

Legal Aspects of Conflict-Induced Migration by Women

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Introduction

People migrate to avoid anticipated conflict, to flee ongoing conflict, and to escape the consequences of past conflict. The capacity to migrate and the migratory experience itself are inflected by gender. The purpose of this paper is to survey how international legal norms and institutions frame and respond to conflict-induced migration, with particular attention to the impact of gender on access to legal status and protection (Martin 2003).

In conflict situations, women and girls tend to be less mobile than their male cohorts. Constraints may include responsibility for children, elderly or disabled kin, as well as safety, cultural and financial obstacles to travel without male accompaniment. The majority of the world's forcibly displaced populations do not traverse state borders, and the majority of this population is also female.

If a woman flees ongoing or impending conflict but remains within the geopolitical borders of a state, her migration is described as internal displacement, and she is labeled an internally displaced person (IDP). If she crosses an international border into a neighboring country that is a party to the 1951 UN Convention Relating to the Status of Refugees and/or the 1967 Protocol, she may qualify as a refugee. Other regional instruments may also offer similar protection. More rarely, she may journey further afield, even to one of the industrialized states of the global North. Depending on how she travels, she may be categorized as a resettled refugee, an asylum-seeker, or a smuggled or trafficked person. The first two categories come within the refugee regime or related national schemes conferring complementary protection, while the protocol to the International Convention Against Transnational Organized Crime governs trafficking and smuggling.

Finally, in any situation where a person crosses an international border and does not secure a legal status, she is potentially subject to domestic law regarding the treatment and expulsion of non-status (illegal) migrants. Apart from refugee protection and the prohibition on the return of persons to face a substantial risk

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of torture (Convention Against Torture, Article 8), international law imposes few restraints on the right of states to expel non-citizens.

The nexus between armed conflict and violations of women and girls' human rights is addressed by UN Security Council Resolution 1325. The Resolution exhorts Member states, parties to armed conflict, military and civilian personnel of peacekeeping missions, and other actors to attend to the specific vulnerabilities and needs of women and girls in armed conflict, and to incorporate a gender perspective (and more women) into all phases of activity, including training, programming and field operations. Importantly, Article 1 of Resolution 1325 also "urges Member States to ensure increased representation of women at all decision-making levels in national, regional and international institutes and mechanisms for the prevention, management and resolution of conflict." Other provisions emphasize the importance of "involving women in all peacekeeping and peacebuilding measures" (Article 6) and the need for "measures that support local women's peace initiatives and indigenous processes for conflict resolution, and that involve women in all of the implementation of the peace agreements" (Article 8(b)). This twin emphases on substantive protection of women and girls' human rights *and* the procedural imperative of including women in decision-making and governance at all stages and levels is mirrored in various initiatives specific to women and conflict-induced migration.

The gender-specific social, economic, familial, sexual, physical and medical impacts associated with conflict-induced migration are documented in detail in other reports commissioned by the UNFPA for this research review. A recent United Nations High Commissioner for Refugees (UNHCR) report usefully summarizes the major risks and vulnerabilities to women and girls through the lens of human rights protection:

- (a) there are birth registration or documentation problems, resulting in a lack of legal identity, which can mean women and girls in particular are vulnerable, for instance, to exclusion from access to resources, to trafficking, to statelessness and/or are unable to pass on nationality to their children;
- (b) there is a lack of age and sex disaggregated data, which prevents adequate identification of groups with specific protection needs;
- (c) camp management, community and leadership structures are insufficiently inclusive of women and gender power relations are unequal;
- (d) there are food and other shortages, resulting in women's and girls' exposure to prostitution, sexual harassment and trafficking, malnutrition, increased drop-out from schools for girls, and child labor;
- (e) health services, including female-to-female services, are not sufficiently accessible, especially bearing in mind that women's sexual and reproductive roles place them at particular risk during pregnancy and giving birth, and that they are disproportionately vulnerable to HIV/AIDS;
- (f) functioning justice systems are not in place or, where they are, traditional harmful practices, domestic violence and other crimes are not adequately addressed; and

- (g) return and reintegration are hampered, for instance, by discriminatory property and inheritance laws. (ExCom 2006a)

This paper focuses on the legal frameworks related to migration, and the extent to which they address (in theory and in practice) these impacts. It is important to acknowledge that while armed conflict and displacement trigger a range of human-rights violations by hostile forces, women displaced by conflict are also at heightened risk of domestic violence, coerced sex, harmful cultural practices, unequal access to resources and social exclusion from members of their own families and communities. Conflict and displacement do not create the structural inequality that underwrites systemic violations of women's human rights, although both phenomena can and do exacerbate the manifestations of that inequality.

Internal Displacement

Normative Framework

The UN *Guiding Principles on Internal Displacement* (hereafter *IDP Guiding Principles*) define its subject matter as

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 recognised State border. (IDP Guiding Principles, Introduction).

In brief, internally displaced persons (IDPs) are forced migrants within state borders. IDPs may remain in their state of nationality for a variety of reasons: They may wish to stay as close to their homes as possible, they may have kin or friends within the state who can provide assistance (often precarious), they may lack the resources to reach an international border, or neighboring states may physically prevent their departure by obstructing entry to the adjacent state. Although international actors acknowledge the right to exit one's country and to seek and enjoy asylum, efforts are sometimes made to discourage flight by offering some form of international protection (in so-called safe havens or other designated areas) within the territory of the state. The success of these initiatives is notoriously uneven and they remain controversial.

