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J. Oloka-Onyango

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# **The Plight of the Larger Half: Human Rights, Gender Violence and the Legal Status of Refugee and Internally Displaced Women in Africa**

J. OLOKA-ONYANGO\*

## **I. THE NATURE OF THE PROBLEM**

This paper launches a broad inquiry into the nature of the burden shouldered by the larger half of humanity, setting the framework for a critique of international and regional law, the two main bodies of jurisprudence within which the issue is addressed. Specifically, why is international law in general so oblivious to the overall situation of women? What are the specific points of law and policy that require critical analysis? How sensitive are feminist critiques of the international arena to the specific condition of the African woman? The second level of inquiry is concerned with the place of gender in the main refugee instruments. The analysis is explicitly linked to general human rights law and the operations of the United Nations High Commissioner for Refugees (UNHCR), the main international agency concerned with protecting the rights of refugees and the internally displaced.

Additionally, consideration will be given to the African human rights and refugee instruments and mechanisms and the extent to which they reflect insensitivity to the plight of refugee and internally displaced women. Part IV of the paper comprises a specific focus on the issues of physical protection and gender violence with particular respect to internally displaced women. The paper also explores the role of the main actors in the field, ranging from the United Nations (UN) and its varied agencies, to the Organization of African Units (OAU) and the African Commission on Human & Peoples' Rights (ACHPR), and to national and extra-governmental actors.

Assessing the results of this inquiry led me to the conclusion that displaced African women and refugees were experiencing "the plight of the larger half." A number of basic facts confirm this conclusion. The global population of women exceeds that of men; more than fifty percent of the world's displaced population live in Africa, and the number of internally displaced persons surpasses that of refugees. The conclu-

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\* L.L.B. (Hons) (MUK); L.L.M., S.J.D. (Harv.); Dip. L.P. (LDC). Senior Lecturer, Faculty of Law, Makerere University, Kampala, Uganda and Visiting Professor, University of Minnesota Law School, Institute of International Studies (1994-95).

sion follows that women outnumber men in both the internally displaced and refugee populations.<sup>1</sup> Consequently, whether examined in their separate spheres as women, as refugees, or as internally displaced, or as a combination thereof, these groups comprise the world's "larger half." Separately, each group faces insurmountable obstacles, and concurrent membership in two or more of the group classifications places a person at an even greater risk of marginalization. African internally displaced women, therefore, comprise one of the most vulnerable groups, which is correspondingly least protected by law.

Constituting a majority has not translated into sociopolitical empowerment or economic liberation for internally displaced and refugee women. On the contrary, the general ostracization of women in the social, political, and economic arenas has created additional barriers for those forced to seek refuge or become internally displaced. Further, the normative and institutional mechanisms to cater to these realities are either manifestly hostile or woefully inadequate to the specific needs of women, whether *qua* women, as refugees, or as internally displaced persons. This is the case irrespective of the dual aspects of the problem, *viz*: the question of legal recognition and status,<sup>2</sup> or the specific acknowledgment of issues particular to the displaced women population, paramount amongst which is the question of gender violence.<sup>3</sup> Evidence of this can be seen in the fact that both the 1951 Geneva *Convention Relating to the Status of Refugees*<sup>4</sup> and the 1969 OAU *Convention on the Specific Aspects of Refugees in Africa*<sup>5</sup> recognize neither the specifics of gender-based persecution nor the particularities of women refugees or of womanhood as a whole. This is the case whether viewed in relation to the conceptualization of the term "refugee" or in the dominant solutions to the refugee crisis that are usually proffered.

The main international instrument concerned with the status of women, the *Convention on the Elimination of all Forms of Discrimina-*

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1. The estimation of forcibly displaced persons varies depending on the source. The number of refugees has been calculated at 20 million and that of internally displaced persons placed at 24 million. Of these, eighty percent are estimated to be in African countries. See *Preliminary Report of the Special Rapporteur on Violence Against Women*, UN Doc. E/CN.4/1995/42 (1994); UNHCR, THE ADDIS ABABA DOCUMENT ON REFUGEES AND FORCED POPULATION DISPLACEMENTS, 10 (1994). For an examination of the problem of compiling and analyzing statistics in the refugee arena, see UNHCR, THE STATE OF THE WORLD'S REFUGEES: THE CHALLENGE OF PROTECTION, 145-147 (1993).

2. See David Neal, *Women as a Social group: Recognizing Sex-Based Persecution as Grounds for Asylum*, 20 COLUM. HUM. RTS. L. REV. 203 (1988), and Genevieve Camus-Jacques, *Refugee Women: The Forgotten Majority*, in REFUGEES AND INTERNATIONAL RELATIONS 141 (Gil Loescher & Laila Monahan eds., 1989).

3. Camus-Jacques, *supra* note 2.

4. *Convention Relating to the Status of Refugees*, July 28, 1951, 189 U.N.T.S. 137 [hereinafter *Refugee Convention*].

5. *Convention governing the Specific Aspects of the Refugee Problem*, Sept. 10, 1969, 1001 U.N.T.S. 45 (entered into force June 20, 1974).

tion against Women (CEDAW)<sup>6</sup>, has existed for a little over a decade but does not address the issues surrounding refugee or internally displaced women. The *African Charter on Human & Peoples' Rights*<sup>7</sup>, mentions the word "women" once, and even then only in an omnibus clause dealing with the family and children.<sup>8</sup> The Organization of African Unity (OAU) is a peculiarly male-dominated organization, and has only recently established a unit within the Secretariat to deal with issues related to gender.<sup>9</sup> Finally, despite the magnitude of the crisis, international law has thus far failed to establish an adequate framework within which to tackle the question of the internally displaced or the very unique circumstances of internally displaced women.<sup>10</sup> Consequently, the pervasive phenomena of gender violence, marginalization, and exploitation that this population experiences remain in a precarious programmatic and legal position.

## II. INTERNATIONAL LAW AND THE PLIGHT OF THE LARGER HALF

### A. *The Status of Women under International Law*

#### 1. International Law Today

International law operates within a framework that is influenced by socioeconomic, political, and historical factors quite different from those that operate on domestic law. Indeed, the United Nations, the main institution created to regulate relations between nations, is only fifty years old and still developing. In comparative terms, international law, and particularly international human rights law, is a distinct discipline in the midst of revolutionary change. Because of this, the parameters of international law remain largely dictated by the hegemony advanced socioeconomic and political powers. Such influence exists in spite of the evolution of distinct interstate principles on the

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6. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, G.A. Res. 34/180, 34 U.N. GAOR Supp. (No. 46) 193.

7. African Charter on Human and Peoples' Rights, June 26, 1981, O.A.U. Doc. CAB/LEG/67/3 Rev. 5.

8. See generally Chaloka Beyani, *Toward a More Effective Guarantee of Women's Rights in the African Human Rights System*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 285 (Rebecca Cook ed., 1994).

9. J. Oloka-Onyango, *The Place and Role of the OAU Bureau for Refugees in the African Refugee Crisis*, 6 INT'L J. OF REFUGEE L., 51, 52 (1994).

10. Francis Deng was appointed the UN Secretary-General's Special Representative on Internally Displaced Persons in 1992. His report comprehensively covers the various issues in relation to legal status, protection and state sovereignty, *inter alia*. While he devotes some attention to the issue of internally displaced women, it is fairly clear that much more could have been said. See, FRANCIS DENG, INTERNALLY DISPLACED PERSONS: REPORT OF THE REPRESENTATIVE OF THE SECRETARY GENERAL TO THE 51ST SESSION OF THE COMMISSION ON HUMAN RIGHTS at 29-33, U.N. Doc. E/CN.4/1995/50 (1995).

use of force, the exploitation of the resources of the sea, and the protection of the environment, to mention only a few subjects covered by the discipline. Some critics, such as those in the Critical Legal Studies (CLS) Movement, have argued that international law is in fact little more than a set of manipulable and indeterminate rules in the hands of adept lawyer-scholars.<sup>11</sup>

Theoretical contestation aside, the most striking distinction between international and domestic law lies in the ability of domestic authorities to set and enforce penalties. The lack of options in the international arena leaves victims dependent on the willingness of political powers to act on their behalf. Furthermore, the world is entering a phase in which many of the basic precepts of international law and practice are under intense pressure and scrutiny. The mechanisms to deal with the situation have proven largely ineffective, as illustrated by the international response to the crises in Bosnia, Chechnya and Liberia. In summation, international law and the institutions established to guide and shepherd its development and operation are under siege, and there is considerable contestation over what this portends for the future.<sup>12</sup>

The above dilemma reflects the general chaos of the world as we approach the third millennium. In the *Agenda for Peace*, United Nations Secretary-General Boutros Boutros-Ghali captures the tensions of the present epoch of world history:

We have entered a time of global transition marked by uniquely contradictory trends. Regional and continental associations of states are evolving ways to deepen cooperation and ease some of the contentious characteristics of sovereign and nationalistic rivalries. National boundaries are blurred by advanced communications and global commerce, and by the decisions of States to yield some sovereign prerogatives to larger, common political associations. At the same time, however, fierce new assertions of nationalism and sovereignty spring up, and the cohesion of States is threatened by brutal ethnic, religious, social, cultural or linguistic strife. Social peace is challenged on the one hand by new assertions of discrimination and exclusion and, on the other, by acts of terrorism seeking to undermine evolution and change through democratic means.<sup>13</sup>

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11. See David Kennedy, *A New World Order: Yesterday, Today and Tomorrow*, 4 *TRANSNAT'L L. & CONTEMP. PROBS.* 329 (1994).

12. Barbara Crossette, New York Times correspondent at the United Nations, has no doubt about what this embattlement means, particularly in the country in which the organization is hosted: "At a time when this organization (the UN) created almost entirely by the United States should be looking ahead to challenges as great as or greater than those that greeted its birth in 1945, it is instead fending off a barrage of incredible grassroots allegations. Out there in America are people who challenge anyone with international credentials." Barbara Crossette, *Sinister? UN's Simply in the Dark*, N.Y. TIMES, at E1.

13. BOUTROS BOUTROS-GHALI, *AN AGENDA FOR PEACE* 41-42 (1995).

Despite this doomsday scenario, it relates only half of the story; the other half, the story of the marginalization of women and the implications of those "... fierce new assertions of nationalism and sovereignty..."<sup>14</sup> is yet to be recounted.<sup>15</sup> International law has been particularly insensitive to the plight of women and has only recently become aware of the role of women as both subjects and objects of international law in the United Nations and in international law and relations as a whole. Intellectuals and activists, too, continue to overlook the problem. All, however, is not lost. In the wake of the gendered structures of international law and their interpretation by scholars, a formidable critique has evolved which demands that we take a second look.<sup>16</sup>

## 2. The Nature of the Feminist Critique

Prominent in the assault on the male-dominated citadels of international discourse are scholars such as Rebecca Cook<sup>17</sup> and Hilary Charlesworth<sup>18</sup> who have attempted to illustrate the manifest biases in the legal and institutional arrangements established at the international level.<sup>19</sup> The latter has made the important point that even the

14. *Id.*, at 42.

15. V. Spike Peterson, *Introduction in GENDERED STATES: FEMINIST (RE) VISIONS OF INTERNATIONAL RELATIONS THEORY 1* (V. Spike Peterson ed., 1992).

16. Recent analyses in the field have produced several interesting dimensions to the issue in both international relations and international law. A separate area — international development — has been the subject of attention from feminist researchers for a considerably longer period of time. For some references on all three, see Rebecca Cook, *Women's International Human Rights: A Bibliography*, 24 N.Y.U. J. INT'L L. & POL. 857 (1992); Marysia Zalewski, *Feminism and War: Well, What is the Feminist Perspective on Bosnia?*, 71 INT'L AFF. 340 (1995); Chandra Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourse*, in THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM, (C.T. Mohanty, A. Russo & L. Torres eds., 1991), and Association of African Women for Research and Development, *The Experience of AAWORD*, 1 DEVELOPMENT DIALOGUE 101 (1982).

17. For a recent example of her work, see Rebecca Cook, *Women*, in 1 UNITED NATIONS LEGAL ORDER 433 (Oscar Schacter & Christopher C. Joyner eds., 1995).

18. See Hilary Charlesworth, *Transforming the United Men's Club: Feminist Futures for the United Nations*, 4 TRANSNAT'L. & CONTEM. PROBS. 421 (1994) [hereinafter, Charlesworth, *United Men's Club*]; Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 69 (1993), and Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991).

19. The feminist literature on international law is fairly substantial. For a good recent bibliography, see Rebecca Cook & Valerie Oosterveld, *A Select Bibliography of Women's Human Rights*, 44 AM. U. L. REV. 1429 (1995). Karen Knop states the agenda of feminist critiques of international legal theory and jurisprudence most succinctly: "Feminist approaches to international law may be understood as seeking to personalize and personify its normative constructs. They draw attention to the male environment in which international legal principles are created and applied: the predominantly male elites who formulate policy in foreign ministries, debate in international fora, draft treaties and declarations, sit on international and regional courts,

compartmentalization, prioritization, and emphasis of the UN's work is clearly related to the construction of relations between the sexes. There is, of course, the additional fact that "... the proportion of women in the highest echelons of the UN does not grow in a permanent way at all; indeed, it regularly grows backwards."<sup>20</sup> In this way the international civil service both replicates and reinforces gender imbalances at the national level. Such a process clearly presents a serious problem in terms of both policy and practice.<sup>21</sup>

The above problem creates a dual-faceted dilemma, a veritable "Catch-22," for any conceptual approach to the struggle for women's human rights. In the first instance, women are generally marginalized as a thematic issue within the context of international relations. The marginalization stems from both the characterization of the issues to the people who determine which issues become important. It is no surprise that the people who define and implement policies are overwhelmingly men. There has never been, for example, a woman Secretary-General. A total of only five women head the UN specialized agencies at the present time, a reflection, once again, of a similar situation of marginalization within the international framework.

The second dimension to the problem is that even when women's issues are tackled in the international realm, they are addressed in an oblique and generally dismissive fashion. Such manner of dealing with women's issues is due to the paucity of women in those arenas of international discourse and action where their impact is most essential. Women's issues are thus generally excluded from the discourse on the general area of international law and practice. Where there are mechanisms erected to deal with the specific condition of women, their nature, prominence, and impact is not considerable.

