination in this regard. Principle 23(3) includes a further improvement that special efforts should be made to ensure the full and equal participation of girls and women in educational programmes. This is commendable.

However, these Guiding Principles are not comprehensive enough with regard to including provisions for the rights and needs of displaced women. These issues should be addressed more specifically and action taken through a well-planned operational strategy.²⁰ A legal instrument, which is of a more binding nature, should be designed for IDPs, with particular attention to the concerns of internally

¹⁸ Accordingly, IDPs must be provided with food and water, basic shelter and housing, appropriate clothing, sanitation and medical services which are needed to prolong or maintain life.

¹⁹ See 'Progress Report on Implementation of the UNHCR Guidelines on the Protection of Refugee Women', United Nations Executive Committee of the High Commissioners Programme, UN.Doc. EC/SCP/74, 1992, p.6.

²⁰ Cossman (n 10)

displaced women and children. The subsequent drafting of legal documents, from guiding principles to a declaration, or finally to a convention, must necessarily be sensitive to the special needs and problems of displaced women.

2.2 London Declaration of International Law Principles on IDPs

The London Declaration of International Law Principles on IDPs is considered the most recent development with regard to the legal status of IDPs.²¹ It states that there are some lacunae in the prevailing system with regard to the protection and assistance of IDPs and aims to fill these lacunae justifying a special legal regime for IDPs;²² it contains 18 Articles, which derive from principles of existing international law setting forth the rights and obligations pertaining to IDPs, for all States, *de facto* authorities, the United Nations and other organizations. The Declaration builds upon emerging authority to protect and assist IDPs, including the 'UN Guiding Principles on Internal Displacement'. Unlike the GPs, which are intended as a guide to the treatment of IDPs from the perspective of their needs,²³ this Declaration focuses on the status of IDPs under international law, human rights and humanitarian law, in the context of refugees, aliens, stateless persons and other nationals.²⁴ The principal objective of the Declaration is to highlight the unique status of IDPs as *de facto* refugees confined to their territories.

²¹ The most striking feature of this Declaration is that it tries to create a balance between the two different legal regimes, i.e. that of refugees and IDPs. It offers a broad definition of IDPs and builds up its provisions on the most important principles of international law derived from international humanitarian law, refugee law and human rights law. The Declaration caters for the aspiration of those who expect a legal synthesis between refugees and IDPs, and is a great leap forward towards a more holistic instrument covering both internal and external displacement. Although a Declaration is generally considered as 'soft law', this particular Declaration is largely based on 'hard law' with the intention of being morally persuasive.

²² The Declaration was submitted and adopted at the 69th Conference of the International Law Association, held in London. See Resolution No.17/2000, 69th Conference of the International Law Association, London, U.K.

²³ Kālin, (n.13)

²⁴ Luke Lee, 'The London Declaration of International Law Principles on Internally Displaced Persons: Its Significance and Implications', (2001) 14 (1) *Journal of Refugee Studies* 70

Articles 2 to 9 elaborate very important rights relating to IDPs. These articles provide general protection for both male and female IDPs. Accordingly, Article 2 (1) states that IDPs shall be protected and assisted in accordance with all generally accepted and, where appropriate, regionally agreed upon human rights, refugee and humanitarian law provisions. Thus this Article emphasizes the entitlement of IDPs to the normal protection and assistance of existing international law. The Annexure of the Declaration lists a number of international instruments on Human Rights Law, Refugee Law and Humanitarian law of particular relevance to the protection of and assistance to IDPs. The Committee describes the Declaration as an important step forward in the larger process of implementing basic human rights for all persons, including IDPs, emphasizing the significance of this article. This entitlement applies irrespective of the territorial confinement of IDPs, (unlike refugees they remain displaced within the territory) and the personal experiences and positions of persons at risk are taken into account.²⁵ The objective is to establish minimum standards of responsibility of States, *de facto* authorities, the United Nations and other organizations, both governmental and non-governmental. These actors may be expected to implement their aspiration for a regime of protection for IDPs. The Committee emphasized this as being the main purpose of the Declaration, which is intended to expand, rather than detract from the larger framework of international law. Thus, IDPs including displaced women will be protected by a regime of international law, tailored to their particular needs.²⁶