The term IDP is descriptive. It does not designate a status recognized in international law, and does not confer specific or unique rights. (In contrast, refugee status entails a legal right against *refoulement*.) In the context of conflict induced migration, the trauma, experiences, and needs of IDPs may render them indistinguishable from refugees. However, two important differences warrant emphasis: First, the IDP definition encompasses a broader range of causal factors (e.g. development or disaster-induced displacement) than does the UN refugee definition (which is limited to persecution on grounds of race, religion, nationality, membership in a

particular social group or political opinion). Secondly, the fact that IDPs have not crossed a border means that as citizens, they are legally entitled to the protection of their state of citizenship. At the same time, their own state may directly or indirectly create the conditions leading to displacement, and then attempt to shield itself from external intervention or criticism of its failure to protect by invoking the principle of state sovereignty. Francis Deng and Roberta Cohen provide a pithy rejoinder to this disingenuous assertion of state sovereignty through the concept of “sovereignty as responsibility”: “The concept of sovereignty cannot be dissociated from responsibility: a state should not be able to claim the prerogatives of sovereignty unless it carries out its internationally recognized responsibilities to its citizens” (Cohen and Deng, 1998, 276-7).

The IDP Guiding Principles are known as “soft law” because they do not in themselves create binding legal obligation on states. In spite or because of that fact, the IDP Guiding Principles have attracted broad support and endorsement since their formulation. The IDP Guiding Principles set out standards relating to protection of IDPs and the provision of humanitarian assistance. To the extent that humanitarian assistance may be a material means of fulfilling protection objectives, protection and humanitarian assistance may overlap in operational terms. Nevertheless, a recent study argues for the importance of attending to the “group-based protection needs of IDPs, as a separate issue from the material needs of IDPs (which may or may not vary significantly from those of non-displaced populations)” (Collinson 2004: 26). This comment reminds us that just as IDPs and refugees are similar in certain respects and distinguishable in others, so too are IDPs and non-displaced civilians and, for that matter, male and female IDPs.

Some of the *IDP Guiding Principles* simply reiterate existing norms of international human rights and international humanitarian law, or restate them in terms directly applicable to the IDP context. Other provisions of the Guiding Principles adapt by analogy from the UN Refugee Convention and regional refugee instruments. Finally, the Guiding Principles also draw from other sources of “soft law”, which often offer greater precision and detail than broadly worded norms contained in international treaties and conventions. As the annotations indicate, the content of the Guiding Principles is informed by, or is consistent with, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the 1993 UN Declaration on the Elimination of Violence Against Women, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, the Statutes of the War Crimes Tribunals for the Former Yugoslavia and Rwanda and the Rome Statute for the International Criminal Court.

A thorough analysis of the IDP Guiding Principles lies beyond the scope of this paper (see Kalin 1999). The following protection-related provisions are highlighted because of their centrality and/or because of their particular salience for women displaced by conflict:

- Preclusion or minimization of displacement through compliance with international human rights and international humanitarian law (Principle 5)
- Right against arbitrary displacement (Principle 6)

- Equality and non-discrimination between IDPs and non-displaced people in the enjoyment of international and domestic rights and freedoms (Principle 1; Principle 22)
- Equality and non-discrimination among IDPs in the application of the Guiding Principles; equality not violated by differential protection and assistance to vulnerable groups (including pregnant women, mothers with young children, female heads of household) (Principle 4)
- Right to dignity and physical, mental and moral integrity, including protection against gender-based violence, forced prostitution, indecent assault, slavery, sale into marriage, acts of violence intended to spread terror (Principle 11)
- Right to respect for family life, including entitlement of displaced family members to remain together (even in internment camps), and facilitation of reunification of separated families (Principle 17)
- Entitlement to necessary medical care and attention “to the fullest extent practicable and with the least possible delay,” without distinction on grounds other than medical grounds; access to psychological and social services (Principle 19.1)
- Special attention to the health needs of women, including “access to female health care providers and services [and] reproductive health care, and appropriate counseling for victims of sexual and other abuses” (Principle 19.2), and to the prevention of communicable diseases, including AIDS (Principle 19.3)
- Equal right of women and men to obtain new or replacement identity documents from authorities, without the imposition of “unreasonable conditions, such as requiring the return to one’s area of habitual residence” (Principle 20)
- Special efforts to enable women and girls to exercise their right to educational and training programmes and facilities as soon as conditions permit (Principle 23)
- Right to an adequate standard of living (Principle 18.1); right to seek freely opportunities for employment and to participate in economic activities (Principle 22.1(b))

The IDP Guiding Principles encapsulate two important human rights dimensions of internal displacement: First, forcible displacement itself (where arbitrary and/or of undue duration) is a violation of human rights and secondly, displacement precipitates and or exacerbates the violation of many fundamental human rights and provisions of international humanitarian law.

As this abbreviated sampling above suggests, the IDP Guiding Principles are sensitive to many of the gender-specific dimensions of internal displacement, including sexual and gender-based violence (SGBV), sexual, reproductive and mental health risks, food insecurity, access to education and livelihood, non-recognition of women’s independent legal personality, etc. Admittedly, some of the provisions that explicitly address gender are framed in hortatory rather than mandatory terms, but it seems reasonable to suppose that the main obstacles to implementation have less to do with the precise wording of the IDP Guiding Principles than with inadequate resources, the exigencies of crisis management, and perhaps political will (Bagshaw and Paul, 2004).

In addition to articulating and defending the specificity of internally displaced women's protection needs, the *IDP Guiding Principles* also encourage authorities to recognize and respect women's agency. For example, Principle 3(d) advises authorities to involve women in the planning and implementation of relocation, and Principle 18.3 similarly instructs authorities to make "special efforts" to ensure women's participation in the planning and distribution of food, shelter, clothing and medicine distribution. Involving women in these activities may, among other things, lead to greater attention to the impact of relocation processes and camp design on women's security.¹ Women's participation in the latter activities would also be instrumental in ensuring non-discriminatory distribution practices, and in diminishing the risk that male relief workers and/or male IDPs will abuse their privileged access to basic supplies to sexually exploit female IDPs.