Rhetorical pronouncements aside, women remain far down on the list of priorities of the United Nations. This can be discerned from a cursory examination of the two main policy documents that have guided UN operations and philosophy in the 1990s, the Secretary-General's *Agenda for Peace*<sup>22</sup> and his *Agenda for Development*.<sup>23</sup> The latter refers to women in a single paragraph out of 245. Of the ninety-two recommendations for action, only two specifically refer to women and even then in the usual rhetorical phraseology that has come to characterize UN inaction on the issue. The injury is compounded by the Sec-

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and make up the supervisory bodies for key international human rights treaties. Seen through women's eyes, the landscape to which international law applies assumes quite different — and disturbing — contours, women standing out from men in sharp relief." See Karen Knop, *Feminism and State Sovereignty in International Law*, 3 TRANSNAT'L L. & CONTEM. PROBS 293, 294 (1993).

20. Charlesworth, *United Men's Club*, *supra* note 18, at 428.

21. *Id.*, at 435.

22. BOUTROS-GHALI, *supra* note 13.

23. BOUTROS BOUTROS-GHALI, AN AGENDA FOR DEVELOPMENT (1995).

retary-General's *Agenda for Peace*, which makes no reference to women throughout more than one hundred pages of analysis and recommendations; the argument that women are adequately covered under the generic term "people" is obviously insufficient! Clearly, if the perception of global peace excludes half of humanity, then a serious problem exists in the arena of international decision-making.

In conceptual terms, too, the United Nations has failed to address the specificities of women's existence and the multifaceted dimensions of oppression which women face. Charlesworth correctly argues that

[b]y focusing on the public domain of state action, international law generally has left women's lives outside its purview. This can be seen in the definition of human rights norms. For example, the operation of most civil and political rights is confined to the public arena; thus the prohibition of torture extends only to behaviors in which the State is directly implicated. So too, the "collective" or "group" right to development has been confined to operate in the public sphere of the formal economy and market. International economic measures exclude women from many aid programs because either they are not considered to be real workers or because they are regarded as less productive than men.<sup>24</sup>

This dilemma was also reflected in the main mechanisms and instruments that were created to implement women's human rights.

### 3. CEDAW and the Instrumentalities of Women's Human Rights

CEDAW was intended to address the differential treatment between men and women under international law. In many respects however, CEDAW has turned out to be a Janus-like instrument, manifesting both positive and negative elements for the global struggle for the emancipation of women. CEDAW has done this by simultaneously promoting action on women's issues at the international level, specifically in the United Nations, while constraining any serious action on issues affecting women in other international fora. Many scholars have pointed out that part of the reason for this is that CEDAW was couched within a predominantly male-centered axis and employs gender-neutral language. Consequently, the manner in which CEDAW conceptualizes the problem, proffers solutions, and adopts strategies to pursue its objectives are constrained in several material particulars by the male-focus of the instrument.<sup>25</sup> From the preamble to the definition of discrimination, CEDAW adopts a standard that permits governments to engage in behavior that is patently inimical to the status of

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24. Charlesworth, *United Men's Club*, *supra* note 18, at 448.

25. See Natalie H. Kaufman & Stefanie A. Lindquist, *Critiquing Gender-Neutral Treaty Language: The Convention on the Elimination of All Forms of Discrimination Against Women*, in *WOMEN'S RIGHTS, HUMAN RIGHTS* 114 (J. Peters & A. Wolper eds., 1995).



women while not necessarily being illegal within the terms established by the instrument.<sup>26</sup>

David Neal points to several additional problems: the instrument has not been enforced or interpreted in a manner that is consistent with a rigorous protection of the mandate conferred on the Committee charged with the implementation of its provisions. Furthermore, the available remedies are inadequate. But the structural problems are compounded by the very subject with which the Convention deals, namely, the issue of women, and the potential threat to established citadels of male hegemony and domination that this question represents.<sup>27</sup> Thus, the CEDAW Committee is starved of resources and has a limited period of time in which to meet.<sup>28</sup> It lacks any power to adopt formal reports or to interpret the substantive provisions of the instrument in any binding fashion, relying primarily on state self-reporting.<sup>29</sup> A mechanism for the hearing of individual petitions was only presented to the CEDAW Committee in January 1995 and has yet to proceed through various steps ending with promulgation by the United Nations General Assembly.<sup>30</sup> Although CEDAW helped to focus attention on women's issues on the international front, clearly much remains in the way of achieving the objectives of equality and non-discrimination with which it is concerned.

The promulgation of the United Nations' *Declaration on the Elimination of Violence Against Women* on December 20, 1993<sup>31</sup> constituted a significant measure in the struggle to project the issue of gender violence onto the international arena as a human rights issue. While the Declaration is a non-binding instrument, its passage illustrates the level of seriousness with which the question of violence against women is being considered and signifies the potential to pursue the further development of the area. Most important is the breach the instrument marks in the public/private distinction that has prevented serious action on issues such as marital rape.<sup>32</sup> Unfortunately, while extending a particular focus to marginalized categories of women, the document makes no mention of internally displaced women.<sup>33</sup>

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26. Laura Donner, *Gender Bias in Drafting International Discrimination Conventions: The 1979 Women's Convention Compared With the 1965 Racial Convention*, 24 CAL. W. INT'L L.J. 241 (1994).

27. Neal, *supra* note 2, at 28.

28. Donner, *supra* note 26.

29. Julie A. Minor, *An Analysis of Structural Weaknesses in the Convention on the Elimination of All Forms of Discrimination Against Women*, 24 GA J. OF INT'L & COMP. L. 137 (1994).

30. See Cees Flinterman, *Draft Optional Protocol to the Convention on the Elimination of all Forms of Discrimination Against Women*, 13 NETH. Q. HUM. RTS. 85 (1995).

31. Declaration on the Elimination of Violence against Women, G.A. Pres. 48/104, 48 U.N. G.A.O.R. Supp. (No. 49) at 217, U.N. Doc. A/48/49 (1993).

32. *Id.*, art. 1, 2 and 4.

33. The Preamble to the instrument states, "Concerned that some groups of

Much less scholarly attention has focused on the operations of the other instrumentalities created to address the question of women at the United Nations, such as the Commission of Women and UNIFEM.<sup>34</sup> The fact is that both are subjected to the same constraints as is CEDAW, *viz.*, accorded low priority, under-funded, and often eclipsed by the programs of other organizations in the general areas of development (UNDP and IBRD), health (WHO), and children (UNICEF). The organizations and documents discussed earlier illustrate the fact that neither the normative nor the institutional mechanisms erected at the international level are adequate to address the problem.

Of course, in relation to the position of African women, there is a need to look both beyond the dominant feminist critiques of international law and the instrumentalities designed to deal with the status of women in international fora. If women in general are marginalized, how much more so in the case of African and other Third World women? To conclude, a survey of the condition of women under international law would be incomplete without making the necessary distinction and conducting a separate analysis of the socioeconomic, cultural, and political conditions under which African women are forced to operate.

## B. *The Specifics of the Black Woman's Burden*

### 1. First World versus Third World Feminism

Despite the significant theoretical assault launched by feminist intellectuals on the domination of the avenues of international discourse and practice by men, there still remains a significant loophole insofar as the incorporation of different Third World voices is concerned, *viz.*: the marginalization of such voices in both international and feminist theoretical analysis and dialogue. This has significant implications for the practical realization of international law in Third World contexts. Many Western feminists, whether debating issues

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women, such as women belonging to minority groups, indigenous women, refugee women, migrant women, women living in rural or remote communities, destitute women, women in institutions or in detention, female children, women with disabilities, elderly women, and women in situations of armed conflict, are especially vulnerable to violence." While internally displaced women could fall into any of these categories, and in particular the last of them, the category is indeed distinct and merits special mention and attention. The significant difference between refugee and internally displaced women is the fact that the latter are facing (within their own country) conditions that the former have fled. The same country that might be a relatively amiable host to refugees can be an ogre towards the internally displaced. The Sudan best exemplifies this paradox.

34. For an examination of the overall situation of women at the United Nations, see HILKKA PIETILÄ & JEANNE VICKERS, *MAKING WOMEN MATTER: THE ROLE OF THE UNITED NATIONS* (1990).

relating to reproduction, political participation, or the male-imposed demarcation between the "private" and the "public" sphere, either carry over the ethnocentric biases of their own sociocultural contexts or assume a comity of perspectives with African women that is often non-existent. This viewpoint shapes these First World feminists' perception of Third World realities as static, primordial and unchanging. In this way, they share with their male counterparts an ethnocentric bond. At best, they pay only lip-service respect to voices emanating from different geopolitical and social contexts.

As previously noted, the dominant focus of Western feminism is the androcentric and male-dominated perspectives that have influenced and continue to prevail in international discourse and practice. This has a dual effect. First, it produces lop-sided and limited analyses of the myriad factors that contribute to the domination of women. The reason is that is because these analyses largely omit an extremely crucial element in the paradigm of international relations, namely, the influence of racial, socioeconomic, class, and ethnocentric perceptions and actions, as well as the impact of the global economic order. Combined with androcentricism these factors detrimentally influence the condition of women in Third World contexts. Second, such analyses also influence the direction of policy in governments, multilateral agencies, and nongovernmental organizations (NGOs) which considerably impact upon conditions in non-Western countries. African women are thus trapped in a double jeopardy, confronted by the debilitating effects of patriarchy on the domestic front, and a truncated feminism and white matriarchy at the international level.<sup>35</sup> One need only look at the dominant Women-in-Development (WID) model to appreciate the point being made.<sup>36</sup>

In addition, the political economy of North-South relations which are founded and maintained on an exploitative basis are often duplicated in contexts that are not necessarily dominated by men. This reinforces the imperialist culture of domination and exploitation. Adetoun Ilumoka, for example, has pointed out that in the international arena it is mainly the voices of middle-class Western women which are heard. Consequently, the attack on white male privilege could "... become the quest for male *and female* white privilege in the system, or simply male and female privilege in the system."<sup>37</sup> The debates on

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35. For a recent examination of this issue, see J. Oloka-Onyango & S. Tamale, *The Personal is Political, or Why Women's Rights are Indeed Human Rights: An African Perspective on International Feminism*, 17 HUM. RTS. Q. 691 (1995).

36. Allison Goebel & Marc Epprecht, *Women and Employment in Sub-Saharan Africa: Testing the World Bank and WID Models With a Lesotho Case Study*, 38 AFR. STUD. REV. 1, 18-19 (1995).

37. Adetoun Ilumoka, *African Women's Economic, Social and Cultural Rights*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 320 (Rebecca Cook ed, 1994).

reproductive freedom, female genital mutilation, and the place of women in development are often dominated by Western women in a fashion that is not necessarily positive for the liberation of their southern sisters.<sup>38</sup>

While we can agree, to cite only one example, that female genital mutilation is a harmful and disastrous practice, the process of moving towards its eradication is one that must be examined within the specifics of the sociocultural and political *milieu* in which the practice is carried out. As a preliminary matter, feminists within the specific context of the society in which the practice takes place cannot be overlooked in Operation Restore Hope ("we-are-here-to-liberate-you") fashion.<sup>39</sup> At times, the maternalism of Western feminism, when transposed to the African context, produces significant tensions and points of conflict, as has happened in the case of the debate over the population "explosion" which is so often presented as a question of reproductive rights and diminishing resources.<sup>40</sup> The following question must be asked, however: Why is the "explosion" always on the non-Western side of the globe?<sup>41</sup>

The preceding examples are only a sampling of the various ways in which aspects of Western feminism, when projected across borders and oceans, can be detrimental to non-Western women. They are particularly manifest of the differentials in power and intellectual hegemony that exist between the two spheres.<sup>42</sup> Despite several critiques of the one-sidedness of Western feminism, even the most erudite and

38. Jean B. Elshtain, *Exporting Feminism*, 48 J. INT'L AFF. 541 (1995).

39. Maivãn Clech Lãm, *Feeling Foreign in Feminism*, 19 SIGNS, 865, 871 (1994).

40. The Malthusian population bogey-man has influenced Western scholars from Robert Kaplan to Paul Kennedy. In an article on European integration and global migration Guy de Lusignan laments the simultaneous aging of the European population, and population pressures and high unemployment in less developed countries. These, he argues, nourish "hopelessness and despair," stimulating them to "... lash out desperately and viciously at the symbols of consumer society." Without batting an eyelid, he asserts,

[a]s Europe's people age and their fertility rate declines, population growth, particularly in the southern Mediterranean basin and in sub-Saharan Africa, may produce a mass migration into western Europe. Similarly, as insecurity and political instability prevail, minorities in central Europe will flee west for fear of oppression and wars. This is not confined to Europe only; similar fears have prompted immigration movements from Haiti and central America to North America.

Guy de Lusignan, *Global Migration and European Integration*, 2 IND. J. GLOBAL LEGAL STUD. 179, 181 (1994).

41. Furedi argues that the "... discussion of population and immigration is intimately linked to cultural — and, implicitly, racial — issues." FRANK FUREDI, *THE NEW IDEOLOGY OF IMPERIALISM* 116 (1994).

42. See Sondra Hale, *A Question of Subjects: The "Female Circumcision" Controversy and the Politics of Knowledge*, 22 UFAHAMU 26 (1994).

sensitive scholars remain oblivious to the reproach of their non-Western colleagues. In the final analysis, what does all this mean?

## 2. Placing African Feminism Firmly on the International Scene

In the first instance, it is fairly clear that there is a need for African feminists to confront the "parallel analysis" in international theoretical discourse. This entails a more concise articulation of the demands and concerns of African women that extends beyond the focus on androcentricism that currently dominates international feminist discourse in the area. In other words, African women and progressives in general need to engage Western feminists more critically in the formulation of international feminist theories.<sup>43</sup> The reasons for this necessity are twofold as Nahid Toubia succinctly points out:

Even within the feminist movement, women from Africa or other "third world" countries must show ourselves to be twice as brilliant and twice as capable as Western women in order to be allowed visibility, or the chance to be our own spokeswomen. Whether or not Western feminists genuinely want women of the "third world" to assert their voices and agendas in the development of an international feminist perspective, it is in fact our responsibility and this generation's historic role.<sup>44</sup>

Second, there is a special need to appreciate the various modes of penetration being adopted by imperialism and how, in the final analysis, these may serve to hamper the struggles of African women for genuine liberation. The modes of penetration comprise factors as diverse as development assistance or "aid" to non-governmental cooperation and academic and collaborative pursuits in the intellectual arena. Finally, it is essential for African women's movements to build broad and progressive coalitions across class and other distinguishing lines of demarcation. Such divisions as these have previously crippled the evolution of an holistic feminism that directly responds to the demands of the context and is not simply an offshoot of the dominant modes of Western feminism.