Article 3 (1) affirms that IDPs are entitled to all the rights conferred by international human rights law including, whenever applicable, those rights secured for aliens such as refugees and stateless persons. This protection thus extends to displaced women as well. The Committee stresses that this article highlights the unique status of IDPs, and focuses on a fundamental tenet of the Declaration: that the plight of IDPs is parallel to that of refugees, and it has characterized IDPs as *de facto refugees*²⁷ The Committee justifies this extension on the basis, that IDPs

²⁵ See the Report of the International Committee on IDPs submitted to the London Conference 2000, p.9

²⁶ See Ibid, p.10.

²⁷ Apparently, the Declaration seeks to avoid the artificial distinction between refugees and IDPs, by extending international protection to all who are forced to flee from their homes and communities, regardless of whether they have crossed national borders.

have the same rights as other nationals in the country of displacement. In situations where these rights are not adequately addressed to their particular needs, they should also benefit from the rights accorded to aliens as refugees and stateless persons in generally accepted international treaties, and by customary international law.²⁸

Article 4 of the Declaration ensures freedom of movement, including the right not to be arbitrarily displaced. However, in the same article it is stressed that these rights should be respected 'to the fullest extent possible'. Obviously, this formulation indicates that these rights may be subject to limitations.²⁹ Article 4 (2) affirms that no one shall be compelled to leave their homes or habitual residence on grounds of persecution or discrimination. These stated grounds reflect in part those of Article 1 A (2) of the UN Convention relating to the Status of Refugees of 1951.³⁰ The Committee observes that these grounds mirror the main root causes of internal displacement with regard to political action, as well as internal strife or armed conflicts. It further states that persecutions and discriminations based on such grounds occur not only prior to internal displacement but also afterwards, when individuals and groups of persons are particularly vulnerable to such violations.³¹ Therefore this Declaration explicitly prohibits persecution and discrimination subsequent to displacement and particularly significant to displaced women.

Article 6 stipulates that appropriate authorities shall issue identity papers to enable IDPs to fully enjoy all the rights provided for under this Declaration. This provision can be appreciated as a useful contribution to the development of international law, because there is no direct provision in it on this issue pertaining to IDPs. Article 8 accords IDPs' rights to education, public health, housing, public relief, rations, access to the courts, employment and social security providing general

See Luke Lee, 'Legal Status of Internally Displaced Persons', (1992) 86 *American Society of International Law Proceedings*, 43

²⁸ See the Report of the Committee, (n. 25)

²⁹ The reasons for this limitation can be public security, public order, public health or military necessity. As the possible limitations may allow for abuse, measures should only be adopted if compelling exigencies so demand.

³⁰ See Article 1 A (2) of the 1951 Refugee Convention.

protection for both male and female IDPs. Article 9, which articulates the entitlement of IDPs to restitution or adequate compensation for property losses or damages, and for physical and mental suffering because of their forced displacement, fills a major gap in international law.

Section III of the Declaration includes rights and obligations of States and the international Community. Article 10 (1) reaffirms the primary responsibility of national authorities to protect and assist IDPs within their jurisdiction. Article 10 (2) highlights the need to respect the territorial sovereignty of all States and the principle of non-interference in the internal affairs of a State. However, it is interesting to observe that Article 10 (3) tries to strike a balance between territorial sovereignty and the bona fide intervention of the international community. It states that humanitarian assistance and/or protection provided to IDPs by the international community should not be deemed as an interference in the internal affairs of the country of displacement. Article 11 imposes an obligation on States and *de facto* authorities to promote and respect the rights and interests of IDPs that are set out not only in this Declaration but also in other applicable instruments.

Thus internally displaced women also are covered by this Declaration generally, and additionally specific reference has been made in Article 2(2) to expectant mothers and mothers with young children.³² This provision prohibits discrimination against IDPs on the basis of sex and gender. The London Declaration has no provisions with regard to specific needs of displaced women except prohibiting gender discrimination. Nevertheless, this Declaration is still very recent, and it will take some time to evaluate its impact on IDPs generally and in particular on internally displaced women.