Institutional Framework

Although primary responsibility for IDPs resides with their states of nationality, the unwillingness or inability of these states to respond effectively to the challenges of internal displacement necessitate an international response. Owing in part to the fact that IDPs are not the subject of a negotiated international agreement, IDPs are rather like institutional orphans. No single agency is dedicated to their protection and assistance. Since the early 1990s, various United Nations agencies, regional governmental agencies, the International Committee of the Red Cross (ICRC) and a host of domestic, regional and international non-governmental organizations have collaborated in addressing the humanitarian and protection needs of IDPs. This collaborative response has sometimes been criticized as inadequate, ad hoc, unaccountable, and opaque. Rather than review its evolution through the years, I will briefly describe the current set of institutional arrangements (Feller 2006; McNamara 2006; Morris 2006).

The United Nations' senior humanitarian official, the Emergency Relief Co-ordinator, bears overall responsibility for co-ordinating protection and humanitarian assistance in complex emergencies through the Office for the Coordination of Humanitarian Affairs (OCHA). The Internal Displacement Division (IDD) is an inter-agency entity housed within OCHA which is tasked with providing support and technical advice on the collaborative response to the Emergency Relief Co-ordinator. The coordinating function is executed through the Inter-Agency Standing Committee (IASC). Members of the IASC are drawn from key humanitarian actors, and include representatives from UN Agencies (including UNFPA) and international non governmental organizations (INGOs). The role of the International Committee of the Red Cross (ICRC) is especially significant in the context of armed conflict because its mandate is guided by international humanitarian law, which specifically focuses on the laws of war in relation to civilians and combatants. The IASC also has a Sub-Working Group on Gender (Gender SWG).² In addition to UN representatives (including UNFPA), the Gender SWG also includes representatives from the International Committee of the Red Cross (ICRC), OXFAM, and the

Women's Commission on Refugee Women and Children. In 1999, the IASC issued a "Policy Statement for the Integration of a Gender Perspective in Humanitarian Assistance," and in 2005 produced the "Guidelines for Gender-Based Violence Interventions in Humanitarian Settings: Focus on Prevention of and Response to Sexual Violence in Emergencies."

Reform of the entire humanitarian response system in 2005 resulted in the introduction of a "cluster approach." The IASC has identified nine sectors or areas of concern and created working groups for each cluster. Each working group is tasked with designating a lead agency for that cluster, developing a list of roles and responsibilities associated with the cluster and member agencies, and surveying existing gaps and capacities.³ The UNHCR is the cluster lead for protection, emergency shelter, and camp co-ordination and management, which is consistent with the UNHCR's historical engagement in extending its "good offices" to a segment of the world's IDP population. The new cluster approach is being rolled out in emerging sites of complex emergencies and natural disasters.

The UNFPA played a leadership role in developing the Guidelines on Gender-Based Violence Interventions as well as the Gender Task Force's recent Gender Handbook on Humanitarian Action. These documents set out background information and key actions regarding gender-specific dimensions for most of the nine clusters at different stages of a humanitarian emergency, thereby enabling the mainstreaming of gender issues within each sector. Humanitarian actors are optimistic about the potential of the cluster approach to provide greater effectiveness and accountability in protection and assistance.

While the UNHCR is the lead agency in the protection cluster, OCHA has also created an inter-agency protection capacity project (ProCap), and a gender capacity (GenCap) project. ProCap's objective is to respond to urgent requirements for "rapid deployment of experienced protection staff to support the UN protection response for IDPs and other vulnerable groups in emergencies and complex crises" (Providing Capacity to do Protection, 2006, 14).⁴ GenCap will adapt this model by employing senior gender advisors and maintaining a roster of gender officers for rapid field deployment in order to ensure mainstreaming of gender issues in all aspects of the humanitarian response.

The practical merits and deficiencies of the cluster approach and of GenCap in addressing the specific needs of women and girls cannot properly be assessed without a fine-grained analysis of the internal dynamics between the many actors involved. Such an analysis lies beyond the scope of this paper.

National Responses

Implementation of the IDP Guiding Principles requires support, or at least non-interference, by the state. With respect to women's human rights, achievement of protection goals before, during and post-conflict necessitates a domestic legal framework capable of responding to gender-based violence, affirming women's independent legal identity, and a property regime that enables women to control property on equal terms with men.

Since 2000, over a dozen states have developed policies or laws that reflect or implement aspects of the *IDP Guiding Principles*, including at least some gender-related provisions.⁵ Progress in narrowing the gap between principle and practice remains a persistent problem, owing to the non-neutrality of the state vis a vis different classes of IDPs, direct or indirect responsibility for human rights and humanitarian law violations, resource limitations, and the pervasive, systemic inequality of women. The following recent examples are no more than random illustrations.

In 2002, Sri Lanka adopted a National Framework for Relief, Rehabilitation and Reconciliation that incorporated the Guiding Principles as official policy for conflict-affected IDPs. According to one commentator, however,

as conflict resumes, political calculations are again taking precedence over humanitarian considerations. Displaced tsunami survivors have been more successful in accessing resources. Houses, albeit of poor quality, were built in record time and compensation payments made. Conflict-affected IDPs were upset by the differential treatment, especially as their monthly food rations were less than those given to tsunami survivors. UNHCR officials are aware of discrepancy of provisions but there is little they can do (Banerjee 2006).

National legal systems regarding property ownership, inheritance and transfer play a crucial role in the ability of widowed women to thrive upon return or resettlement, as this African example indicates:

...restrictions on women's ability to own, acquire and manage property must be overcome. Widowed women are particularly vulnerable because in a number of countries they are unable to inherit land or property from either their husbands or their parents. This was a significant problem in Rwanda for the many displaced widows seeking to return home after the genocide. Recently in Liberia, and at the urging of local women's groups, national law has been amended to allow women married under customary law to inherit their husband's property. However, efforts are needed to ensure that IDP women are aware of these rights. Due to low literacy, in particular among women, creative dissemination techniques are needed (Mooney 2004).