Engaging Western feminism in this fashion will, at a minimum, allow for the airing of alternative and more authentic voices on the plight of the African woman. The assault on external domination must nevertheless be accompanied by a thorough examination of the condi-

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43. Of course, in order for any real success in the transformation of international legal theory, there is a need for progressive male scholars to join hands with Third World feminists in confronting the challenges presented. See, Peter Mutharika, *The Role of International Law in the Twenty-First Century: An African Perspective*, *FORDHAM INT'L L.J.* 1706 (1995).

44. Nahid Toubia, *Women's Reproductive and Sexual Rights*, in *GENDER VIOLENCE AND WOMEN'S HUMAN RIGHTS IN AFRICA* 15 (Centre for Women's Global Leadership ed., 1994).

tions of patriarchy on the domestic front and by a reappraisal of whether the dominant modes of expression adequately cater to the interests and demands of women. Nowhere is this need more apparent than in relation to refugee and internally displaced women in Africa.

### III. REFUGEE LAW AND THE SITUATION OF WOMEN IN AFRICA

#### A. *Gender in the International Refugee Instruments*

Against the preceding background, we can begin to examine and understand not only how law mistreats and marginalizes women but more specifically the situation of women, particularly refugees and the internally displaced, in the African context. The main refugee instruments do not refer to women, sex, or gender at all.<sup>45</sup> In this respect, the 1951 Geneva Convention and the 1967 Protocol are not only gender-insensitive, they are also especially prejudiced against women from non-Western countries. To appreciate how this is so, it is necessary to engage in a process of disaggregation of the essential elements of international refugee law as we know it. This means examining the meaning of the term "refugee" as used in these instruments,<sup>46</sup> the content of a "well-founded fear of persecution," (the basis on which a grant of refugee status is made) and of the various elements (race, religion, political opinion, membership in a social group etc.) on which a claim for refugee status can be entertained.

#### 1. The 1951 Geneva Convention

As the principal instrument in refugee law, the Geneva Convention was passed in the aftermath of the second World War, and was designed to address conditions prevailing at the time, especially the fallout from the persecutions of the Nazi era. In this respect, the Convention was both constrained to a point of time, as well to a specific place. While it articulated a legal foundation for the basic protection of refugees, Goodwin-Gill points to the necessity for it to "... be complemented and in due course replaced by an instrument appropriate to

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45. Article 3 of the 1951 Convention (covering non-discrimination) asserts that the Convention shall be applied to refugees, "without discrimination as to race, religion or country of origin." For an analysis of what the impact of this phraseology actually is, see Sunny Kim, *Gender-Related Persecution: A Legal Analysis of Gender Bias in Asylum Law*, 2 AM. U. J. GENDER & L. 107.

46. Article 1, para. 2 refers to a refugee as a person who as a result of events occurring before January 1, 1951 (the Second World War and its aftermath), "... and owing to 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 . . . ."

present and future needs.<sup>47</sup> Why is this so? Goodwin-Gill goes further in offering an explanation,

[f]ounded upon a laudable, if highly individualistic conception of persecution, premised upon admission and integration, the Convention's capacity for narrow or restrictive interpretation in the highly structured environments of case by case adjudication leaves thousands 'outside' or 'beyond' protection. They become objects of ad hoc, discretionary and extra-legal policies that finally benefit no one. Individuals are commonly denied even basic rights, or any opportunity to contribute to their own solution. Administrations in turn, appear incompetent to combine humanitarian policy with effective management of their borders.<sup>48</sup>

But there are additional problems with the instrument. The main principles of refugee law enshrined in the 1951 Convention are based exclusively on a narrow reading of human rights to cover only civil and political rights as well as on an artificial and unsustainable demarcation between the public and the private spheres of human existence. This bias has been carried over into the work of the UNHCR and finds manifestation in the *Handbook on Procedures*.<sup>49</sup> Yet, the *New Webster's Dictionary* defines the term "persecution" as "to cause to suffer"<sup>50</sup> — making no distinction between suffering that may arise from a violation of what are considered to be civil and political rights, or by a deprivation of economic, social, or cultural rights. When read together with all the major human rights instruments, from the *Universal Declaration of Human Rights* to the *Tehran Proclamation*, and from the twin Covenants to the *Vienna Declaration*, the distinction that was made in the 1951 instrument (and which continues to hold true) is patently untenable.<sup>51</sup> However, the distinction was not made

47. Guy Goodwin-Gill, *Asylum: The Law and Politics of Change*, 7 INT'L J. REFUGEE L. 1, 8 (1995).

48. *Id.*, at 8.

49. See UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES 14-15 (1992). The Handbook is unequivocal in espousing the position that ". . . various measures not in themselves amounting to persecution . . ." (in a political sense), may amount to a ". . . well-founded fear of persecution."

50. NEW WEBSTER'S DICTIONARY 748 (1994).

51. The Universal Declaration of Human Rights, GA Res. 217A (III), U.N. Doc. A/810 at 71 (1948), is the main international instrument in the arena of human rights. The Proclamation of Teheran (proclaimed by the International Conference on Human Rights at Tehran, Iran, May 13, 1968) affirmed the indivisibility of the two categories of rights in paragraph 13. The twin covenants are the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, G.A. Res. 2200, 21 U.N. GAOR Supp. (No.16) 49, UN Doc. A/6316 (1967), and the International Covenant on Civil and Political Rights Dec. 16, 1966, annex to G.A. Res. 2200, 21 U.N. GAOR Supp. (No.16) 52, U.N. Doc. A/6316 (1967). The Vienna Declaration and Program of Action, adopted June 25, 1993, I.L.M. 1661 (1993), reaffirms the indivisibility and interdependence of both categories of rights in Article 5.

by accident and conforms to both the sexist and ethnocentric perceptions that prevail in the formulation of international human rights law.

Alexander Aleinikoff criticizes the standard and meaning of "persecution" as employed in American asylum law.<sup>52</sup> He goes on to condemn existing adjudicatory practice in the US for over-emphasizing the need for an applicant to identify the specific cause of persecution.<sup>53</sup> Furthermore, there are only five grounds on which an asylum grant is considered under the Convention — a practice which is in fact derived from the UNHCR's recommendations and procedures governing the granting of refugee status.<sup>54</sup> Aleinikoff proceeds to argue that it would be more useful to look first to international human rights law and then to pose the question: is there a deprivation of fundamental human rights, or the threat of the imposition of serious harm as a penalty for the exercise of a fundamental human right to the asylum applicant who has fled her or his country?<sup>55</sup>

Arboleda and Hoy extend the critique by asserting that the application of the Convention definition of refugee as employed in Western countries, is "... fast becoming over-legalistic, mired in judicial abstraction, removed from the reality facing refugees, and subject to the vagaries of national interests."<sup>56</sup> Finally, Jacqueline Castel completes the critique by pointing out that women may often find it more difficult than men to meet the legal criteria for persecution established for refugee status in the Convention, primarily because they are excluded from participating in public life in which such grounds of persecution arise.<sup>57</sup>

Despite the strength and veracity of these arguments, none of these scholars probe deeply enough. The logical conclusion to their arguments is that the grounds in the Convention for the determination of refugee status are insufficient and lop-sided. But this is not merely for the reasons they suggest. It is my contention that we must question

52. Alexander Aleinikoff, *The Meaning of 'Persecution' in United States Asylum Law*, 3 INT'L J. REFUGEE L. 5, 5 (1991).

53. Aleinikoff points out as follows: "But while the existence of one of the five grounds might understandably signal the qualitative aspect of the definition of persecution, it is by no means clear that persecution ought to be so limited; or more importantly, that an applicant must be able to establish conclusively that one of the five grounds is at work in order to establish persecution. Persecution may well be given a 'free-standing' meaning, that requires judgments about both the degree of and justification for the harm, but not one that necessarily invokes the five grounds as the test of the qualitative aspect" *Id.*, at 13.

54. UNHCR HANDBOOK, *supra* note 49, at 17-25.

55. *Id.*, at 5.

56. Eduardo Arboleda & Ian Hoy, *The Convention Refugee Definition in the West: Disharmony of Interpretation and Application*, 5 INT'L J. REFUGEE L. 66, 76 (1993).

57. Jacqueline R. Castel, *Rape, Sexual Assault and the Meaning of Persecution*, 4 INT'L J. REFUGEE L. 39 (1992).



the overall ideology of those grounds because they are rooted in the philosophy that accords primacy of place to political and civil rights over economic, social, and cultural rights.<sup>58</sup> As a consequence, international refugee law, as presently conceptualized, can in fact only cater to a small number of *de facto* refugees.<sup>59</sup> Once again, this is a bias that refugee law has inherited from the general *corpus* of international law.<sup>60</sup> According to Charlesworth and Chinkin, the primacy accorded to civil and political rights in international law "... is directed towards protection for men within their public life."<sup>61</sup> They go on to make a point that is crucial for an understanding of the prejudices of international refugee law alluded to above:

[t]he same importance has not been generally accorded to economic and social rights which affect life in the private sphere, the world of women . . . This is not to assert that when women are victims of violations of civil and political rights they are not accorded the same protection, but that these are not the harms from which women most need protection.<sup>62</sup>

We could confidently state that most women need protection from harms in the sphere of their economic, social, and cultural rights. This point assumes a heightened dimension when married to the present condition of social and economic existence in much of the Third World.<sup>63</sup> Under assault from the debilitating effects of structural adjustment policies,<sup>64</sup> the majority of women refugees in the 1990s in fact have a "well-founded fear" that their economic, social and cultural rights will be denied<sup>65</sup> in spite of international human rights law that places such rights on the same level as the civil and political rights protected by international refugee law.<sup>66</sup> Stated differently, in the ab-

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58. Of course this does not mean that economic, social and cultural rights are never taken into consideration. See e.g., Arthur Helton, *Refugees: An Agenda for Reform*, in HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 49, 50 (L. Henkin & J.L. Hargrove eds., 1994). It is nevertheless clear that, as in everyday, non-conflictual and non-refugee situations, such rights are relegated to the back seat. See J. Oloka-Onyango, *Beyond the Rhetoric: Reinvigorating the Struggle for Economic, Social and Cultural Rights in Africa*, 27 CAL. W. INT'L L.J. 1 (1995).

59. Employing different premises Eduardo Arboleda arrives at a similar conclusion. E. Arboleda, *The Refugee Definition in Africa and Latin America: The Lessons of Pragmatism*, 3 INT'L J. REFUGEE L. 185 (1993).

60. See generally, Andrew Byrnes, *Women, Feminism and International Human Rights Law: Methodological Myopia, Fundamental Flaws or Meaningful Marginalization*, 12 AUSTL. Y.B. INT'L L. 205 (1992).

61. See Charlesworth & Chinkin *supra* note 18, at 69.

62. *Id.*, at 69.

63. For an enlightened discussion of this and other issues, see Isabelle R. Gunning, *Expanding the International Definition of Refugee: A Multicultural View*, 13 FORDHAM INT'L L.J. 35, 72-85 (1989-90).

64. See Yemi Osinbajo & O. Ajayi, *Human Rights and Economic Development in Developing Countries*, 28 INT'L LAW. 727, 755 (1994).

65. See Ilumoka, *supra* note 37.

66. A 1986 Working Group of the United Nations placed stress on the involun-

sence of a well-founded fear as determined by prevailing standards, governments can so easily dismiss people (especially women) who are genuine refugees as "economic migrants." Paradoxically, if we take the elements in the UNHCR's definition of an economic migrant, namely that their departure must be "voluntary" and for "exclusively economic considerations" as a reference point, then it is clear that a person who flees a country on account of the deprivation of her economic, social and cultural rights is not an economic migrant. Such a person who has been "made to suffer" in this way is logically entitled to protection.<sup>67</sup>

The implications of such a radical reformulation of refugee law reach farther than the mere inclusion of economic, social, and cultural rights in the formula for the determination of refugee status. Such a reformulation is not just the recognition of greater numbers of people as refugees, given that the Geneva Convention initially catered to large movements of people, and that present restrictions arise mainly from the revisionist rendering of the instrument.<sup>68</sup> More importantly, it is with respect to responsibilities of Western and non-Western governments, immigration, and multilateral agencies, first and foremost both in the formulation of policies, that impact on the observation of human rights in general. Secondly, it is also pertinent in providing support to those refugees who do not necessarily reach their borders. In this way we mean both the internally displaced and what we can only refer to as the "internally dispossessed" i.e. those persons (men and women, but especially the latter) who are effectively denied the realization of their human rights, particularly in the economic and social arena. The discussion of refugee law today, even as it expands to encompass the internally displaced, fails to consider the issue in a

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tary character of refugee movements, rather than on the narrow elements in the 1951 Convention, and noted that economic or social factors, "... sometimes the legacy of recent history or aggravated by the international economic situation . . ." were important factors for consideration in the area. See G.J.L. COLES, *THE QUESTION OF A GENERAL APPROACH TO THE PROBLEM OF REFUGEES FROM SITUATIONS OF ARMED CONFLICT AND SERIOUS INTERNAL DISTURBANCE* 14-15 (International Institute of Humanitarian Law No. 9, 1989), quoting Report of the Group of Governmental Experts on International Cooperation to Avert New Flows of Refugees, UN Doc. A/41/324 (1986).

67. UNHCR HANDBOOK, *supra* note 49, para. 64. Of course we need to re-examine and reconceptualization the notion of "protection" too. As Goodwin-Gill states, "The essence of protection extends beyond well-founded fear of persecution, beyond race, religion, nationality, social group membership, or political opinion. For protection relates to the broad field of individual and community rights, not excluding the right of communities, bound by ethnicity, culture or language to decide for themselves the economic, social, cultural and political framework most conducive to maintaining their identity" Guy Goodwin-Gill, *Editorial*, 5 INT'L J. REFUGEE L. 1, 6 (1993).

68. Of course certain scholars may challenge even this contention. For an interesting treatment of the fluctuating nature of status determination prior to the passing of the 1951 Convention, see James Hathaway, *The Evolution of Refugee Status in International Law: 1920-50*, 33 INT'L & COMP. L.Q. 349 (1984).

holistic fashion. The failure to understand that persecution in the 1990s can be economic, social, and cultural, and that women and the peoples of the Third World are particularly vulnerable to this form of persecution is to give human rights only a one-sided interpretation.