As examined above, the UN Guiding Principles and the London Declaration are considered non-binding instruments although they cover the protection and assistance concerns of IDPs. However, they are considered to be inspired by

³¹ See the Report of the Committee, (n. 25)

³² While Article 2 emphasizes the implementation of basic human rights for all IDPs, Article 2(2) acknowledges the particular vulnerability of certain classes of persons and advocates preferential treatment for them.

hard law instruments, which cover IDPs in general terms. Therefore the protection afforded by various branches of international law for displaced women in general will be discussed in this section.

2.3 Displaced Women and International Human Rights Law

In more recent years, the international community has increasingly recognized women's rights as human rights, and a plethora of international human rights instruments, which are applicable in general or in particular to women all over the world, contain numerous provisions to ensure this. Additionally, both governmental and non-governmental organizations have increasingly focused on women's human rights. However, international human rights law has not adequately addressed all the problems pertaining to women, including the problems of displaced women. On the other hand, many of the available provisions have not yet been applied effectively to redress the disadvantages and injustices experienced by women, exclusively because of their gender.³³

Generally, human rights are in jeopardy in situations of armed conflict, and displaced women are also deprived of their fundamental human rights in flight. Human rights violations of women in situations of armed conflict are violations of the fundamental principles of international human rights as well as humanitarian law. The recent focus on women's human rights, and the advances made with regard to protection of women in human rights law, have made a significant impact on displaced women. However, broader consideration has yet to be given to the question of grave violation of human rights of displaced women in the context of armed conflict.

³³ Rebecca Cook, Women's international human rights law: the way forward, (1993) 15(2) *Human Rights Quarterly* 231

CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)³⁴ is often described as an international bill of rights for women.³⁵ This Convention is unique and plays an important role in bringing women into the focus of human rights concerns, during peace as well as in times of war. Thus it has a considerable impact on displaced women.

The main objective of the Convention is to eliminate discrimination against women everywhere. In its Preamble, the Convention acknowledges that extensive discrimination against women continues to exist, and such discrimination violates the principles of equality and respect for human dignity. The term “discrimination against women” is defined in Article 1 for the purposes of the Convention.³⁶ Although this Article is more limited in scope than similar provisions of some other instruments³⁷ it is considered an improvement with regard to women’s rights that focus specifically on discrimination against them.

Women who have become displaced due to armed conflict experience discrimination quite frequently, and their fundamental human rights are ignored. States Parties to this Convention are obliged to undertake a series of measures to eliminate all

³⁴ Convention on Elimination of All Forms of Discrimination against Women, Open for signature 18 December 1979, entered into force on 3 September 1981.

³⁵ The Convention was the culmination of more than 30 years of work of the UN Commission on the Status of Women, a body established to monitor the situation of women and to promote women’s rights. Although efforts were made by this Commission for the advancement of women, which have resulted in several declarations and conventions, CEDAW is the central and most comprehensive document among them. See Savitri Goonesekere, ‘Working Paper on the UN Convention on Women and the Sri Lankan Legal System’, (1981) Colombo: Centre for Women’s Research, p.2 and p.6

³⁶ “...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 a basis of equality of men and women, of human rights and fundamental freedom in the political, economic, social, cultural, civil or any other field”.

³⁷ For instance, Article 2 of the UDHR provides that “everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as sex”.

forms of discrimination against women, including the displaced. They are committed to submit national reports to the Committee on the Elimination of Discrimination Against Women at least every four years on measures they have taken to comply with their treaty obligations.³⁸ Accordingly, they should put the provisions of the Convention into practice, and this would serve to enhance the legal status of displaced women as well.³⁹ The Committee considers these reports and makes suggestions and recommendations accordingly.⁴⁰ In relation to displaced women, the Committee could make recommendations and suggestions to States Parties to take remedial action to enhance the status of displaced women in their territories. The effectiveness of the Committee has become more apparent after the adoption of the new Optional Protocol to the CEDAW.