In 2004, the Colombian Constitutional Court ruled that state authorities violated the constitutional rights of IDPs: "through action or omission by the authorities in providing displaced populations with optimum and effective protections, thousands of people suffer multiple and continuous violations of their human rights" (quoted in Cepeda-Espinoza, 2006, 22). The Court drew particular attention to the high proportion of vulnerable social groups (including female heads of household and pregnant women) among the IDPs.

In Darfur, the protection mandate of international actors is hampered by the antagonistic stance of the government of Sudan. While rape by militia is recognized as chronic and widespread,

[o]ne disappointing characteristic of the protection response in Darfur has been the limited emphasis on understanding and supporting community self-protection strategies. One example of working with communities has been the arrangement of patrols to protect women from sexual violence and abduction by militia while searching for firewood around camps. Humanitarian agencies have collaborated with [African Union Mission in Sudan] to organise weekly or bi-weekly firewood patrols from the major camps. For the individuals

involved, these patrols had a significant protective effect, but they were only carried out in a limited number of camps and were not consistently undertaken.

Another attempt to reduce the risk of sexual violence women face has been the provision of fuel-efficient stoves. Fashioned from clay and water, these stoves cut down on firewood usage by up to 40%, thereby reducing the frequency with which women have to travel outside the relative safety of camps in search of fuel. Although such stoves had been introduced with great success elsewhere in Sudan and in northern Kenya, humanitarian organisations spent over a year debating whether they would be appropriate in Darfur on the grounds that women who supported themselves by selling firewood would lose income – arguably a secondary consideration set against the risk of rape, and one that could have been addressed through complementary income generation. When the concept was finally adopted, further time was lost selecting the stove model (Pantuliano and O’Callaghan, 2006, 11).

Large INGOs with experience in protection undertake a range of stand-alone protection activities, including women and child protection programming and access to justice projects. Many have also mainstreamed protection approaches across their relief activities. Working on protection has resulted in antagonistic relations with the Sudanese authorities, and as a result many other agencies have limited their engagement in protection to less contentious programming, such as the provision of fuel efficient stoves (Pantuliano and O’Callaghan, 2006, 8).

The vulnerability of women to members of their own community, especially when they appear to challenge conventional gender hierarchies, is revealed in the following observation:

Humanitarian actors have established or strengthened women’s committees which are consulted in relation to issues regarding food distribution and sexual violence.

Humanitarian agencies in Darfur are also implementing programmes aimed at building the knowledge and capacity of national organisations to undertake work in support of human rights and international law. One concern in this regard is that international organisations do not have the capacity to protect local organisations from the heightened threats they face as a result of their increased involvement in protection work (Pantuliano and O’Callaghan, 2006, 13).

UNFPA’s leadership role in responding to sexual and gender-based violence in Darfur posed serious challenges for the agency, including capacity and resources to attend to both the health and legal dimensions of sexual and gender based violence. Success in suspending a Sudanese legal requirement of reporting sexual violence to local police as a pre-requisite to medical treatment, and the successful conviction of an army officer for rape, can be counted as important achievements.

Refugees

The contemporary refugee regime began in Europe, and was formulated by and for Europeans displaced by World War II and the descent of the Iron Curtain. The singular, distinctive right that attaches to the declaration of refugee status is *non-refoulement*, or non-return to the country of nationality. The 1951 UN Convention Relating to the Status of Refugees formally expanded in geographical, temporal scope with the 1967 Protocol on the Status of Refugees, but the legal definition of the refugee remains essentially unchanged. A refugee is a person who:

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

Refugees must be outside their country of citizenship, must fear a harm that constitutes persecution, and the persecution must have a nexus to one of the five grounds. The 1984 OAS *Cartagena Declaration* and the 1969 OAU (now AU) *Refugee Convention* broaden the scope of refugee protection, de-emphasize the individualized requirement of persecution, and encompass reasons for flight that affect populations as a whole, such as “generalized violence,” “massive violation of human rights,” and events “seriously disturbing public order.”

The mandate of the United Nations High Commissioner for Refugees (UNHCR) is “to safeguard the rights and well-being of refugees. UNHCR strives to ensure that everyone can exercise the right to seek asylum and find safe refuge in another state, and to return home voluntarily.” To that end, the UNHCR engages in protection and humanitarian assistance, works with states that host asylum seekers and refugees, and seeks durable solutions to refugees’ displacement, whether by return, local integration in the country of first asylum, or resettlement in a third country.

In addition to serving those who meet the legal definition of a refugee, the UNHCR also responds to situations of mass influx by designating groups as “prima-facie refugees” without performing individualized assessments. The UNHCR also lends its “good offices” to assisting some IDPs and stateless people. To the extent that the mandate of the UNHCR and the ICRC overlap, the division of labour tends to favour the UNHCR in the refugee domain, unless host governments actively impede UN agencies from operating in the field (Aeschlimann 2005; Krill 2001).

Factoring Gender into the Refugee Regime

Gender emerged on the international refugee agenda in the mid-1980s, and attention at the international, regional and domestic level has manifested in a number of initiatives since then. Indeed, during a period that witnessed states (especially in the Global North) expending increasing resources on non-entrée mechanisms to deter and deflect asylum-seekers, the generally favourable response (in principle) to recognizing gender-related persecution stands out as a rare counter-trend, thanks in large measure to feminist advocacy, scholarly research, and networking inside and outside governmental institutions (Macklin 1995; Macklin 1998; Crawley 2001; Spijkerboer 2000).