Two levels of reformulation are thus suggested by the preceding discussion. The first level pertains to the standards and determination of the elements that must be taken into consideration. At a minimum, gender must become a sixth category; economic, social, and cultural rights should be accorded more respect and attention in the analysis of the refugee problem.<sup>69</sup> The second is a point which will be reconsidered after examining the 1967 Protocol and the operation of UNHCR; it relates to the concept of burden sharing and global redistributive justice.<sup>70</sup>

## 2. The 1967 Protocol and Beyond

The 1967 Protocol recognized the geographical and time-bounded bias inherent in the earlier document and left the social group category intentionally undefined. Ostensibly this ensured the necessary flexibili-

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69. Numerous recent articles have considered the issue of gender and refugee law in some detail. See for example: Todd S. Schenk, *A Proposal to Improve the Treatment of Women in Asylum Law: Adding "Gender" Category to the International Definition of "Refugee,"* 2 IND. J. GLOBAL LEGAL STUD. 301 (1994); Priscilla F. Warren, *Women Are Human: Gender-Based Persecution is a Human Rights Violation Against Women,* 5 HASTINGS WOMEN'S L.J. 281 (1994); Andrew M. Duetz, *Gender and International Human Rights,* 17 FLETCHER FORUM OF WORLD AFF. 33 (1993); Mattie L. Stevens, *Recognizing Gender-Specific Persecution: A Proposal to Add Gender as a Sixth Refugee Category,* 3 CORNELL J. L. & PUB. POL'Y 179 (1993); Walter C. Long, *Escape from Wonderland: Implementing Canada's Rational Procedures to Evaluate Women's Gender-Related Asylum Claims,* 4 UCLA WOMEN'S L.J. 179 (1994); Linda Cipriani, *Gender and Persecution: Protecting Women under International Refugee Law,* GEO. IMMIGR. L.J. 511 (1993), and Emily Love, *Equality in Political Asylum Law: For a Legislative Recognition of Gender-Based Persecution,* 17 HARV. WOMEN'S L.J. 133 (1994). Leading the way in following the UNHCR guidelines on refugee women in the domestic context is Canada. However, as Audrey Macklin points out, there is a need to guard against the ethnocentrism — implicit in some of the literature urging the inclusion of gender as a ground for refugee status — that assumes that women in Western countries are not the victims of the same kind of persecution that they urge should become a ground for the grant of refugee status to applicants from elsewhere. She points out that, "Given that every country discriminates against women, how will the line be drawn between "mere" discrimination, and discrimination so "severe" that it amounts to persecution? One concern is that the line may be drawn by reference to whatever "we" (the nonrefugee producing country) do. What "we" do is discrimination. The more the claimant's state looks different from ours, the more what "they" do begins to look to "us" like persecution. In other words, the fear is that cultural difference may become the yardstick along which the shift from discrimination to persecution will be measured." See A. Macklin, *Refugee Women and the Imperative of Categories,* 17 HUM. RTS. Q. 213, 263-274 (1995).

70. Roman Boed, *The State of the Right of Asylum in International Law,* 5 DUKE J. COMP. & INT'L L. 1 (1994).

ty to address new situations as they would arise.<sup>71</sup> At the same time however, the Protocol failed to visit the gendered notion of asylum that had been written into the earlier instrument.<sup>72</sup> In the circumstances the 1967 Protocol is not adequate for two reasons. In the first instance, the refugee situation has so dramatically changed that there is a need to address the very premises and underlying notions governing refugee law and practice, not simply the geographical and time-related aspects of the issue. Secondly, the fluidity of the international instruments has allowed for more restrictive interpretations to prevail, and for an inordinate shift of the burden of both hosting and caring for refugees from North to South.

Such fluidity is fostered in the erection of restrictive immigration policies in Western Europe and North America that are clearly biased in application against refugees from non-Western (and specifically non-white) contexts.<sup>73</sup> Several observers have asserted that such practices constitute a violation of a variety of international human rights instruments.<sup>74</sup> In the words of Arthur Helton,

[g]overnments, particularly those of Western developed countries, increasingly treat those once considered to be part of refugee movements as unauthorized migrants. Foreign policy ceases to be a motivating force to assist and protect refugees. Instead, budgetary constraints come to the fore. Migration management becomes a guiding principle, and most asylum seekers are considered economic migrants from less developed countries.<sup>75</sup>

We must add that racist considerations are also in operation in the evolution of the new immigration practices and that the restrictive application of refugee law in this fashion obviously has significant implications for the status of women. Such implications must be ad-

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71. Neal, *supra* note 2, at 229.

72. Article 1(2) removed the application of the January 1, 1951 date to the definition of "refugee," and Article 1(3) applied the Protocol without geographical limitation. Protocol Relating to the Status of Refugees, Oct. 4, 1967, art. 1, 606 U.N.T.S. 267.

73. In concluding their examination of the German legislation in this area, Blay and Zimmerman state, "However one views the reform of refugee law, it does not augur well for prospective asylum seekers in Germany. More importantly, the German situation appears indicative of emerging trends in refugee law in Western Europe generally. We may thus be witnessing the beginning of the end of liberal asylum laws in Europe." Sam Blay & Andreas Zimmerman, *Recent Changes in German Refugee Law: A Critical Assessment*, 88 AM. J. INT'L L. 361, 368 (1994).

74. Kerry E. McCarron (Note), *The Schengen Convention as a Violation of International Law and the Need for Centralized Adjudication on the Validity of National and Multilateral Asylum Policies for Members of the United Nations*, 18 B.C. INT'L & COMP. L. REV. 401, 422-426 (1995).

75. Arthur Helton, *The United States Government Program of Intercepting and Forcibly Returning Haitian Boat People to Haiti: Policy Implications and Prospects*, 10 N.Y.L. SCH. J. OF HUM. RTS. 325 (1993).

dressed in a forthright manner. A look at the operations of the UNHCR will take us some distance in addressing this question.

### 3. UNHCR: The Theory and the Practice

The history of refugee movements extends to a period well before the present century and can more accurately be traced to the process of state formation.<sup>76</sup> Mechanisms at the international level designed to cater to the problem are nevertheless a phenomenon of more recent vintage. The UNHCR can thus trace its heritage to the creation by the League of Nations in 1917 of the Office of the High Commissioner for Russian Refugees.<sup>77</sup> The UNHCR was established on the same day as the Geneva Convention was opened for accession, and since that time has seen its role expanding into a variety of different humanitarian and protection contexts. Many of the new areas undertaken by UNHCR were not predictable either in terms of character or permanency at the time the office was created.<sup>78</sup> The history of the organization has been recounted elsewhere; indeed the UNHCR has frequently come under criticism for a variety of reasons. The question remains of what has been the UNHCR's role in relation to refugee women and the internally displaced?

With respect to the issue of women (at least conceptually), the concerns of the organization have evolved progressively with unfolding geopolitical realities. The UNHCR *Handbook on Procedures*<sup>79</sup> (first published in 1979) makes no specific mention of women, and many of the issues covered clearly manifest a bias towards male refugees, as demonstrated by the typical "gender-neutrality" of the language employed as well as in relation to the conceptualization problem.<sup>80</sup> Part of this "neutrality" relates to the general problem already examined *viz.*, the bias inherent in refugee law.<sup>81</sup> However, in 1985 the Execu-

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76. For an interesting analysis of the process by which the phenomena of refuge and asylum developed in international law, see David Kennedy, *International Refugee Protection*, 8 HUM. RTS. Q. 1 (1986).

77. UNHCR was the product of Resolution 319(A) of December 3, 1949 of the UN General Assembly, and established as a subsidiary organ of the General Assembly on January 1, 1951, initially for a 3 year period. For a more extensive history of the organization, see Gregory McCue (Note), *Environmental Refugees: Applying International Environmental Law to Involuntary Migration*, 6 GEO. INT'L ENVTL. L. REV. 151 (1993).

78. U.N. CENTRE FOR HUMAN RIGHTS, FACT SHEET NO. 20, HUMAN RIGHTS AND REFUGEES 5 (1993).

79. See UNHCR, HANDBOOK, *supra* note 49.

80. *Id.*, at 43-44.

81. Paragraph 182 of the UNHCR Handbook refers to the Final Act of the Conference that adopted the 1951 Convention, and the recommendation that governments take the necessary measures for the protection of the refugee's family, especially with a view to "... [t]he protection of refugees who are minors, in particular unaccompanied children and girls . . . ." *Id.*, at 43.

tive Committee of the UNHCR specifically noted that "... refugee women and girls constitute the majority of the world refugee population, and that many of them are exposed to special problems in the international protection field."<sup>82</sup> The same recommendation recognized "... that States, *in the exercise of their sovereignty* are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a particular social group ..."<sup>83</sup> The main implication of this statement is clear: granting asylum on the basis of sexual persecution is permissive. Consequently, states are under no affirmative obligation to take gender into account in the grant of asylum, even if it may be precisely the issue of one's womanhood that has caused flight in the first instance.<sup>84</sup> With respect to the issue of gender as a basis for status, therefore, the UNHCR has made only limited advances.

Significantly more progress has been made by the UNHCR in addressing the conditions that might adversely affect refugee women. In 1988, the Executive Committee spoke to the need for particular attention to be paid to the issue of physical safety and the sexual exploitation of women refugees. It urged government support for the Special Resettlement Program for women-at-risk, and called for the recognition of refugee women as a vital economic force.<sup>85</sup> The Executive Committee made several recommendations on a number of bureaucratic issues with respect to the promulgation of guidelines which include liaison with other UN agencies, the design of training modules, and the solicitation of detailed progress reports on the various aspects of the issue.<sup>86</sup> At the 40th Session, the Committee made a number of additional observations, in part commending action already taken by the High Commissioner while at the same time urging further movement on the issue of refugee women.<sup>87</sup>

The most important instrument from UNHCR on the issue of women refugees is the *Guidelines on the Protection of Refugee Women*<sup>88</sup> that was issued following the construction of a general framework and that was outlined in the UNHCR Policy on Refugee Women; these guidelines were adopted by the 41st Session of the Executive

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82. UNHCR, CONCLUSIONS ON THE INTERNATIONAL PROTECTION OF REFUGEES: ADOPTED BY THE EXECUTIVE COMMITTEE OF THE UNHCR PROGRAMME 84 (1990).

83. *Id.*, at 85.

84. Anders B. Johnsson, *The International Protection of Women Refugees: A Summary of Principal Problems and Issues*, in WORKING WITH REFUGEE WOMEN: A PRACTICAL GUIDE 98 (Ninette Kelley ed., 1989).

85. UNHCR, CONCLUSIONS, *supra* note 82, at 124.

86. *Id.*, at 124-125.

87. *Id.*, at 139-141.

88. UNHCR, *Guidelines on the Protection of Refugee Women*, UN Doc. ES/SCP/67 (1991).

Committee.<sup>89</sup> The *Guidelines* are situated firmly within the framework of international human rights law and emphasize the linkage with domestic legislation on rape, physical attack, and sexual discrimination.<sup>90</sup> Note must be taken of the fact that while the *Guidelines* provide a fairly comprehensive framework of reference, they are specifically concerned with the issue of protection. The issue of refugee status a serious issue within the context of current refugee trends.<sup>91</sup>

The *Guidelines* cover issues relating to assessment and planning, protection needs and responses, assistance, reporting, and follow-up. The *Guidelines* have more recently been augmented by an *Executive Committee Conclusion on Sexual Violence Against Women*, which sought to expand the protection of refugee women against gender violence.<sup>92</sup> The Committee made its strongest condemnation of persecution through sexual violence, referring to it as a "gross violation of human rights." This culminated with the issuance of detailed *Guidelines on the Prevention of and Response to Sexual Violence Against Refugees* in early 1995, which are likewise addressed to field workers. Significantly, they also address the effect of sexual violence on status determination.<sup>93</sup>

As a framework, the two sets of *Guidelines* are fairly comprehensive, thoughtful, and sensitive to the situation of women refugees. The main problem is, of course, the question of enforcement. Whether in fact they have been or are in general usage when dealing with female refugee problems in the African context is a question we turn to after examining into the overall context of the displacement of women in the African context.

## B. *Women and Displacement in the African Context*

### 1. State Sovereignty, Human Rights, and the OAU

Against the backdrop of several decades of colonial domination and exploitation, the continuing specter of *apartheid* in the unliberated Portuguese and other Southern African colonies, and the throes of Cold War rivalry, the promulgation of a Charter for African unity reflected the peculiar situation of the time. Consequently, just as the main concerns of the day were maintaining the hard-won liberation and protect-

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89. *Id.*, at 7.

90. *Id.*, at 7-9.

91. For an attempt to construct a framework for considering gender in asylum applications, see Nancy Kelly, *Guidelines for Women's Asylum Claims*, 6 INT'L J. REFUGEE L. 517 (1994).

92. Lauren Gilbert, *Rights, Refugee Women and Reproductive Health*, 44 AM. U. L. REV. 1213, 1225-1227 (1995).

93. *Id.*, at 1228.

ing the new states, two features came to characterize the creation and subsequent operation of the OAU: state sovereignty and non-interference.<sup>94</sup> The two concepts ensured that human rights never attained much prominence in the formative years of the organization's existence. The OAU Charter, the quintessential instrument for the conduct of relations between African states, ignored the fact that states are merely a conglomeration of people to whom human rights protection should extend.

African countries were generally hostile to concerns about human rights, either dismissing them as imperialist interference in their domestic affairs or using them in the Cold War stand-off between the superpowers. Not until 1981 did the OAU promulgate an instrument which addressed the issue of human rights.<sup>95</sup> With the promulgation of the African Charter on Human and Peoples' Rights, the OAU added the progressive notion of "peoples' rights" to the human rights debate. As Shelley Wright has observed, the introduction of the concept of peoples' rights into international human rights discourse was a hopeful sign,

... that shows the possibility of escaping from a narrowly white male European discourse of rights and creating a new venue for discussion which attempts to escape from the exploitative and destructive underside of traditional human rights talk. By limiting rights to the terms set by eighteenth and nineteenth century theorists whose major concern was control of property — either through the accumulated property of capitalism or the egalitarian redistribution or elimination of property proposed by socialism — we remain trapped in the discourse of those who define all human relations through the language of ownership and control, or lack of control over property.<sup>96</sup>

Of course, a more critical reading of the African Charter will illustrate that the instrument was not wholly committed to a radical reconceptualization of the notion of human and peoples' rights in the same fashion as, for example, the Algiers Declaration of 1976.<sup>97</sup> Nev-

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94. Solomon Gomes, *Sensitivity to the Principle of Non-interference in the Internal Affairs of States: A Political Imperative*, Paper Presented at the International Negotiation Network (INN) Consultation, the Carter Center, Emory University, Atlanta, Georgia, USA, (February 17-19, 1993).