However, some critics point out that the responsibility lies with States, and the silence of the Convention with respect to a time-scale for the realization of its goals is considered a weakness.⁴¹ Reporting procedures alone also do not effectively encourage compliance with international requirements. The Convention has failed to deal comprehensively with the issue of gender based violence, or violence against women, although this is clearly fundamental to its most basic provisions.⁴² However, Article 6 has taken a stand on certain abhorrent practices⁴³

³⁸ The Committee on the Elimination of Discrimination Against Women acts as a monitoring system to oversee the implementation of the Convention by States Parties to it and this is done principally by examining reports submitted by the States Parties. Under Article 18, States Parties are required to submit reports to the UN Secretary-General on legislative, judicial and other measures which they have taken in accordance with the Convention. See Article 18 of the CEDAW.

³⁹ Article 17 of the CEDAW establishes this Committee in order to oversee the implementation of its provisions.

⁴⁰ Subsequently, the Committee reports annually on its activities to the General Assembly through the Economic and Social Council, and the Council transmits these reports to the Commission on the Status of Women for information.

⁴¹ Rebecca Wallace, *International Human Rights Text and Materials*, (London: Sweet & Maxwell, 1997) pp.32-33 and see further Goonesekere, (n. 36) 6.

⁴² See Radhika Coomaraswamy, Special Rapporteur on Violence Against Women, Its Causes and Consequences, Preliminary Report, E/CN.4/1995/42, 22 November 1994.

⁴³ Article 6 of the Convention states that States Parties shall take appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation or prostitution of women.

and the General Recommendation No.19 could bridge this lacuna in the Convention, at least partially.⁴⁴ Despite these weaknesses, this Convention serves as a catalyst for the continued progress on the issues particularly relevant to women, including the displaced.

OPTIONAL PROTOCOL TO THE CONVENTION ON ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

The Optional Protocol to the Convention on Elimination of all forms of Discrimination Against Women introduced the right of petition.⁴⁵ By ratifying this Protocol, a State recognizes the competence of the Committee on the Elimination of Discrimination Against Women to receive and consider complaints from individuals or groups within its jurisdiction. The Optional Protocol is very useful in implementing the CEDAW more effectively. It broadens the interpretation and the practical application of the Convention.⁴⁶

Now for the first time in history, there is a forum exclusively designed for women to be heard and problems to be remedied, because this Protocol includes the first gender specific international complaints procedure, established to enhance existing

⁴⁴ This Recommendation deals exclusively with violence against women and calls on States Parties to take all necessary measures to prevent gender-based violence. See Committee on the Elimination of Discrimination against Women, 16th Session, General Recommendation No. 19, CEDAW/C/1992/L.1/15, 1992. This Recommendation will be analyzed later.

⁴⁵ The introduction of the right of petition through an optional protocol to the CEDAW was recommended in the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in 1993. Subsequent to this Conference, the Committee on the Elimination of Discrimination Against Women and the Commission on the Status of Women studied the possibility of a new Optional Protocol to the CEDAW and adopted a new Protocol to the CEDAW in 1996.

⁴⁶ Before this Protocol, the only implementation mechanism included in the CEDAW was the reporting procedure whereby the States submit any dispute concerning the interpretation or implementation to arbitration. Accordingly, two or more State Parties can refer disputes about the interpretation and implementation of CEDAW to arbitration, and if the dispute is not settled, then it can be referred to the International Court of Justice. Nevertheless, this procedure is subject to a large number of reservations and has never been used.

mechanisms for the implementation of human rights within the UN system. Accordingly, the Protocol contains two procedures. One is a communications procedure, which allows individual women or groups of women to submit claims of violation of rights which are protected under the Convention, to the Committee. Accordingly, citizens of States Parties are permitted to lodge complaints with the Committee alleging violation of their rights as set out in the Convention, and thus the violations of displaced women's rights, generally guaranteed by the CEDAW, can be effectively addressed.⁴⁷

This Protocol also creates an inquiry procedure which enables the Committee to initiate investigations into situations of grave or systematic violation of women's rights in States that become parties to the Protocol. It is modelled on an existing human rights inquiry procedure.⁴⁸ In particular, it would allow violations to be investigated where individuals or groups are unable to report these communications, either for practical reasons or because of fear of reprisals. According to this procedure, in a situation similar to the massive violations of women's human rights in Rwanda, the Committee can start an inquiry without any individual or group communication, and is therefore also vital in protecting the rights of displaced women. However, in either case, it is compulsory that the particular State within which the violation occurs is a party to both the Convention and the Optional Protocol. Clearly this development would considerably increase the strength of the Committee and its ability to have a direct impact on the problems of gender-based discrimination and violence against women, which are more common in situations of conflict related displacement.