The Definition of a Refugee

Reference to sex or gender is notably absent from the refugee definition’s grounds of persecution, leading some to insist that the existing definition must be amended to add sex or gender to the list. This argument has not prevailed internationally or domestically for a variety of reasons, not least of which is that the prospect of

inviting states to open up the refugee definition for revision in a climate of resistance (if not open hostility) to refugees risks the outcome of a more restrictive, retrograde definition.

Instead, the UNHCR and various states have adopted guidelines that advance a gender-sensitive interpretation of the existing refugee definition, and counsel decision-makers on procedural issues that relate to creating a safe and supportive environment within which a refugee claimant can disclose her narrative in furtherance of making a proper determination of refugee status. This approach has been refined over the years through the individual initiatives of states, non-governmental organizations (NGOs), regional organizations and the UNHCR (Center for Refugee and Gender Studies, Guidelines; Crawley and Lester 2004). Each set of guidelines draws inspiration from existing refugee jurisprudence in non-gender contexts, developments in women's human rights, and from cross-jurisdictional precedents. The outcomes reflect an ongoing process of iteration, mutual feedback, and transnational networking across jurisdictions and subject areas.

Broadly speaking, the substantive analysis contained in most gender guidelines addresses three elements of the refugee definition: the agent of persecution, the form of persecution and the reasons for persecution. Drawing on feminist critique of the public/private distinction as well as developments in refugee jurisprudence (Ward 1993), gender guidelines emphasize that the agent of persecution may be the state, or a non-state actor (spouse, relative, employer, insurgent group) in circumstances where the state is unable or unwilling to provide protection. In addition to forms of physical and psychological suffering commonly inflicted on both sexes, persecution includes rape, domestic violence, female genital mutilation, dowry-related violence and trafficking. Although refugee law distinguishes between prosecution and persecution, the enforcement of certain laws (e.g. forced abortion) may be inherently persecutory, even if in furtherance of a legitimate state objective (cf. population control). The same applies to laws imposing a penalty that is seriously disproportionate to its objective (e.g. stoning for adultery). The cumulative effect of persistent, chronic, discrimination that imposes consequences "of a substantially prejudicial nature on the person concerned" may also constitute persecution. Similarly, a pattern of state denial of protection to women abused by non-state actors could also contribute to a finding of persecution (UNHCR 2002, para. 14).

While the form of persecution may be uniquely or mainly inflicted on women, the reasons may be unrelated to gender. For example, racialized women may be subject to sexual violence or reproductive control to terrorize, punish or annihilate a given racial/ethnic/cultural group. In such cases, persecution may be gendered in form, but on account of race or nationality. A union organizer may be raped (while her male colleague is tortured some other way) on account of real or imputed political opinion.

Women who resist the strictures placed on them by theocratic regimes in the name of religion may face persecution on account of their political opinion (feminism) or religion (non-conformity to the dominant interpretation of religious requirements). In certain cases, the reason for persecution and/or the absence of state protection is the devalued status of the female claimant as a woman. Domestic

violence and female genital mutilation are two frequently cited examples. Defining and circumscribing “particular social group” in refugee law has proven controversial, but tribunals and courts in various jurisdictions have nonetheless accepted that women (or some subset thereof) may constitute a particular social group because sex is an innate or unchangeable characteristic, and women are socially subordinate to men.

As the foregoing examples illustrate, the grounds of persecution may overlap, and the same facts may yield multiple (though complementary) legal conclusions regarding the nexus between persecution and the listed grounds. Some states, courts and the UNHCR have explicitly confirmed that gays, lesbians, bi-sexuals and other sexual minorities may also constitute particular social groups.

On the procedural side, gender guidelines offer practical advice on how to promote an adjudicatory environment that is non-intimidating, accessible, culturally sensitive, confidential, and female-only (on request or automatically). Gender guidelines may also caution decision-makers about inappropriate reliance on demeanour and the possible dearth of documentary evidence. The UNHCR guidelines advise that female asylum seekers should be interviewed separately and in the absence of male kin in order to protect women’s opportunity to present their own case. They also recommend that psycho-social counseling and other support be available where necessary.

Fewer than half of asylum-seekers are women. Taking as given the estimates that women comprise more than half of the world’s refugees, this suggests that asylum is less accessible for women than men. Since countries in the global North (including Australia) expend enormous resources on deterring the arrival of asylum-seekers, thereby rendering the journey expensive, dangerous and difficult, it is unsurprising that proportionally fewer women are in a position to reach countries of asylum. The success of gender guidelines in encouraging greater recognition of gender-related persecution must be balanced against the fact that fewer women than ever are able to access countries of asylum to advance those refugee claims.

Protection Issues for Refugee Women in Countries of Asylum

The practical problems confronting refugee women in countries of first asylum are broadly comparable to those of internally displaced women. Some potential differences in the circumstances of refugees versus IDPs that may be attributable to border crossing include the following:

- Lack of identity documents may complicate recognition of citizenship status of children born to women outside the country of nationality
- Family reunification in refugee situations is complicated by the fact that family members are separated by a border; the ICRC has particular expertise and capacity in tracing missing persons and reuniting family separated by conflict
- Refugees may be more likely to converge in camp settings, while a greater proportion of IDPs may be dispersed (residing with relatives) or in hiding (from fear)

- IDPs may be closer to the arena of conflict, and therefore women, girls and boys may be more likely to be subject to abduction/forced recruitment
- Government forces and opposing militia may be especially hostile to the presence of humanitarian actors in IDP situations, and obstruct delivery of assistance and protection
- IDPs may be more vulnerable to ongoing coercion in relation to their mobility, meaning that they may be repeatedly displaced or forcibly immobilized.

Because no one situation of displacement is identical to another, generalizations about the material impact of border crossing on women should be made advisedly.