95. Edward Kannyo, *The Banjul Charter on Human and Peoples' Rights: Genesis and Political Background*, in *HUMAN RIGHTS AND DEVELOPMENT IN AFRICA* 128 (Claude E. Welch & R. Meltzer eds., 1984).

96. Shelly Wright, *Economic Rights and Social Justice: A Feminist Analysis of Some International Human Rights Conventions*, 12 *AUSTL. Y.B. INT'L L.*, 241, 255-256 (1992).

97. See Francois Rigaux, *The Algiers Declaration on the Rights of Peoples*, in *UN LAW/FUNDAMENTAL RIGHTS: TWO TOPICS IN INTERNATIONAL LAW* 211-223 (Antonio Lassese, ed., 1979) and ISSA SHIVJI, *THE CONCEPT OF HUMAN RIGHTS IN AFRICA* (1990).



ertheless the Charter provides the possibility for the development of an alternative vision.<sup>98</sup> Unfortunately, this was not the case with the conceptualization of the status of women adopted by the Charter, which is predominantly traditional.

The fact that the international community had passed CEDAW a mere two years earlier is only obliquely apparent from a reading of the African Charter. Only one out of more than sixty articles makes any reference to women, and even there only in an omnibus clause that covers the family and tradition.<sup>99</sup> Through the creation of a Commission charged with the implementation of the rights in the Charter, one would have hoped for some attention to the issue of women. A look at the guidelines for reporting would suggest otherwise.<sup>100</sup>

The Guidelines too, emphasize the position of women in relation to the family, i.e., in relation to marriage, motherhood and child-care.<sup>101</sup> Two additional pages are devoted to general, broad guidelines on the elimination of discrimination in terms of Article 18 of CEDAW.<sup>102</sup> Finally, the Guidelines do not address the situation of refugees, despite the fact that Article 12 of the Charter refers to various aspects of the right ". . . when persecuted to seek and obtain asylum . . ." <sup>103</sup> Needless to say, neither the Charter nor the Guidelines refer specifically to the situation of refugee women, and in the state reports that have been received to date, the issue of women in general is given short shrift.<sup>104</sup>

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98. For a serious attempt to develop an alternative vision to the Banjul Charter, see Makauwa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties* 35 VA. J. INT'L L. 339 (1995).

99. African Charter, art. 18.

100. The Guidelines are interesting because of their progressive and far-reaching methodology, which stands in contrast to some of the more conservative aspects of the Charter (such as the provisions on worker's rights, for example). See Oloka-Onyango, *supra* note 58.

101. AFRICAN COMMISSION ON HUMAN & PEOPLES' RIGHTS, PROMOTION, PROTECTION AND RESTORATION OF HUMAN AND PEOPLES' RIGHTS: GUIDELINES FOR NATIONAL PERIODIC REPORTS 14-15 (1988).

102. *Id.*, at 44-45.

103. See Article 12(3) of the African Charter.

104. For a useful comparison of the situation of women by the OAU and other regional mechanisms of human rights observance, one could usefully look to the normative response to the question of children's human rights. The later produced an African equivalent to the Convention on the Rights of the Child within a year of the promulgation of the international instrument. Furthermore, in Article 23, the African instrument makes specific reference to the situation of refugee children. See generally, African Charter on the Rights and Welfare of the Child (Adopted by the 26th Session of the Assembly of Heads of State and Governments of the OAU, July, 1990, Addis Ababa); reproduced in AFR. Y.B. INT'L L., 295 (1994). For a general discussion of the Charter, see Bankole Thompson, *Africa's Charter on Children's Rights: A Normative Break with Cultural Traditionalism*, 41 INT'L & COMP L.Q. 432 (1992).

The above conceptual difficulties are compounded by the actual functioning of the Commission. Some of its problems are clearly logistical, such as the Commission's location in Banjul, the Gambia in West Africa, whereas the OAU Secretariat is located in Addis Ababa, Ethiopia in the east. The Commission is starved for resources and meets only twice a year. These bi-annual sessions are unspectacular on account of the rather lackluster fashion in which states parties make their reports, the failure of governments to send representatives to the sessions,<sup>105</sup> and the non-attendance of certain commissioners.<sup>106</sup>

But the logistical factors are compounded by a host of political realities. First, the manner of appointment of the Commissioners is severely circumscribed by the fact that it is a function vested in the Heads of State; this process politicizes the appointments. The Commission's Secretary is appointed by and accountable to the OAU Secretary-General. Reports are issued by the Assembly of Heads of State and Government (AHSG); between sessions of the Commission it is almost *functus officio*. The approach adopted towards confidentiality is reportedly "excessive," with "terribly frustrating" consequences.<sup>107</sup> Of the eleven Commissioners, the first woman was appointed in 1992, the second in 1995, largely on account of NGO pressure. Although the Commission is known to have received petitions concerning violations relating to women's human rights and to have recently hosted a conference on the situation of displaced women in Africa, it has yet to develop a comprehensive and revolutionary approach to the general issue of women's human rights<sup>108</sup> or the rights of refugees in general.<sup>109</sup>

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105. Claude Welch, *Human Rights and African Women: A Comparison of Protection under Two Major Treaties*, 15 HUM. RTS Q. 549, 554 & 561 (1993).

106. See Astrid Danielsen & Gerd Oberleitner, *Africa*, 13 NETH. Q. HUM. RTS. 80 (1995).

107. INTERRIGHTS, *THE THEORY AND PRACTICE OF CONFIDENTIALITY IN HUMAN RIGHTS PROCEDURES: A COMPARATIVE SURVEY WITH REFERENCE TO THE AFRICAN CHARTER ON HUMAN & PEOPLES' RIGHTS 2* (1993).

108. Of course part of the problem is that Human and Women's Rights groups have not sought to activate the Commission sufficiently. According to Seble Dawit, "If we are to get any action, complaints need to be filed with the Commission on violations of the human rights of women resulting from direct government action or from its failure to act. We have to be able to show that there is a need to review and strengthen the protective structure, and one way to do that is to highlight the failures of the domestic system by using regional protective measures." Seble Dawit, *Culture as a Human Rights Concern: Highlights for Action*, in GENDER VIOLENCE AND WOMEN'S HUMAN RIGHTS IN AFRICA 41 (Centre for Women's Global Leadership, ed. 1994).

109. On only one occasion has the Commission been seized of an issue relating to refugees. In a communication presented by a Senegalese human rights group, the Commission examined the expulsion of some 517 West Africans from Zambia in February 1992. The Commission ruled that the matter was admissible under the provisions of the African Charter, but refused to consider the merits of the case. The closest it came to censuring the Zambian government was to point out that,

We of course overreach ourselves and need to return to a consideration of the main refugee instrument in African jurisprudence, the 1969 OAU Convention. As we change our focus, it is important to keep in mind that even with an instrument specifically addressed to the issue of human and peoples' rights such as the African Charter, the OAU failed to accord women any fundamental respect for their rights beyond those associated with motherhood. Moreover the rhetorical attention paid to the question of refugees in the Charter was not followed through in the Guidelines for state reporting. The disjunctive separation of the refugee question and the issue of human rights is one that has a long history in post-independence Africa and also found reflection in the 1969 Convention.

## 2. The 1969 OAU Refugee Convention: A Critical Analysis

Initially perceived as a temporary problem, the refugee question eventually grew to dominate the relationship between states on the African continent.<sup>110</sup> Thus, a combination of socioeconomic and political realities produced both the flexibilities and the tensions that are apparent in the 1969 OAU Refugee Convention.<sup>111</sup> In summary, these are the political issues surrounding the doctrine of non-intervention, the proscription on "subversive activities," and the socioeconomic aspects related to burden-sharing. Both weigh like an albatross around the future development of refugee law and protection in Africa and are particularly deleterious to the status of women refugees. The flexibilities in the OAU Convention emanate from the definition adopted of the term "refugee," a term which has been glorified as African "traditional hospitality."<sup>112</sup> In a comparative sense, this is certainly true when contrasted with the manifestly racist and restrictive policies presently in application in a variety of Western countries.<sup>113</sup> However, it belies the conceptual and practical realities that exist on the ground.<sup>114</sup> It is also a dangerous characterization in light of what I

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. . . Article 12, paragraph 5 of the African Charter, prohibiting mass expulsion, is intended to prevent the formal violation of individuals' rights which occurs when individuals are treated as part of a national, religious, or ethnic collectivity. The apparent mass character of the expulsion in question, therefore, could constitute a violation of the African Charter.

*See Recontre Africaine pour la Defense des Droits de l'Homme (RADDHO) v. Zambia*, (Communication No.71/92, 16th Session of the Commission).

110. *See generally*, R.C. Channgani, *AFRICAN REFUGEE LAW: PROBLEMS AND PROSPECTS* (1992).

111. OAU Convention, *Supra* note 5.

112. *See* Art Hansen, *African Refugees: Defining and Defending their Human Rights*, in *HUMAN RIGHTS AND GOVERNANCE IN AFRICA* 139, 153-156 (Cohen, Hyden and Nagan eds., 1994).

113. Helton, *supra* note 58, and Arboleda & Hoy, *supra* note 56.

114. Those realities were recently manifest when the Ivorian government caused Liberian refugees to flee their camps, in a retaliation attack against Liberian rebel

have already said about burden-sharing, and the evolution of restrictive immigration policies in the West.<sup>115</sup> A critical inspection of the basic tenets of the OAU Convention reveals that the instrument was strongly influenced by the perceptions of sovereignty and nationhood that prevailed at the time on the continent. Unsurprisingly, therefore, the Convention is not strongly linked to a human rights perception of the refugee problem.

The instrument made several significant contributions to the *corpus* of international refugee law (on burden-sharing, non-rejection at the border, *non-refoulement*, voluntary repatriation, and temporary asylum) and is urged by many scholars,<sup>116</sup> activists and policy makers<sup>117</sup> as a relevant model for other regions. Nevertheless, it manifests a number of problems. These include the fact that it does not specifically mention the rights of refugees,<sup>118</sup> it is silent on refugee women, and it erects several barriers in relation to rights of movement, expression, and association. Such restrictions on the rights of refugees are often not justifiable in terms recognized by international instruments.<sup>119</sup> Elsewhere I have argued that the 1969 Convention reserved most sensitivity for "... the maintenance of harmonious relationships *between* African states, than it [did for] the rights of refugees as such. Hence, it could be asserted that the OAU Convention was protective of refugees *qua* refugees by default, rather than by design."<sup>120</sup> Moreover, the main institution created to address the situation of refugees — the Bureau for Refugees — was both conceptually and in terms of resources, ill-equipped to comprehensively address the problem.<sup>121</sup> Nevertheless, as an institution, the OAU has sought to address the issue of refugees in a pragmatic fashion, and taking account of the omnipresence of the doctrines of state sovereignty and non-interference. This is illustrated by the various declarations, conferences, and initiatives undertaken by the organization in the field of both conflict resolution, addressing the root causes of conflict and in responding to the various issues raised by asylum and the refugee question.<sup>122</sup>

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movements. Howard W. French, *At an African Border, Hospitality Comes to Grief*, N.Y. TIMES, July 24, 1995, at A4.

115. Chris J. Bakwesegha, *Forced Migration in Africa and the OAU Convention*, in *AFRICAN REFUGEES: DEVELOPMENT AID AND REPATRIATION* 3, 13 (H. Adelman & J. Sorenson eds., 1994).

116. Arboleda & Hoy, *supra* note 56.

117. UNHCR, *supra* note 1, at 6.

118. In this respect, the 1969 OAU Refugee Convention employs a methodology duplicated in the Banjul Charter, which makes reference to the rights of women and children "... as contained in relevant international instruments ..." a formulation which can lead to a whittling down of the struggle for rights by such categories of people. See OAU Convention and African Charter.

119. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *AFRICAN EXODUS: REFUGEE CRISIS, HUMAN RIGHTS AND THE 1969 OAU CONVENTION* 91-109, (1995).

120. Oloka-Onyango, *supra* note 58.

121. Oloka-Onyango, *supra* note 9.

122. See the Khartoum Declaration on Africa's Refugee Crisis, adopted by the

Even though limited in scope to the situation of refugees, the 1969 Convention was never designed to address what is arguably an even larger problem, *i.e.*, the issue of the internally displaced. We must return first to the international arena to appreciate the nature of the problem for this category of dispossessed persons before considering its ramifications within the African context.

#### IV. INTERNAL DISPLACEMENT, PHYSICAL PROTECTION AND GENDER VIOLENCE

##### A. *The Condition of Internally Displaced Women: Conceptual and Practical Dimensions*

###### 1. The Broad Context

Internal displacement has long been an issue of particular conceptual and practical difficulty for the international community. In the African context, when married to the serious issues of human rights violations, state sovereignty, and the processes of nation-state transformation, the issue gains in magnitude.<sup>123</sup> Furthermore, there are fundamental questions of strategy and approach which will critically influence the evolution of international standards in the area. Questions relating to root causes, the ubiquitous phenomenon of state sovereignty and the problematic notion of humanitarian intervention are neither the province of unilateral action nor of single-step solutions. In particular, it is impossible to evade the fact that the illiberal, the discriminatory and the sometimes manifestly fascist governments, which have been and, in some instances, continue to dominate state power, often bear prime responsibility for the problems of displacement in Africa.<sup>124</sup> Last, but perhaps most importantly, what is the appropriate institutional framework for addressing the question: an expansion of the mandate of the UNHCR, or the creation of a wholly new organization?<sup>125</sup> No UN agency has a protection mandate for this category of

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Organization of African Unity Commission of Fifteen on Refugees, September 24, 1990, reproduced in 3 INT'L J. REFUGEE L. 153 (1990). For more background on the activities of the OAU in this regard, see UNHCR, *supra* note 1, at 3.

123. See Gomes, *supra* note 94.

124. Ahmednasir M. Abdullahi, *The Refugee Crisis in Africa as a Crisis of the Institution of the State*, 6 INT'L J. REFUGEE L. 562 (1994).