There are opposing views that the creation of this Optional Protocol would lead to the overlapping or duplication of existing mechanisms.⁴⁹ However, several

⁴⁷ However, in order for individual communications to be admitted for consideration by the Committee a number of criteria must be met, including that domestic remedies must have been exhausted.

⁴⁸ This procedure would allow investigation of substantial abuses of women's human rights by an international body of experts and be useful where individual communications fail to reflect the systemic nature of widespread violations of women's rights.

⁴⁹ For example, one may argue that women can seek redress for their rights violations under existing mechanisms or they can bring their petitions before other UN bodies

arguments prevail in support of the creation of this Protocol.⁵⁰ The CEDAW specifically addresses all forms of discrimination against women, while the Protocol helps women to file their complaints under it because they consider this mechanism as the most appropriate one. However, at the same time it allows them to file the same complaint under other mechanisms.⁵¹

After receipt of a communication, and prior to its final decision, the Committee has the option of transmitting to the State Party an urgent request that it should take steps to protect the alleged victim or victims from irreparable harm.⁵² This provision is very important with regard to the victims of sexual violence in the context of conflict related displacement, and can be considered a remarkable milestone in enhancing human rights of women both in times of peace and war. Accordingly, displaced women can avail themselves of it to obtain redress for their trauma and suffering.

However, in addition to this mechanism, the UN Human Rights committee, which oversees the implementation of the ICCPR,⁵³ may receive complaints of violations of the sex equality provisions of the Covenant. The individual complaint procedure of the Human Rights Committee is available to individuals of States Parties to the

such as the Optional Protocol to the ICCPR, which is monitored by the UN Human Rights Committee. In a time that the UN is in a financial crisis, it has been argued that additional mechanisms would be a burden to the UN.

⁵⁰ Accordingly, it does not duplicate other mechanisms existing under other Conventions which address some of the ways in which the principle of non-discrimination can be violated. It enhances existing mechanisms by specifically incorporating practices and procedures that have been developed under other complaints procedures by placing CEDAW on equivalence with other human rights treaties, which have complaints procedures. See Laboni Amana Hoq, 'The Women's Convention and its Optional Protocol: empowering women to claim their nationality protected rights', (2001) 32 (3) *Colombia Human Rights Law Review*, 687

⁵¹ See UNIFEM 'Hand Book on The Optional Protocol to the Convention on the all forms of Discrimination Against Women', Inter American Institute of Human Rights, San Jose, Costa Rica, 2000, p. 24.

⁵² See Article 5 of the Optional Protocol.

⁵³ See International Covenant on Civil and Political Rights and its Optional Protocol for this procedure. As the scope of this thesis is limited, this mechanism will not be discussed in detail.

Optional Protocol to the ICCPR. Accordingly displaced women in these countries also can bring their human rights violations in accordance with the procedure established under the ICCPR in addition to the mechanism under the new Protocol.

The UN Economic and Social Council also expressed its deep concern about the widespread violations of the rights of refugee and other displaced women and children, and their specific needs regarding protection and assistance.⁵⁴ It further stressed the importance of ensuring their full participation when their needs are analyzed and programmes are designed and implemented. The Economic and Social Council called upon the international community to give priority to extending international protection to refugee and displaced women and children by implementing measures to ensure greater protection from physical violence, sexual abuse, abduction and circumstances that could force them into illegal activities.⁵⁵

All these developments are of major significance in relation to the enhancement of the legal status of all categories of displaced women. However, the most significant factor is not mere enactment of laws but the enforcement. Although in the recent past remarkable progress can be seen in relation to human rights protection of women, the existing body of human rights law must be proven as a satisfactory regime from the perspective of women, including the displaced. Commentators have convincingly demonstrated the limitation of this law, which does not adequately take into account the grim reality of women's experience.⁵⁶ There is a universal failure in relation to respect for and enforcement of human rights of women, for complex reasons which vary from country to country.⁵⁷

⁵⁴ Resolution adopted by the Economic and Social Council, E/Res/1991/23.