Like OCHA, the UNHCR has formulated policies, guidelines and manuals about mainstreaming gender into all aspects and phases of refugee protection and assistance, including participation in decision-making about protection and assistance. Recent documents indicate a shift in tone, from the idea that forcibly displaced women and girls are inherently vulnerable, to an approach that focuses on identifying and disaggregating the specific types of harms and risks to which women, girls, men and boys are vulnerable. One might describe this as a transition from asking the question “what is the impact of displacement on women and girls?” to asking instead “how does the impact of displacement vary in relation to gender?”

The latest UNHCR initiative concerning to gender and conflict-induced migration is the ExCom Conclusion on Women and Girls at Risk (hereafter “ExCom Conclusion”). The preamble to the ExCom Conclusion observes that women and girls are more likely to encounter certain kinds of protection problems, and less likely than men or boys to be able to exercise their rights. This gendered discrepancy is meant to explain why the ExCom Conclusion advocates taking “specific action in favour of women and girls [to ensure that] they can enjoy protection and assistance on an equal basis with men and boys.” The identification of a particular woman or girl as “at risk” appears to be the precondition to an “urgent protection intervention”, and presupposes that not all women and girls should be characterized as “at risk” on account of being female.

The ExCom Conclusion begins by identifying general and specific risk factors in the protection environment that, alone or in combination, place individual women or girls “at risk.” The ExCom Conclusion also notes how risk can be compounded over time and space, suggesting that “if women and girls have been subjected, for instance, to SGBV in the area of origin or during flight, this may leave them at heightened risk in the place of displacement.”(ExCom Conclusion, para. (d)). Women and girls in urban versus camp settings may both face risks of SGBV, but they deal with different constraints on movement and access to assistance from international actors.

The ExCom Conclusion lists a number of preventive strategies for the UNHCR, other international governmental organizations (IGOs) and NGOs to use in identifying, assessing and monitoring risk factors at all stages of displacement. The last section of the ExCom Conclusion articulates immediate, medium and long-term intervention responses to deal with individual cases of at-risk women and girls.

These include safe houses for women victimized by domestic and sexual violence within refugee camps, relocation to other sites of refugee protection, resettlement, access to legal, psycho-social and economic assistance, and deployment of mobile courts to facilitate access to justice.

Repatriation and Resettlement of Refugee Women

Repatriation of refugee women raises similar issues to the reintegration of IDP women in their regions of origin. Gender-specific legal barriers include restrictions on women claiming, inheriting or acquiring title to property. Stigmatization of widows and women who were (or were presumed to have been) prostituted or sexually violated also impedes return and reintegration. Resettlement to a third country (United States, Canada, Australia, Norway, Sweden, Great Britain etc.) benefits few refugees, and proportionally fewer women than men. The ExCom Conclusion's encouragement of resettlement for women at risk must be read in light of this background constraint, which is unlikely to change significantly in the foreseeable future.

A major limitation of both the IDP and the refugee regimes is the institutional presumption among key international governmental organizations (and their funders) that displacement ought to be and therefore will be temporary. Investment in programmes and strategies for the management of indefinite or permanent displacement is difficult to reconcile with this presumption, even though experience shows that many situations of displacement go unresolved for years, even decades.

Trafficking

The international legal approach to trafficking is framed within a criminal law perspective that makes states not individuals – the primary victim. This creates a misalignment between the implicit or explicit human rights framework informing the approach to trafficking in IDP and refugee discourse, and international law governing trafficking. This incongruity is especially visible in respect of persons trafficked across borders. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol), supplements the UN Convention Against Transnational Organized Crime. Trafficking in persons is defined as follows:

- (a) "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- (c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article;
- (d) “Child” shall mean any person under eighteen years of age.

The Trafficking Protocol is situated in an international instrument devoted to combatting transnational crime. In this context, the illicit movement of contraband arms, drugs, and people across borders is understood as a criminal activity orchestrated by transnational organized crime to the detriment of individual states. Although trafficking does not require that the person concerned cross an international border, the transnational focus of the UN Convention orients attention toward unauthorized movement across borders, and the consequential “assault” this inflicts on state sovereignty.

Trafficking and Conflict-Induced Migration

Trafficking and forced migration converge in at least two ways: First, women and girls who are displaced by conflict may be targeted by traffickers. Trafficking may be for the purposes of sexual exploitation by international peacekeepers, forcible recruitment into militia, forced “marriage” to combatants, or non-sexualized exploitative labour. This linkage between displacement and trafficking is widely recognized in the literature and addressed in various UN documents, including the IDP Guiding Principles and the UNHCR ExCom Conclusion on Women and Girls at Risk. It should be noted, however, that sex trafficking attracts attention that is probably disproportionate in relation to trafficking for other forms of exploitation. Nevertheless, even where women and girls are trafficked for non-sexual forms of labour exploitation, their subjugation places them at risk of sexual, emotional and physical abuse and the various consequential harms to physical and mental health.

Secondly, trafficking itself may be understood as a form of [indirect] conflict-induced migration (Martin 2006). For example, a woman who has not fled ongoing or impending conflict may nonetheless experience economic, personal and/or sexual harms that make her especially vulnerable to traffickers. If she is trafficked within the borders of her country, one may describe her as an IDP. If trafficked outside her country she may, subject to meeting various other criteria, come within the definition of a refugee.

There are, in theory, few obstacles to treating internally trafficked persons as IDPs for purposes of bringing them within the ambit of the IDP Guiding Principles. The situation of transnationally trafficked women is less clear (Demir 2003). A few successful asylum claims have been made by trafficked women in Australia (VXAJ, 2006), Canada (CRDD T98-06186, 1999), and the United States (JM, 1996), other cases in these same jurisdictions (*Lleshanaku* 2004) and in the UK (VD, 2004)

and elsewhere, the narrowness of the refugee definition makes it an awkward vehicle for redressing the harms to trafficked women. Moreover, the refugee definition directs attention solely at future persecution in the country of nationality, whereas the harms of trafficking are arguably inflicted in the country into which the woman is trafficked (and where she would make her asylum claim) as much as in the country of origin. While advocates tactically and creatively deploy the refugee regime to protect trafficked women, it is a strategy dictated by the absence of viable remedial alternatives.