125. David Petrasek asks similar questions in his treatment of the issue, and in particular provides several reasons why the present institutional arrangement (the UNHCR "good offices") or an expansion of it may be inadequate. But he goes further to question whether the refugee regime and mechanisms are adequate to address the problem: "It would be anomalous to address the gaps in protection for IDPs and to ignore the many gaps in international standards affecting refugees and asylum-seekers. Such anomalies arise because the problem has been too narrowly defined. The problem is not only to find a means of protecting people who are already displaced inside their own countries, but to tackle the root causes of displacement . . ." Da-

persons, although the UNHCR stepped in under the *aegis* of its "good offices" mandate; the UNHCR is clearly over-stretched, and may indeed be compromised through the performance of this function. The International Committee of the Red Cross (ICRC) is often granted access to the camps of the internally displaced, but at times the conditionality that attaches to such access (such as the prohibition on commentary on the condition of human rights) may render the situation even worse from a protection perspective.<sup>126</sup>

The words of Francis Deng, the UN Secretary-General's Special Representative on the Internally Displaced, best capture the various dimensions of the problem:

The crisis is monumental. Its scope and intensity go beyond the traditional human rights concerns, although protection remains the most crucial issue involved. Despite the magnitude of the crisis, the international community is both legally and organizationally ill-prepared for an effective response to this global humanitarian and human rights tragedy. There is therefore an urgent quest for the development of ways and means to provide international protection for and assistance to the internally displaced and all those in similar circumstances of need.<sup>127</sup>

Deng is the most prominent and prolific of the several scholars who have recently sought to address the problems posed by the question of the internally displaced.<sup>128</sup> While a comprehensive solution to the crisis is still some distance in the future, it is hoped that emerging mechanisms are an appropriate response to the various complexities of the crisis. The concerted attention to the question should provide a particularly unique opportunity to ensure not only a specific gender-sensitivity in the evolution of normative and institutional mechanisms to address the issue, but also that the matter will be conceptualized broadly to consider the human rights imperatives in which it is located.

Richard Plender urges the adoption of relevant standards in the area, pointing out the legal and practical problems that are involved. With respect to the former, Plender specifically states that the mandate of the UNHCR can be extended with few legal problems, although the issue of resources and the question of direct intervention with

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vid Petrasek, *New Standards for the Protection of Internally Displaced Persons: A Proposal for a Comprehensive Approach*, 14 REF. STUD. Q., 285, 286 & 288, (1995).

126. See J.B. Kabera & C. Mayanja, *Homecoming in the Luwero Triangle*, in WHEN REFUGEES GO HOME 96, 99 (Tim Allen & Hubert Morsink eds., 1994).

127. Francis Deng, *Dealing with the Displaced: A Challenge to the International Community*, 1 GLOBAL GOVERNANCE 45 (1995).

128. Among them are, Petrasek, *supra* note 125; Richard Plender, *The Legal Basis of International Jurisdiction to Act with Regard to the Internally Displaced*, 6 INT'L J. REFUGEE L. 345 (1994), and especially, Maria Stavropoulou, *The Right Not to be Displaced*, 9 AM. U. J. INT'L L & POL. (1994).

governments are significantly more problematic.<sup>129</sup> This applies whether it is the UNHCR or an entirely new agency which addresses the problem.<sup>130</sup> For the present, and even in the absence of a more solid legal framework, UNHCR needs to promulgate specific guidelines in the area. This must be done in collaboration with the Secretary-General's Special Representative, who has already attempted to formulate some preliminary principles in relation to the definition of internally displaced persons, the question of their rights, and the obligation of states.<sup>131</sup>

The UNHCR has progressed in several material particulars in the creation of a framework for addressing the issue of the internally displaced.<sup>132</sup> The 45th Session of the Executive Committee drew inspiration from Resolution 48/116 of the General Assembly, which was acknowledged as providing an appropriate framework for the continued involvement of UNHCR.<sup>133</sup> Note was taken of the fact that involuntary displacement had assumed "global dimensions" and that there was a similarity between the causes of internal displacement and refugee movements.<sup>134</sup> These similarities, "... often call for similar measures with respect to prevention, protection, humanitarian assistance and solutions..."<sup>135</sup> The Committee encouraged the development of internal criteria and guidelines while emphasizing that "... activities on the behalf of internally displaced persons must not undermine the institution of asylum, including the right to seek and enjoy in other countries, asylum from persecution."<sup>136</sup> While the Conclusion specifically mentions the case of women and children, to date there has been no articulation by the UNHCR or the Executive Committee of the situation and rights of internally displaced women.

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129. Plender, *supra* note 128, at 350.

130. Clearly there are problems in having UNHCR execute this mandate and the discomfit of officers within the organization is understandable. Pierre Bertrand has pointed out that, "The major effect of using prevention as a new approach has been to shift the work of UNHCR from the relatively stable conditions in the country of asylum to the more turbulent and often evolutionary processes in the country of origin. Thus, we are confronted with the major challenge of developing principles and strategies to meet the protection and assistance needs of uprooted people in their own country, notwithstanding the constraint of the principle of State sovereignty, or, as in the case of Somalia, the difficulties encountered when the State's own structures have virtually collapsed." Pierre Bertrand, *An Operational Approach to International Refugee Protection*, 26 CORNELL INT'L L.J. 495, 496 (1993).

131. See Deng, *supra* note 10.

132. See Executive Committee of the High Commissioner's Programme (45th Session), Protection Aspects of UNHCR Activities on Behalf of Internally Displaced Persons, (Sub-Committee of the Whole on International Protection), 24th Meeting, August 17, 1994, EC/SCP/87.

133. Executive Committee of the High Commissioner's Programme (45th Session), *Internally Displaced Persons*, (Executive Committee Conclusion, No. 75 (XLV)-1994).

134. *Id.*, at para. (d).

135. *Id.*, at para. (b).

136. *Id.*, at paras. (k) and (l).

## 2. The Gender Dimensions of Internal Displacement

The fact that women comprise nearly eighty percent of the internally displaced population points to an obvious gender dimension to the problem. Forbes Martin illustrates the various legal and practical problems faced by internally displaced women in a treatment of the issue predating current attention.<sup>137</sup> Women who are trapped in a situation of internal displacement ostensibly benefit from special protection under Article 4 of the Second Additional Protocol of 1977 to the Geneva Conventions<sup>138</sup> and a series of other international and regional instruments.<sup>139</sup> The problem is that not all governments have ratified these instruments, and even then, ratification may not always provide much of a barrier to human rights abuses.<sup>140</sup> Given this context, Martin emphasizes the need to pay particular attention to the situation of women:

In reality, civilians, including women and children, are often the first victims of conflicts. Fleeing one's home or taking refuge in a displaced person's camp is not necessarily protection from physical attacks. Moreover, for internally displaced women, even more so than refugees, access to assistance, particularly food, shelter and health care, is often the primary protection problem encountered. In a number of countries, governments and/or resistance forces have used food as a weapon, and impeded efforts to provide international assistance to civilians under their control.<sup>141</sup>

The specific case of internally displaced women raises special problems of a nature directly related to their gender. One way to begin addressing the situation can be to extend the principles and rules developed by the UNHCR to develop a body of guidelines for the treatment of internally displaced women.<sup>142</sup> Such rules would follow the

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137. SUSAN FORBES MARTIN, *REFUGEE WOMEN* 28-29 (1992).

138. *cf.* Articles 4,5 and 6.

139. Stavrapoulou, *supra* note 128, at 723-724.

140. Martin, *supra* note 137, at 29.

141. *Id.*, at 29.

142. The promulgation of such rules are intimately tied up with the whole issue of the nature of mechanisms established to monitor internal armed conflict. Clapham points out that the problem is intrinsically political and not legal, and because of this, we are left with the conclusion that "... international humanitarian law is theoretical rather than practical and that its application is riddled with pitfalls." He goes on to state,

even if the one organization entrusted with the guardianship of the Conventions, the ICRC, is able to seek to enforce the relevant provisions of humanitarian law, such action is usually limited to private exhortations and quiet diplomacy, due to the organization's operational dependency on the consent of the parties and its general commitment to confidentiality.

ANDREW CLAPHAM, *HUMAN RIGHTS IN THE PRIVATE SPHERE* 116 (1993). Clapham also points to the initiative contained in the "Declaration of Minimum Humanitarian Standards," which attempts to deal with the problems of recognition and status, by



format of the two sets of UNHCR guidelines but would extend even further to encompass indirect problems of approach and conceptualization.<sup>143</sup> Thus, while the UNHCR guidelines are very specifically concerned with the "... special protection needs that reflect their gender..."<sup>144</sup> and, thus, in particular addressed to UNHCR protection officers, the proposed guidelines could address the broader relationship of governments, multilateral institutions, and NGOs. This implies a two-pronged strategy: the first prong would address the very specific day-to-day issues of livelihood, gender violence and protection in the form of a code of conduct, while the second would address the broader questions of institutional operations, such as relations with governments as well as linkages between human rights, development work, and displacement.<sup>145</sup> For example, the role of multilateral institutions in the creation and fostering of situations of displacement by direct acts of commission, such as through the construction of large infrastructural projects, or by acts of omission, which fail to adequately adopt a broad human rights framework for action in their particular spheres of operation, *e.g.* development. However, it is necessary to consider the issue in a manner which looks beyond the question of displacement *per se*; one must consider the overall relationship of the operations of multilateral institutions, such as the World Bank and the IMF, to broad human rights principles.<sup>146</sup> Often, the absence of any serious attention to the human rights context within which development assistance is being applied by IGOs may exacerbate, rather than ameliorate the situation.<sup>147</sup> This is clearly the case with one of the most prominent intergovernmental agency's mandate to cover certain aspects of the situation of the internally displaced, the United Nations Development Program (UNDP).

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binding "all persons, groups and authorities," and is to be applicable to "all situations, including internal violence, disturbances, tensions and public emergency." *Id.*, at 117.

143. Inspiration can, for example, be drawn from the attempt by the World Health Organization to formulate basic principles for action by this organization with respect to major emergencies. See, *Coping with Major Emergencies: WHO Strategy and Approaches to Humanitarian Action*, World Health Organization, U.N. Doc. WHO/EHA/95.1 (1995).

144. UNHCR, GUIDELINES, *supra* note 88, para. 3 at 7.

145. Stavrapoulou, *supra* note 128.

146. For an excellent analysis of the connection between these issues, see James Paul, *The United Nations and the Creation of an International Law of Development*, HARV. INT'L L.J. (1995).

147. For a comprehensive examination of the various dimensions of this issue, see HUMAN RIGHTS COUNCIL OF AUSTRALIA, *THE RIGHTS WAY TO DEVELOPMENT: A HUMAN RIGHTS APPROACH TO DEVELOPMENT ASSISTANCE*, 1995.

### 3. Multilateral Action on Internal Displacement: The Case of UNDP

Following the increasing problems of the internally displaced worldwide, the Secretary-General designated the United Nations Development Program (UNDP) as local focal points for the coordination of relief, although this has obviously not solved the larger problems of protection and human rights violations. In a recent report on the Horn of Africa by independent experts commissioned by the UNDP, the various dimensions of the problem were clearly laid out.<sup>148</sup> The report pointed out that, aside from emphasizing the development of an inter-agency approach to the problem, there was a need for more dissemination of information and program support.<sup>149</sup> However, one must question whether the UNDP is the most appropriate agency for this function, particularly since the organization is yet to develop a human rights-sensitive dimension to its operations.<sup>150</sup> An illustration of this can be found in the case of a country such as the Sudan, which has both an appalling human rights record and a massive population of displaced persons.<sup>151</sup>

And yet, the UNDP included Sudan in its sustainable human development reports as one of several countries that has adopted an "exemplary model of development."<sup>152</sup> No mention is made of the displacement or of the human rights abuses for which the Sudan has long been notorious.<sup>153</sup> Thus, the credibility of an organization, such as the UNDP, can be compromised. In addition, it can be positively inimical to the resolution of the crisis.<sup>154</sup> As such, there is still a glaring need for the UNDP to address the issue in a comprehensive and human rights-sensitive fashion.<sup>155</sup> Such a comprehensive approach must be

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148. UNITED NATIONS DEVELOPMENT PROGRAM, HORN OF AFRICA PROGRAMME FOR THE DISPLACED (HOAP): MISSION REPORT (1994).

149. *Id.* Summary and Conclusions, at paragraph 1.7.

150. Oloka-Onyango, *supra* note 58, at 26-31.

151. For an analysis of the situation in the Sudan, see AMNESTY INTERNATIONAL, SUDAN: 'THE TEARS OF ORPHANS': NO FUTURE WITHOUT HUMAN RIGHTS (1995); FUND FOR PEACE, ABUSES AGAINST WOMEN IN THE SUDAN (1992); and FRANCIS DENG, PROTECTING THE DISPOSSESSED: A CHALLENGE FOR THE INTERNATIONAL COMMUNITY 65-81 (1993).

152. UNITED NATIONS DEVELOPMENT PROGRAM, THE EXPERIENCE OF SUDAN: PROMOTING COMMUNITY-LED DEVELOPMENT (1994).

153. AMNESTY INTERNATIONAL, *supra* note 151.

154. Francis Deng diplomatically notes the expression of "skepticism" elicited from the international community in Khartoum, when he sought their views on attempting to find a solution to the problem of the internally displaced. DENG, *supra* note 151, at 79.

155. The Mission Report makes the following conclusion: "Before any operational programmes for the displaced are undertaken, the countries concerned will need to commit themselves to a minimum of effective legal safeguards and legal protection for the displaced including their physical security. This is best articulated in a regional policy framework (agreement, declaration) which could be used as a basis for

gin with a reemphasis of basic human rights, encompassing civil, political, economic and social rights without discrimination, in addition to the so-called third generation group rights (such as peace and the environment), which in the case of the internally displaced, all conceptually collapse one into the other.<sup>156</sup> Addressing the issue in this fashion raises obligations not only for the host government, but for a range of other actors including multilateral organizations, multinational companies, as well as relief and humanitarian agencies. Particularly acute is the situation where displacement and marginalization come together to create an especially difficult situation for internally displaced women. Thus, they are affected in their freedom of movement, work, livelihood, health, and education, not to mention vicious physical and verbal attacks.<sup>157</sup> For the purposes of the present discussion, we conclude with a specific examination of the issue of gender violence and physical protection as it affects internally displaced women before considering the place of the various concerned actors.