⁵⁵ Ibid.

⁵⁶ See Charlotte Bunch, 'Women's Rights as human rights: Towards a revision of human rights' (1990) 12 *Human Rights quarterly*, 486

⁵⁷ These reasons include a lack of understanding of the systematic nature of the subordination of women; the failure to recognize the need to characterize the subordination of women as a human rights violation; and a lack of State practice to condemn discrimination against women. See Cook (n 33) 231

Enforcement of women's human rights is not a simple proposition, and can be best managed through reforms at both the local and international level.⁵⁸ However, it is increasingly admitted that it is in the context of human rights law rather than humanitarian law that more progress has been made in recognizing and attempting to meet the unaddressed needs of women. This attention to women's human rights has had substantial implications for IHL.⁵⁹ It is therefore submitted that strengthening and enforcing the existing human rights of women, and recognition of women's rights as human rights, would greatly help to protect and guarantee the human rights of women both in times of peace and conflict, and would trigger efforts at protection of the human rights of displaced women. States should be requested to ratify all major human rights instruments, and should be supervised by way of getting country reports to ensure that these standards are observed.

2.4 Displaced Women and International Humanitarian Law

IHL offers extensive protection for women, which was twofold from its inception. First, women benefit from the provisions, which protect all the victims of armed conflict in general. In addition, IHL contains a number of provisions which address the specific needs of women in armed conflict, including the displaced. Both the general and special protection are enshrined in the four Geneva Conventions of 1949, and their two Additional Protocols of 1977. States Parties to these legal instruments have a duty to ensure respect for IHL, and this includes promoting respect for the rules protecting civilian women victims and former women combatants, who are no longer taking an active part in the hostilities (*hors de combat*), from any form of violence and, if crimes are perpetrated, to bring the guilty to justice. Not only States Parties but also non-State Parties to an armed conflict have a duty to ensure protection and respect for all civilians in adherence to these instruments. This is a special feature of this body of law.

⁵⁸ Marsha A Freeman, 'Women, law and land at the local level claiming women's human rights in domestic legal systems', (1994) 16 (3) *Human Rights Quarterly* 48

⁵⁹ See Judith Gardam, 'Women, Human Rights and International Humanitarian Law' (1998) 324 *International Review of the Red Cross* 425

In the context of armed conflict, displaced women are protected by IHL, as this body of law is concerned with minimizing human suffering in times of war. Both the general and specific provisions are embodied in the Four Geneva Conventions and their two Additional Protocols. IHL guarantees the equality of men and women, forbidding any kind of discrimination. Accordingly, the four Geneva Conventions and both Protocols provide provisions in this respect. For example, Article 12 of the First and Second Geneva Conventions, Article 16 of the Third Convention, Article 27 of the Fourth Convention and Article 75 of the Additional Protocol II provide for treatment “without any adverse distinction founded on sex...”. However, this is a prohibition on discrimination and not on differentiation. Hence, different treatment of men and women and the recognition that women may have additional, specific needs is reflected in the provisions of IHL and grants special rights and protection for women. Distinctions on the basis of sex are prohibited only to the extent that they are unfavourable or adverse.⁶⁰ Consequently, women including the displaced are entitled to all the rights and freedoms specified by these instruments without any distinction based on sex.⁶¹

Like all other civilians, women who are not actively involved in an international armed conflict are protected by the Fourth Geneva Convention Relative to the Protection of Civilian Persons in time of War of 1949.⁶² In addition to this, some Articles specifically protect women against any attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault in the context of international armed conflict.⁶³

⁶⁰ See Lindsey (n 5)

⁶¹ Article 75 (1) of the Protocol I highlights that persons who are in the power of a party to the conflict shall be treated humanely without any adverse distinction based upon race, colour, sex ...etc. Article 76 (1) of the same protocol provides that “women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault. These provisions are crucially important to address specific problems encountered by all women including the displaced, in times of war such as rape, sexual harassment and mutilation.