The Trafficking Protocol recognizes persons who are trafficked as “victims”, but does not recognize the harms inflicted on them as human rights violations. While the Protocol encourages states to undertake programs and actions to prevent trafficking and to treat trafficked persons as victims rather than criminals, it does not entitle trafficked persons to a remedy. These protection gaps reflect the fact that the Trafficking Protocol supplements an instrument that formally regards them as contraband commodities. The Trafficking Protocol encourages states to extend various forms of medical, psychological and social assistance to trafficking victims. It recommends that repatriation of trafficked persons to their countries of nationality or residence “preferably be voluntary.” It also invites states to consider legislation that would permit trafficking victims to remain in the country temporarily or permanently, with due regard to “humanitarian and compassionate factors” (Article 7). None of these provisions is mandatory. In particular, the discretion reserved to states on the matter of deportation of trafficked persons (unlike refugees, who possess a right of *non-refoulement*) is attributable to states’ experience with the UN Refugee Convention. States are now resolute in their refusal to relinquish sovereign authority to expel non-citizens, especially those who enter or remain without legal authorization (which is typically the case with trafficked persons). In short, the Trafficking Protocol confers no rights on trafficked persons. States can and do deport trafficked women back to places where the women were so desperate to leave, or their families were so destitute, or child welfare institutions so inadequate, that they more or less knowingly put them(selves) in the hands of traffickers. In these situations, deported women and girls stand a high risk of being re-trafficked, either because they cannot thrive in their country of origin, or because those who trafficked them initially will apprehend them again.

While one may criticize the Trafficking Protocol for making the welfare of trafficked persons a matter of state discretion, it is important to note that some states have followed the Trafficking Protocol’s recommendation regarding temporary protection. The United States offers a temporary visa to trafficked women, although it is contingent on women agreeing to cooperate in prosecutions of traffickers. Provisions for granting temporary resident permits to trafficked persons also exist in Canada and many EU states (Citizenship and Immigration Canada 2006; Schlapkohl 2006: 71–80).

The Council of Europe Convention on Action Against Trafficking in Human Beings (hereafter “Trafficking Convention”) goes further by securing trafficked persons short-term residence permits without conditions attached:

Each Party shall provide in its internal law a recovery and reflection period of at least 30 days, when there are reasonable grounds to believe that the person concerned is a victim. Such a period shall be sufficient for the person concerned to recover and escape the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities. During this period it shall not be possible to enforce any expulsion order against him or her. (Article 13).

The Trafficking Convention also requires the issuance of renewable resident permits to trafficked children when it is in the best interests of the child, and to adults where:

- (a) the competent authority considers that their stay is necessary owing to their personal situation;
- (b) the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings. (Article 14)

These latter provisions effectively implement the same discretionary principles as exist in the Trafficking Protocol. The Council of Europe Trafficking Convention will come into force when ratified by ten Member States. Thus far, only Austria, Moldova and Romania have ratified but over thirty states have signed the Convention.

The phenomena of trafficking, smuggling and irregular migration more generally must be understood against a landscape where the opportunities for lawful migration and asylum anywhere, but especially to prosperous and stable states of the global North, are extremely restricted. The options for women to relocate as autonomous, permanent immigrants are even more limited. The vast majority of women's migration is structured around the performance of gendered work namely sex, child/elder care, or household labor, even where the women in question possess education, skills, and experience in other occupations. Spousal migration (including so-called mail-order marriages), domestic work, and sex work each involve performance of one or more aspects of "women's work." In short, the migration of women is often dependent on a man and/or temporary. The resort to trafficking, smuggling and clandestine entry is largely a response to the absence of alternatives. The preponderance of gendered forms of labour reflects the global demand for (low cost) gender work in receiving countries. Without defending the exploitation involved in trafficking (which also often accompanies other types of irregular migration), it remains the case that combating irregular migration in the absence of viable alternatives in the country of origin deprives women of the only exit route that exists for them.

Conclusion and Recommendations

A survey of the many guidelines, handbooks, resolutions, toolkits, conclusions, and manuals produced by various United Nations bodies confirms an awareness of the protection issues specific to women and girls displaced by conflict, and an intention

to operationalize the norms at all levels, especially in the field. Persistent challenges to effective implementation remain. This paper does not presume to resolve this gap between theory and practice. Rather, I offer three recommendations that build on the distinctive role the UNFPA plays in advancing the protection of women and girls displaced by conflict.

Chronic Displacement

The main UN bodies that address displacement (UNHCR and OCHA) operate from the institutionalized premise that displacement ought to be temporary. This norm constrains the capacity of these bodies to adopt strategies that accommodate the ineluctable fact that many situations of displacement are long-term, if not permanent. However, the UNFPA operates in many different contexts (e.g. development as well as emergencies) and with different populations (displaced and non-displaced). It is not organized around a narrative model of catastrophe, followed by temporary disruption, culminating in restoration of the *status quo ante*. As such, its programming need not reflect the same assumptions and priorities as other actors. Therefore, the UNFPA may be well positioned to implement strategies in the health, livelihood and shelter domains that recognize the potential permanence of the temporary, and which (where appropriate) traverse the divide between displaced women and girls and non-displaced women and girls in surrounding communities who may be similarly situated with respect to the risks and needs addressed by UNFPA activities.