## B. *Gender Violence and Physical Protection: Towards a Framework of Action*

### 1. Concept and Analysis

When examining the issues of gender violence and physical security, two factors must be considered. The first is an expansive definition of the term "violence," which as Nahid Toubia reminds us, must be viewed not only as a series of commissions, but also omissions, which amount to a failure to recognize the existence of fundamental human rights for women.<sup>158</sup> The structural, as opposed to physical, violence can produce several different effects on women and thus on the exercise or realization of their human rights.<sup>159</sup> Structural violence, extending from poor nutrition, inadequate health care (including a lack of contraceptives, coerced sterilization and forced abortions, to mention only a few factors) to limited access to education and other resources,

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resource mobilization." Mission Report, *supra* note 148, at 1. Once again the focus is in the wrong place because it emphasizes "resource mobilization" over the need to address the root causes of the displacement. Furthermore, calling upon the very state which violated the rights of the displaced to erect minimum legal standards for their protection, and to expect enforcement thereof, is akin to placing the monkey in charge of burning down the forest! In sum, it allows for a deflection of attention from the fundamental causes of the displacement, to looking primarily at its manifestations.

156. Maria Stavropoulou, *Indigenous Peoples Displaced from their Environment: Is there Adequate Protection?* 5 COLO J. INT'L ENVTL L. & POL. 105 (1994).

157. FUND FOR PEACE, *supra* note 151, at 2.

158. Toubia, *supra* note 44, at 16-17.

159. See John Sorenson, *Refugees, Relief and Rehabilitation in the Horn of Africa: The Eritrean Relief Association*, in AFRICAN REFUGEES: DEVELOPMENT AID AND REPARATION 79 (H. Adelman & J. Sorensen eds., 1994).

combine to create a situation of severe discrimination against women which international law has yet to address in a forthright fashion. While all of these are problems common to a situation of stability, they are doubly problematic in conditions of flight and displacement.<sup>160</sup> An additional major problem is that attention from the United Nations system to the question of violence has "... not been reflected in the development of international law."<sup>161</sup>

The second factor is the significant differentiation among the women who comprise the displaced population. Jok points out that care should be taken to consider the specific situation of female children, young women, and the elderly.<sup>162</sup> Consequently, despite the claim among relief and other humanitarian agencies that women as a group have been accorded special attention, it is a fact that

... rates of maternal mortality, inadequate women's diet during pregnancy, high energy expenditure associated with physical activity in production, violence against women (including forcible extra-marital sex) high fertility levels which have sparked ever greater concern among health professionals over the increasing reproductive health problems and susceptibility of Third World women to a multitude of reproduction-related health problems have not been addressed in health relief efforts.<sup>163</sup>

These factors can be combined with realities that result in a desperate situation for displaced and refugee women.<sup>164</sup> These factors may include a scarcity of resources, the manner of their control and distribution, the utilization by governments of those resources (food, health care, etc.)<sup>165</sup> as a political weapon against the displaced populace (as was the case in the Eritrean and Ethiopian wars, and continues to be so in the Sudan) and finally, the impact of political violence on health and physical security. Displaced and refugee women participate in a wide variety of activities that make their burden particularly acute and even more susceptible to violence. They care for the sick and the elderly, they cater to the needs of children and daily household subsistence, they often bear sole responsibility, due to widowhood or separation from their spouse, for family maintenance; they

160. For a succinct examination, see Immigration & Refugee Board of Canada, *Women in Somalia*, 13 REFUGEE STUD. Q. 92 (1994).

161. They go on to point out that, "The doctrine of jus cogens, with its claim to reflect central, fundamental aspirations of the international community, has not responded at all to massive evidence of injustice and aggression against women." Charlesworth & Chinkin, *supra* note 18, at 72.

162. Jok Madut Jok, *Health Consequences of War and Health Relief: Challenges of Assessment*, 21 UFAHAMU 50 (1993).

163. *Id.*, at 55.

164. *Id.*, at 53.

165. Tina Wallace, *Taking the Lion by the Whiskers: Building on the Strengths of Refugee Women*, in CHANGING PERCEPTIONS: WRITINGS ON GENDER AND DEVELOPMENT 62 (T. Wallace & C. March eds., 1991).

forage for and provide food, water, fuel, health care, education, and cultural cohesion. Given the enormity of responsibilities and the vulnerability of their situation, displaced women obviously require heightened measures of protection. While protective measures must ensure that women retain their autonomy and freedom of movement (and not provide the excuse to instead curtail them), particular care should be taken to ensure that the principles which are developed respond in an appropriate manner to the dictates of the specific context, rather than to simply transfer them from one context to another.

## 2. Sexual Violence in a Context of Dislocation

With particular reference to the issue of sexual violence, the problem is especially magnified. Jok again: "Repeated brutally forced sexual contact is a common aspect of the displaced female experience, either during the escape, at border crossings or during their life in camps."<sup>166</sup> Most reports can only be an underestimation of the magnitude of the problem for a variety of reasons; "[s]ome societies continue to attach a stigma to the woman who has been sexually violated. Many displaced women who have been raped or violated . . . are regarded by their community to have no more value, and they are sometimes isolated. As traumatic as it sounds, it becomes hard to assess these women's psychological problems that may result."<sup>167</sup> Connected to the "public" dimension of sexual violence is of course the phenomenon of rape. Catherine MacKinnon correctly asserts that rape (as illustrated by the conflict in former Yugoslavia) has been deployed as an official policy of war in a genocidal campaign for political control.<sup>168</sup> It is not simply a policy of the pleasure of male power unleashed, it is

rape under control. It is also rape unto death, rape as massacre, rape to kill and to make the victims wish they were dead. It is an instrument of forced exile, rape to make you leave your home and never want to go back. It is rape to drive a wedge through the community, to shatter a society, to destroy a people. It is rape as genocide.<sup>169</sup>

While the cases of Bosnia, Somalia, and Rwanda brought the issue of rape to the forefront, the use of rape as a tool of war knows a much longer history and thus connects to the overall context in which such acts of violence against women are committed.<sup>170</sup> The question that must be asked is: how do myths and beliefs about gender play a role in the creation, maintenance and ending of wars, and other 'public' acts of

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166. *Id.*, at 55.

167. *Id.*, at 56

168. Catherine A. MacKinnon, *Rape, Genocide, and Women's Human Rights*, 17 *HARV. WOMEN'S L.J.* 5 (1994).

169. *Id.*, at 11-12.

170. Zalewski, *supra* note 16, at 355.

violence? In other words, what are the gender dimensions to war, and are we responding appropriately to them?

The answer to this question implies a number of issues for those concerned with the situation of women in such contexts. This requires both macro and micro-analyses of the specific situation. Women are not only reproducers as they are considered to be in the instance of health targeting; they also produce food and maintain the health of their families. They are involved in the collection, storage and dissemination of food and health care. All of this implies a variety of different factors that need to be taken into consideration which can only be discerned from a concrete investigation of a number of case-studies. In short, intellectual or academic discussion cannot take the place of hard empirical analysis.

It is thus imperative to conduct a comprehensive survey of the various dimensions of the issue, which will involve as a primary element in the discussion, internally displaced women, social workers, and policy makers. From such a discussion will emerge the contours of appropriate standards and practices to address the question of gender violence in the context of displacement. Specific socio-cultural factors need to be taken into account. Furthermore, the political *milieu*, the hostility or insensitivity of the government and other involved parties, is of manifold importance to the design of comprehensive mechanisms to address the situation. The end result of this process should be a more complete analysis and appreciation of the issue. Problems such as domestic violence (including marital rape, battery and the sexual assault of female children) and violence of a generalized nature must be addressed by the communities at large.<sup>171</sup> In short, it first and foremost demands looking to the displaced community itself for answers:

The best protectors of their rights are the people themselves: they have vested interests in ensuring that their rights are safeguarded and they are directly on the spot when violations occur. But when the situation gets out of hand and they need back-up assistance, this basic initiative is often trampled underfoot by zealous rescuers. Too often uprooted people have to tolerate help that robs them of their right to self-direction, afraid to speak out lest they should lose the material aid on which they depend for survival.<sup>172</sup>

Fundamental to any program of action are the refugees and internally displaced persons themselves who are, more often than not, forgotten. Unless their participation is sought and appreciated, uprooted

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171. Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture*, 25 COL. HUM. RTS. L. REV. 291 (1994).

172. Shirley DeWolf, *Practical Aspects of UNHCR-NGO Partnership*, Paper Presented at the UNHCR/PARINAC Conference, Addis Ababa, Ethiopia (March, 1995).

women will remain at the mercy of a variety of hostile forces both within and outside of their displaced contexts.

However, action by the people affected by the situation must nevertheless be augmented by adequate responses. It is thus inadequate to design principles or guidelines for dealing with the issue of violence against such communities, unless there are also existing mechanisms which can respond in an expeditious and adequate fashion to the problem. Gilbert suggests that the UNHCR establish a mechanism akin to that of the World Bank's recently-created Inspection Panel<sup>173</sup> in order to receive and adjudicate complaints by refugees.<sup>174</sup> While such an idea is indeed welcome, given the nature of the harm involved as well as the conditions in which refugees and internally displaced persons are living, it may be more appropriate to think in terms of a mechanism that can respond expeditiously and effectively, and one which is based at the site of displacement, rather than one which is headquartered in Geneva, in the same way that the World Bank Inspection Panel is housed at the Bank's headquarters in Washington, DC.

Regarding the issue of physical security, a comprehensive scheme of principles that extends beyond those in place for refugee camps is overdue.<sup>175</sup> Of particular necessity is the need to consider the fact that internal displacement imports security problems of a different nature from the refugee context.<sup>176</sup> It is in this regard that the concept of "safe havens" has evolved, albeit few examples that have thus far taken place: the Kurds in Iraq, and Bosnian Muslims shielded from Serbian and Croatian attack.<sup>177</sup> There are several problems associated with the concept of "safe havens," most fundamentally the degree of safety they can actually provide. As Christopher Tiso points out, the creation of safe havens is dependent upon the Security Council's authorization under Chapter VII of the United Nations Charter, or the consent of the crisis country, in deference to the notion of state sovereignty.<sup>178</sup> Securing such areas from attack is especially problematic if there are on-going military hostilities. The long-run effects of a United Nations-created zone of "tranquility" are innumerable.

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173. For a good discussion of this new Bank institution, see Daniel Bradlow, *International Organizations and Private Complaints: The Case of the World Bank Inspection Panel*, 34 VA. J. INT'L L. 553 (1994).

174. Gilbert, *supra* note 92, at 1245-1246.

175. Elly-Elikunda Mtango, *Military and Armed Attacks on Refugee Camps*, in REFUGEES AND INTERNATIONAL RELATIONS 87 (Gil Loescher & Laila Monahan eds., 1989).

176. See generally M. Othman-Chande, *International Law and Armed Attacks in Refugee Camps*, 60 NORDIC J. INT'L LAW, 153 (1991).

177. See Christopher Tiso, *Safe Haven Refugee Programs: A Method of Combatting International Refugee Crises*, 8 GEO. IMMIGR. L.J. 575 (1994).

178. *Id.*, at 576.

These conditions underline the urgency of developing principles appropriate to the situation of internal displacement. While this may not entail the promulgation of an international legal instrument, clearly the need for developing such principles in a comprehensive fashion cannot be overemphasized.<sup>179</sup> Mtango points to the inadequacies of the UNHCR Executive Committee's *Conclusion on Military and Armed Attacks on Refugee Camps and Settlements* and makes the point that there is a need to review the assumption that makes refugee camps and settlements exclusively humanitarian and civilian.<sup>180</sup> He argues that the language used in the *Conclusion*, ". . . falls short of the absolute prohibition of attacks on refugee camps and settlements . . ." and urges the adoption of a declaration on the issue by the General Assembly.<sup>181</sup> Of course the issue of physical protection in relation to displaced camps and settlements is yet to be addressed comprehensively and involves significantly more complex issues, as we have already pointed out.

### C. *The Place and Role of Institutional Actors*

#### 1. Who is to Act, and How?

All of the above factors raise particular issues for a variety of actors directly and indirectly concerned with the issue. In short, the questions relating to refugee and internally displaced women are global human issues and must necessarily be addressed in a comprehensive fashion, taking full account of the various dimensions of the problem. This implies examining not only the root causes of displacement but also the creation of adequate and effective measures to address the phenomenon. It means asking hard questions and challenging traditional methodologies for dealing with the causes and results of human conflicts. For example, UN troops and monitors of conflict situations have on occasion (as in Mozambique) turned out to be more of a threat to the population they are supposed to protect than a positive force in

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179. Petrasek returns to the issue of complexity and contradiction involved in devising comprehensive rules for the internally displaced:

It would be easier to isolate issues relating to protection (i.e. after displacement) from issues of prevention (tackling root causes) and solution (right to return), both in terms of simplifying the drafting process and of ending up with clear legal principles. The more comprehensive the standards the more complex the drafting process will be, and it could well take years before there is sufficient consensus to achieve a resolution in the General Assembly. On the other hand, to focus on just one aspect of a complex problem (e.g. asylum) risks repeating the mistakes of the past which have left us with a refugee protection treaty that is silent on so many pressing issues.

Petrsek, *supra* note 125, at 289.

180. Mtango, *supra* note 175, at 121.

181. *Id.*



protection of it. As one critic has asked: "who is going to watch the men who are watching the men who are supposedly watching out for us?"<sup>182</sup>

At the macro-level of analysis, one must examine the nature of political and economic relations specific to the particular entity being examined and within the context of global relations as a whole. First and foremost is of course the legal regime; how sensitive is this to the violations committed against women, and what are human rights and women's rights NGOs doing about it? How many of them are addressing the specific problems of displacement, whether of refugees or of the internally displaced?

Secondly, what are the mechanisms erected to expose the shady connections of business and commerce with dictatorial governments, and with particular respect to the arena of conflict, trade, and the exchange of arms. Thus, while the UNHCR was deploying troops within the Rwandan refugee camps in Zaire for the protection of refugees, very little action was taken against the process of rearmament underway within those very same camps. Human Rights Watch's aptly entitled report, *Arming with Impunity*, details the terror which the ex-army and militia of the former Rwandan government is already wreaking amongst the refugees.<sup>183</sup> How much more so if they begin a sustained attempt to recapture power? What implications does this have for those in the camps and for those in Rwanda?<sup>184</sup> Is the international community not staring another catastrophe in the face?<sup>185</sup> What does the OAU think of its member governments colluding with people whose motives are not only malevolent, but also clearly genocidal?<sup>186</sup>

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182. MacKinnon, *supra* note 168, at 13.