⁶² Under this Convention, they benefit from all the provisions, which state the basic principle of humane treatment, including respect of life and physical and moral integrity, particularly forbidding coercion, corporal punishment, torture, collective penalties, reprisals, pillage and the taking of hostages. Furthermore, in the event of infractions committed in relation to the conflict, women have the right to trial by an independent and impartial court established by law respecting the generally recognized principles of judicial procedure.

⁶³ See Article 27 of the Fourth Geneva Convention.

In an internal armed conflict women are protected by the fundamental guarantees governing the treatment of persons not taking part in hostilities, which are contained in Article 3, common to all four Conventions. In addition, Protocol II offers better legal protection primarily to the civilian population, and thus to displaced women, in the context of internal armed conflict.⁶⁴ Article 13 (2) of Protocol II stipulates, “civilian population and individual civilians shall not be the object of attack. Acts or threats of violence, the primary purpose of which is to spread terror among the civilian population, are prohibited.” Article 17(1) of the same Protocol expressly prohibits forced movements of civilians. It further states that “should such have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.”⁶⁵ This provision is of the utmost significance for all the displaced, including women. Thus displaced women are protected as members of the civilian population against the effects of hostilities in non-international armed conflict by the provisions of this Protocol.

Although IHL thus affords extensive protection to women civilians, in real life they are not always as protected as they should be. They still suffer, and their protected rights are violated due to a lack of respect and to problems relating to the implementation of laws applicable to them. If the rules of IHL were better observed, the suffering of women in war would be much less. Therefore, States Parties to the Geneva Conventions and their Additional Protocols must be committed to ensure respect for the rules enshrined in these instruments, to lessen the suffering of civilian women affected by conflict, including the displaced.

2.5 Displaced Women and International Refugee Law

International refugee law applies to those who have sought asylum in a foreign country. Therefore only refugee women can claim legal protection under this law,

⁶⁴ For example, Article 4(2) expressly forbids outrages upon personal dignity, in particular, humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault in general terms.

⁶⁵ See Article 17(2) of Additional Protocol II.

while internally displaced women and other categories of displaced women are not entitled to do so. The UNHCR can be considered the guardian of international refugee law. Whilst the 1951 Refugee Convention and the 1967 Protocol provide shelter for refugee women, additional coverage is provided by some other documents prepared by the UNHCR. These instruments provide an excellent model for developing standards to address specific concerns of internally displaced women.

UNHCR GUIDELINES ON THE PROTECTION OF REFUGEE WOMEN

UNHCR Guidelines on the Protection of Refugee Women have been prepared to identify the specific protection issues facing them,⁶⁶ and outline various measures that can be taken to improve protection for refugee and other displaced women whose rights have been similarly violated.

Refugee women have special protection needs that reflect their gender. Para 3 of the Guidelines explains these needs, such as protection against manipulation, sexual and physical abuse and exploitation, and protection against discrimination on the basis of sex in the allocation of goods and services. These Guidelines suggest the kind of protection needs which might arise in different situations, the specific interventions that may be appropriate, and improvements that can be made to prevent abuses at territorial borders and in the design of camps and settlements.

The protection problems that internally displaced women face are similar, or perhaps much greater, than those of refugee women, since in most cases their own governments are responsible for their displacement. These Guidelines could therefore be used as a model to develop provisions with regard to internally displaced women. In practice also UNHCR has used them in several instances. for both refugee and internally displaced women.⁶⁷

⁶⁶ See UNHCR Guidelines on the Protection of Refugee Women, UNHCR, Geneva, July 1991.

⁶⁷ The scope of this article does not allow for a detailed analysis of such instances.

UNHCR GUIDELINES ON PREVENTION AND RESPONSE TO SEXUAL VIOLENCE AGAINST REFUGEES

Sexual violence intensifies fear for their lives by women already affected by displacement. These Guidelines provide a primer on when and how sexual violence can occur in the refugee context, and the effects it can have on the victims. They address ways to combat its occurrence, and how to respond.⁶⁸ They serve as a useful tool in creating awareness among the field staff and general public. The term 'refugee' is used in these Guidelines in a broad sense, and refers also to IDPs. Hence this could also apply, the necessary changes having been made, to asylum seekers, returnees and IDPs.⁶⁹

Six years after the publication of the UNHCR's Guidelines on Prevention and Response to Sexual Violence against Refugees, an 'Inter-Agency Lessons Learned Conference on Sexual and Gender-based Violence in the Refugee Situation' was held in Geneva. Throughout the Conference the terms 'refugee' and 'IDPs' were used interchangeably, and the issues and problems related to the theme were considered as identical to both groups.⁷⁰ Therefore, these Guidelines should also be applied to internally displaced women where necessary.