Trafficking as a Protection Issue

As noted earlier, trafficking is formulated as a “crime control” problem in the Trafficking Protocol to the UN Convention on Transnational Organized Crime. Although many commentators inside and outside the United Nations acknowledge the human rights dimensions of trafficking, no body has made the protection of the human rights of trafficked persons a central tenet of an agenda for action. The expertise and experience of UNFPA with respect to SGBV and reproductive health place it in a unique position to advance a protection agenda for internally trafficked women and girls within the IDP framework, and to promote the human rights of trafficked women and girls more generally. The Report of the Special Rapporteur on Violence Against Women on trafficking provides a useful starting point for developing a human rights framework for action (Coomaraswamy 2000).

Legal Literacy

Every day, refugee and internally displaced women demonstrate their resilience and resourcefulness in the face of relentless hardship. They also reflect on their situation and, given an opportunity, speak out. A remarkable video posted to YouTube

in 2008, depicts a committee of Darfuri women in a Chad refugee camp who gathered to produce a list of grievances grounded in their specific experience as female refugees. Their action was sparked by an incident of horrific and organized violence against seven girls and women in the camp, ranging in age from ages thirteen to thirty. These girls and women were accused of prostitution, and some of the men decided to “restore morality” by making an example of them. One night, the girls and women were rounded up, bound, and severely beaten and abused within earshot of camp residents. In the wake of this attack, a committee of women gathered together to publicize the ways in which their lives as Darfuri women had been worsened by the refugee camp experience. At risk to their own safety, they demanded recognition and respect for their humanity, their dignity and their rights. The result was the Farchana Manifesto (http://www.youtube.com/watch?v=-DfeOTR_IZE). The following is transcribed from the translation of the Arabic text, as narrated in the video:

A Declaration Written by the Women of Farchana Refugee Camp: We the women have many concerns about deprivation of our liberties and denial of our freedom of expression. Here, we relate them to you, one by one:

1. Limited Freedom of Expression. We are denied freedom of expression. Women have no voice.
2. Limited Right to Work. It is forbidden for women to better their living conditions. If a woman works, she must still see to all her responsibilities such as caring for the sick, household management, and caring for the children. The husband’s role is non-existent. And a woman is not married needs to go to work to bring food for herself and her children, but has no right to do so.
3. Inequality Between Wives. There is a lack of equality between wives, if a man has multiple wives. This is an injustice.
4. Lack of Property Rights. Women cannot freely decide how to manage their own property, such as money, gold, domestic objects and cattle.
5. Restricted Movement. There are restrictions on external communications, for example, visiting neighbours, family friends and especially long distance. If a woman is allowed to travel long distance, she will not receive any money, and will have to make do.
6. Limited Access to Education. Access to education is restricted for girls, especially university.
7. Discouragement of Girls. Girls are discouraged from attending school.
8. Mothers Blamed. When a girl becomes pregnant, her mother must take responsibility and is held accountable. This can bring negative reactions from her husband, and can lead to divorce.
9. Physically Gruelling Labour. Hard labour is done by women: Gathering firewood, collecting grass for cattle, shelter construction. All physically grueling work is the responsibility of women.
10. Lack of Trust. A woman cannot leave her home without her husband’s approval or knowledge. Otherwise, she will immediately be accused of having left in order to prostitute herself. Even worse, when she is out gathering firewood, she

may be caught and raped. When she comes home, men blame her for the rape, accusing her of “asking for it”.

11. Lack of Worth. A woman has no value except for sexual pleasure. Men want to have many children, but do not think of their children.
12. Forced Child Marriage. After five or six years of school, girls are forced to marry. Then they must stay at home without higher education, work, or freedom.
13. Agencies not Listening. Even during aid agency meetings, women’s voices are not taken seriously. Only the men are being heard.
14. No Recourse for Grievances. The space or organization that will take into account their concerns does not exist.

We thank you, and hope that women’s liberties and worth become important matters in this world, on this day June 10, 2008.

The general concerns raised in the Farchana Manifesto are surely not unique to this group of refugee women. The UNFPA’s activities bring them into regular, close contact with women under the aegis of providing services that are perceived as more or less apolitical. This opens up an opportunity for the UNFPA to be an organization that listens and that takes women’s concerns into account. The UNFPA can be an important ally for change, an ally that displaced women seek, need and deserve.

Notes

1. The location of latrines, and the means of gathering firewood are two commonly cited illustrations of camp design issues that affect women’s security.
2. Formerly the IASC Task Force on Gender and Humanitarian Assistance.
3. The clusters and lead agencies for conflict-induced IDPs are as follows: Logistics (WFP), Emergency telecommunications (OCHA, UNICEF, WFP), Camp co-ordination and management (UNHCR), Emergency Shelter (UNHCR), Health (WHO), Nutrition (UNICEF), Water, sanitation and hygiene (UNICEF), Early Recovery (UNDP), Protection (UNHCR).
4. According to the IASC website, the Guidelines “specifically details minimum interventions for prevention and response to sexual violence to be undertaken in the early stages of an emergency”, while the Gender Handbook “is a sector-by-sector guide on how to ensure gender equality programming in humanitarian situations. It provides practical tips on how to mainstream gender and checklists to measure the progress in meeting the needs and ensuring the equal participation of women, girls, boys and men in all aspects of humanitarian response.” The Guidelines and the Handbook are meant to support and complement one another.
5. States and regional organizations that have adopted or indicated an intention to adopt laws or policies reflecting the Guiding Principles include Angola, Burundi, Liberia, Sierra Leone, Nigeria, Uganda, Great Lakes Region, India, Nepal, Philippines, Sri Lanka, Colombia, Peru, Azerbaijan, Bosnia-Herzegovina, Georgia, Serbia-Montenegro, Russia, Turkey, the African Union, the Inter-governmental Authority on Development in the Horn of Africa, the Organization of American States, the Organization for Security and Cooperation in Europe. Brookings Institution, n.d.).

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