183. HUMAN RIGHTS WATCH VOL. 7. NO. 4, RWANDA/ZAIRE: REARMING WITH IMPUNITY: INTERNATIONAL SUPPORT FOR THE PERPETRATORS OF THE RWANDAN GENOCIDE 14-15 (1995). See also Stephen D. Goose and Frank Smyth, *Arming Genocide in Rwanda*, 73 FOR. AFF. 86 (1994).

184. For a study that explicitly states that the results will be disastrous, see AFRICAN RIGHTS, DISCUSSION PAPER NO. 5, HUMANITARIANISM UNBOUND? CURRENT DILEMMAS FACING MULTI-MANDATE RELIEF OPERATIONS IN POLITICAL EMERGENCIES 33-36 (1994). African Rights states that the focus on "humanitarianism" in the aftermath of the defeat of the government army (i.e. the immediate needs of the emergency), meant that the issue of genocide was relegated to the background; massive material assistance went to the killers; the killers had an unrestricted outlet for propaganda, and political structures have been recreated that are inimical to the long-run resolution of the crisis in that country. *Id.*, at 35.

185. We must also take note of the fact that several months before the Rwandan genocide, human rights organizations had been warning about the influx of arms into the country. The world simply turned a blind eye. See HUMAN RIGHTS WATCH (ARMS PROJECT) VOL. 6. NO. 1, THE ARMS TRADE AND HUMAN RIGHTS ABUSES IN THE RWANDAN WAR (January 1994).

186. In this respect the second recommendation of Human Rights Watch on the possible effect of the traffic of arms to Rwanda, is a chilling reminder that we ignore the present situation at our peril, "The Arms Project calls for all countries

Implicated in the general crisis of humanitarianism is of course the phenomenon of relief assistance which, according to Alex de Waal, has "... been used to sustain armies, maintain garrison towns, keep open supply routes, and allow generals to don the humanitarian mantle."<sup>187</sup> Evidently there is much in the way of waste and lack of accountability for which these agencies are responsible, all the while maintaining a veneer of assistance, as

[h]undreds of millions of dollars have been spent . . . on a 'humanitarian' operation that is in fact feeding soldiers more than it is feeding their victims. The SPLA's quartermaster is the World Food Programme, USAID and an array of NGOs. Government garrisons live on international food aid. But no one knows the true figures for the impact of the programmes, or the rates of diversion, because no proper studies have been done. Meanwhile, the war is in a stalemate.<sup>188</sup>

Reconsidering the macro-level of protection includes an examination of the overall human rights framework, the specific conditions within refugee and displacement-producing countries, and the establishment of appropriate mechanisms of conflict resolution.<sup>189</sup> Given these questions, which obviously extend beyond the scope of this paper, the following account gives a summary of the various actors and of the individual and/or collective actions that should be adopted in pursuit of a resolution to the crisis.

## 2. Developing a Program of Action

Fundamental to addressing the issue of displacement as it affects women is the normative reformulation of the principal human rights and refugee instruments. This necessarily entails a comprehensive and far-reaching review of both the structural elements we have referred to as well as the normative and institutional factors that combine to underlie the domination and marginalization of women by international law. Such a program would entail an examination and revamping of the major international institutions, beginning with the United Na-

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which choose to sell arms or provide military assistance in the future to legally and explicitly condition such transfers upon the human rights performance of the recipient. The Arms Project believes that weapons of increased lethality and technological sophistication should not be introduced into Rwanda given the existing evidence of the parties' willingness to abuse human rights." *Id.*, at 37.

187. Alex de Waal, *African Encounters*, 6 INDEX ON CENSORSHIP 14, 17 (1994).

188. *Id.*

189. The OAU has devoted significant attention to the establishment of such mechanisms following the upsurge of internal conflicts in the 1990s. See ORGANIZATION OF AFRICAN UNITY, *RESOLVING CONFLICTS IN AFRICA: IMPLEMENTATION OPTIONS*, (1993). For a general, more objective comment, see Sam G. Amoo, *Role of the OAU: Past, Present and Future*, in *MAKING WAR AND WAGING PEACE: FOREIGN INTERVENTION IN AFRICA*, 239 (David Smock ed., 1993). See also DENT OCAYA-LAKIDI, *AFRICA'S INTERNAL CONFLICTS: THE SEARCH FOR RESPONSE* (1992).

tions, but extending to cover agencies as diverse as the World Bank, UNICEF, UNDP, and WHO. Contemporaneous to this exercise must be a consideration of the extent to which these bodies have incorporated women into their structures of operation at executive and operational levels.

The second level of attention must be the achievement of an overall balance in gender and nationality since Third World peoples comprise the greater percentage of the global population and because the majority of conflict situations and displaced populations are in these areas. Women with a sensitivity to the cultural, political and socioeconomic realities of those contexts should begin to be more actively recruited into such agencies.

One of the continuing problems is that United Nations institutions that are mandated to cover women's issues, such as CEDAW, the Commission on the Status of Women and UNIFEM, lack both a prominent profile and adequate resources to pursue the tasks for which they were created. At the same time, in order to avoid the "ghettoization" of women's issues, other UN agencies should, within their own work, devote more attention to the gender dimensions of their activities, e.g. trade (UNCTAD and the UTO), industry (UNIDO), and intellectual property (WIPO).

Within the regional context, there is a specific role for the OAU, particularly since its function as a body for the liberation of African states from the yoke of colonialism was terminated with South African independence. However, the organization clearly needs to be more aggressive in order to achieve compliance of member states and to effectively resolve some of the long-running and festering disputes on the continent. In this respect, the OAU itself needs to devise a code of conduct for its leadership and to devise methodologies that do not simply allow governments to commit egregious violations against their citizenries. It should apply sanctions such as those used to coerce dues payments against human rights violators; it should also apply sanctions against dictators who have remained in office for an inordinate length of time without seeking a popular mandate, as well as to those who come to power by force and proceed to abuse it.

Central to the operation of the continental human rights and refugee regime is the African Commission on Human and Peoples' Rights (ACHPR). The Commission must conduct a comprehensive review of their guidelines on state reporting to comprehensively cover the issue of women's rights, the rights of refugees and the internally displaced, and in particular to ensure that states parties take their obligations under the Charter seriously.<sup>190</sup> Furthermore, the organi-

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190. The problem of the lack of seriousness of states parties towards the reporting requirement under the African Charter is a point taken up with brisk, but inci-

zation must devise a mechanism for expeditious intervention and public commentary on issues of particularly egregious human rights violations and must consider the issues of autonomy of action (from the OAU Secretariat) and operation (from the Assembly of Heads of State and Government). In tandem with such reorientation, the Bureau for Refugees must be revitalized, first with increased funding for its operation, and secondly with a reversion to and reinvigorated execution of its original mandate of advocacy and protection. This would involve, *inter alia*, encouraging more accession to and ratification of the 1969 Refugee Convention by states parties, and ensuring that domestic regimes governing refugees and immigration are in conformity with the regional instrument.

The institutions of the international community, including the UNDP, World Bank and the IMF, need to develop appropriate mechanisms for addressing human rights (civil and political and economic, social and cultural) in a holistic and comprehensive fashion. They must recognize and acknowledge past and present contributions of their organizations to the situations of human rights violations and socio-economic collapse; amends can be made through the assumption of a larger proportion of the burden of hosting refugees and catering to the internally displaced in a comprehensive fashion, and reviewing the structure and content of continuing operations. Zolberg *et al.* state:

Given the inescapable reality that the majority of the developing countries' refugees will remain in the South, the richer states must, at a minimum, accept a greater financial obligation to assist the countries of first asylum in the South, the richer states must, at a minimum, accept a greater financial obligation to assist the countries of first asylum in the South. The division of labor has a historical precedent: After World War II, a war-devastated Western Europe demanded that the resource-rich North America absorb most of the financial outlays for refugee relief, as Western Europe provided the asylum. Four decades later, Europe, North America, Japan and a handful of others constitute the resource-rich North and must pay accordingly, not only on ethical grounds, but also to reduce social conflict in recipient countries that could compound the refugee problem. The concept of sustainable refugee policy introduced in the discussion of refugee-warrior communities is relevant also in this respect: Refugee policy must be held up against the

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sive criticism by Tigere, who asserts that the impression created by the first Zimbabwean report to the Commission is of " . . . a state steeped in hypocrisy and unconcerned about human rights, even though one would like to believe that the "chimurenga" (revolutionary war of liberation) was predicated on the aspirations of the people of Zimbabwe to assert their human rights and fundamental freedoms." We may add that Zimbabwe's attitude to reportage fits the general mold. See P. Tigere, *State Reporting to the African Commission: The Case of Zimbabwe*, 38 J. AFR. L. 64, 66 (1994).

negative yardstick that at least it should not contribute to greater refugee flows in the future.<sup>191</sup>

Despite these sentiments being in the right place, they are based on false premises. Instead, a rearticulation of the notion of burden-sharing that takes into consideration both the contribution of those members of the international community who are better-endowed, and the historical legacies of the colonial experience as well as the inadequacies of the measures taken in order to address the situation of underdevelopment is required.<sup>192</sup> When reformulated in this fashion, what emerges is not an obligation based on moral imperative, as Zolberg and company suggest, but rather legal consequences on which legitimate claims can be based, and assessments of binding "contractual obligation" made.<sup>193</sup>

National domestic structures, such as immigration, police, armed forces, the judiciary, and other administrative services are of critical importance to ameliorating the plight of refugee and internally displaced women. Initially, there will be an overall need for training in the general field of human rights and specifically in catering to refugee and internally displaced populations, and the recognition of the human rights dimensions of the issue. National agencies need to develop systems of reportage and exchange of information on the situation of the above categories of people. The preeminent need will be for the creation of democratic structures of local and national governance, as well as of suitable mechanisms for the resolution of conflicts within and between communities.

Relevant laws and institutions need to be reformed in order to bring them into conformity with international and regional standards in women's rights, refugee and general human rights law. Indigenous Nongovernmental Organizations (particularly human rights and Women's Rights Groups) need to consciously incorporate action on refugees and the internally displaced in their operations and evolve gender-sensitive methods of operation. Furthermore, there is a gaping need for the commencement of programs of promotion, litigation and support for the rights of refugee and internally displaced women. On the other hand, international NGOs, which by contrast are more intimately involved in the issue, must review their relationships with local NGOs, and also their operations in relation to humanitarian and hu-

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191. See A. ZOLBERG & A. SUHKRE, *ESCAPE FROM VIOLENCE: CONFLICT AND THE REFUGEE CRISIS IN THE DEVELOPING WORLD* 282 (1989).

192. Such admission can be found in reports such as the World Bank's, *SUB-SAHARAN AFRICA: FROM SUSTAINABLE CRISIS TO SUSTAINABLE GROWTH* (1989), and forms the basis for what Rolf Knieper argues is the necessity to move away from the notion of "development assistance," and to begin to consider such transfers as part of "an integrated policy in an integrated world." ROLF KNEIPER, *THE CONCEPT OF NATIONAL SOVEREIGNTY AND DEVELOPMENT LAW* 27 (1992).

193. *Id.*, at 10-12.

man rights emergencies, and erect mechanisms to more effectively coordinate operations in the field of traditional development work with activities in the promotion of human rights.

Finally, it is necessary to conclude with some specific recommendations:

1. At an international level:

— The legal instruments currently in place which address the related issues of women, refugees and the internally displaced must be urgently reviewed and a process of promulgation of more where they are non-existent. These would necessarily include:

— The prommelgation of a Convention on the Internally Displaced (with a Codicil/Code of Conduct specifically addressing the various facets of the situation of internally displaced women).

— A Second Protocol to the 1951 Geneva Convention addressing issues, such as gender-bias; restrictive application of the asylum grant; relationship to international human rights standards (including specifically economic and social human rights and so-called "third Generation" human rights).

2. Regional mechanisms and institutions:

— Promulgate a Protocol to the Banjul Charter on the Rights and Status of Refugee and Internally Displaced Women, the Elderly, disabled and children.

— A Second Protocol to the Banjul Charter comprehensively covering the general human rights of Women (incorporating CEDAW, ICCPR, ICESCR, etc.).

## V. TOWARDS RECONSTRUCTION

This study has focused on today's "wretched of the earth," African refugee and internally displaced women. Through the employment of a broad lens it has attempted to illuminate the sexual, geopolitical, racial, and socioeconomic factors that combine to create and exacerbate this condition. While appreciating the fact that the concrete conditions of displacement require that we develop effective normative and institutional mechanisms to address the specific situation relating to displacement, we should never lose sight of the broader picture. In short, so long as the "apartheid of gender" continues to determine the character of the international legal regime, and such manifest discrimination is combined with the exclusion of whole populations on account of their racial and socioeconomic attributes, we shall make little headway in addressing the question.<sup>194</sup>

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194. The phrase "apartheid of gender" is taken from a statement made by Ms.

At the same time, while maintaining a focus on the global and national dimensions of the problem of refugee and internally displaced women, we should bear in mind that these seemingly international problems are merely the domestic script writ large. Such a reality, the fact that the issue of women's human rights have for so long been relegated to the private, ostensibly "familiar," sphere of domestic resolution, should force us to devote our efforts to the quest for a comprehensive transformation of the plight of humanity's larger half. In essence this means seriously taking women's rights as human rights and pursuing them as such.

The preceding analysis illustrates that piecemeal assaults will change little. Nothing short of a comprehensive reconstruction of the basic premises of international, regional and domestic human rights law, will alter the status of women. Unfortunately, this is doubly true for the condition of women who are refugees or internally displaced.

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Karin Poo, Deputy Executive Director of UNICEF, to a preparatory meeting for the Beijing Women's conference. See Karin Sham Poo, *The 'Apartheid of Gender' Must End*, Statement at the ECE High-Level Regional Preparatory Meeting for the 4th World Conference on Women, Vienna, Austria, October 17, 1994. See also REBECCA COOK, *THE ELIMINATION OF SEXUAL APARTHEID: PROSPECTS FOR THE FOURTH WORLD CONFERENCE ON WOMEN* (ASIL Issue Papers on World Conferences No.5, 1995).