3. CONCLUSION

This article attempted to examine the particular vulnerability of that displaced women especially in situations of armed conflict, and appraised some of the positive developments, which have improved the lives of displaced women during the recent

⁶⁸ See Radhika Coomaraswamy, 'Forward', 'Sexual Violence against Refugees: Guidelines on Prevention and Response', (Geneva, UNHCR (1995)

⁶⁹ See 'Introduction', 'Sexual Violence against Refugees: Guidelines on Prevention and Response', p.ii.

⁷⁰ The conclusions and recommendations that emerged from the Conference provide a clear guide and implementation framework for the way forward and highlighted the need to do necessary revisions to the UNHCR's Guidelines on Prevention and Response to Sexual Violence against Refugees. See Rudd Lubblers, and Mary Robinson, 'Prevention and Response to Sexual and Gender-based Violence in Refugee Situations', Inter-Agency Lessons learned Conference Proceedings, Geneva, 27-29 March 2001.

past. Accordingly, the significance of the provisions of UN Guiding Principles on Internal Displacement, the London Declaration of International Law Principles on IDPs, the CEDAW and its new Optional Protocol, 1949 Geneva Conventions and their two Additional Protocols of 1977 were evaluated. It was explained that displaced women can make use of these provisions in order to get redress for their trauma and suffering at least partially as was examined due to some inherent weakness of these provisions.

Since the Sovereign State is primarily responsible for the protection of its civilians, local authorities must safeguard displaced women. For that, at the international level, States should ratify the relevant international instruments of human rights and humanitarian law including the CEDAW and its Optional Protocol, the CRC, the ICCPR, the Torture Convention, the Genocide Convention, and the Convention on the Elimination of All Forms of Racial Discrimination. At the national level, Governments should enact necessary laws in accordance with their international legal obligations, incorporating international law into municipal legal systems.

Specifically, States should make every effort to end impunity for criminal acts that occur within their borders and by their security forces. This should include preventive measures, punishment and prosecution of perpetrators of such crimes. States must provide redress for victims, including compensation for injuries, appropriate support services within national mechanisms, and should provide economic, social and psychological assistance to victim-survivors.⁷¹ All necessary measures must be taken to ensure respect for the law by all parties involved in armed conflict.

It is important to press Governments and other responsible actors to take steps to implement the recommendations of Special Rapporteurs on Internally Displaced Persons, Violence against Women and Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict. Displaced women, too, should be made aware of their legal rights and responsibilities.

⁷¹ Radhika Coomaraswamy, Report of the Special Rapporteur on Violence against Women, its Causes and Consequences. (1998) E/CN.4/1999/68

Not only States actors, but also non-State actors, should remain within the bounds of international humanitarian and human rights law, recognizing that they are liable for individual crimes against international humanitarian law, and that, under universal jurisdiction, they may be prosecuted for such crimes in any court of law. The international legal responsibility of non-state actors should be clarified under international humanitarian law as well as human rights law, so that violations by non-States actors do not meet with impunity.⁷²

The UNHCR Guidelines on the Protection of Women and on Prevention and Response to Sexual Violence against Refugees provide an excellent model in developing political and legal responses to the problem of internally displaced women. However, it is important to understand that the mere adding of special programmes for displaced women will not solve the problems faced by them or their families and communities. Therefore women should not be recognized as a special interest group in the problem of displacement, but rather as integral partners and participants in developing solutions to problems that have severely affected their lives.⁷³ A gender sensitive approach should be adopted when developing laws or programmes on their behalf. In developing such programmes sovereign States should work cooperatively with all the actors involved in the phenomenon of displacement, and should ensure the participation of displaced women.

⁷² Ibid.

⁷³ Cossman (n 10)

