

# RIGHTS, REFUGEE WOMEN & REPRODUCTIVE HEALTH

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## I. INTRODUCTION

The United Nations High Commissioner for Refugees (UNHCR), in conjunction with state governments and nongovernmental actors, has developed effective responses to refugee emergencies around the world. Perhaps more than any other U.N. agency, UNHCR is in the business of saving lives, and, in coordination with nongovernmental partners, it does so well, effectively mobilizing its own staff and relief agencies to meet the needs of refugees fleeing violence, conflict, and disaster in their own countries. Moreover, UNHCR has been more responsive than most other international agencies to the special protection and assistance needs of women. In July 1991, building on its own evolving policies toward refugee women, as well as on the work of an Expert Group Meeting on Refugee and Displaced Women and Children the previous year,<sup>1</sup> UNHCR implemented Guidelines on the Protection of Refugee Women that recognize the particular problems faced by women in the refugee context and develop recommendations for addressing their situation.<sup>2</sup> In addition to confronting issues of legal protection, the Guidelines also recognize the critical link between the protection of refugee women and assistance-related measures.<sup>3</sup>

One area where the link between protection and assistance is critically important is reproductive health care. Health workers often become aware of the special health problems of refugee women when

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1. See *CSW Report on Refugee and Displaced Women and Children*, U.N. ESCOR, Comm'n on the Status of Women, 35th Sess., Agenda Item 5(c), U.N. Doc. E/CN.6/1991/4 (1990).

2. OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR), *GUIDELINES ON THE PROTECTION OF REFUGEE WOMEN* (July 1991) [hereinafter *UNHCR GUIDELINES*].

3. *Id.* ¶ 9 ("[I]nternational protection of refugee women must be understood in its widest sense. Refugee women who are unable to feed, clothe and shelter themselves and their children will be more vulnerable to manipulation and to physical and sexual abuse in order to obtain such necessities.").

women who have been sexually abused seek medical care.<sup>4</sup> In recent years, UNHCR has recognized the gravity of the problem of sexual violence against refugee women and has taken measures to combat it.<sup>5</sup> Yet, even though violence against women often has far-reaching implications for women's reproductive health, such as unwanted pregnancies and sexually transmitted diseases (including HIV/AIDS), human rights standards are not invoked in the refugee context to further women's access to vital social services, including reproductive health care.<sup>6</sup>

As the Guidelines point out, existing health services often are inadequate to deal with most gender-specific needs.<sup>7</sup> Gynecological services are frequently lacking and family planning services are, in most cases, virtually nonexistent. When women's health needs are served, it is mainly in their role as mothers. In many camp settings, the limited focus of primary health care is on maternal and child health (MCH) rather than on other health problems faced by women, such as infections and cervical cancer, female genital mutilation (FGM), sexually transmitted diseases (STDs), and the lack of sex education for adolescent girls.<sup>8</sup> Moreover, as the Guidelines indicate, many nongovernmental organizations that provide health services, including services related to maternal and child health and health education, are unable to provide access to family planning because of their religious mandates.<sup>9</sup>

A recent study by Deirdre Wulf, commissioned by the Women's Commission for Refugee Women and Children, demonstrates both the need for broader access to family planning services in the refugee context as well as some of the obstacles to the provision of such

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4. *Id.* ¶ 90.

5. See, e.g., *Note on Certain Aspects of Sexual Violence Against Refugee Women*, Executive Committee of the High Commissioner's Programme, 44th Sess., ¶¶ 1, 38-40, U.N. Doc. A/AC.96/822 (1993); see also UNHCR, DRAFT GUIDELINES ON THE PREVENTION OF AND RESPONSE TO SEXUAL VIOLENCE AGAINST REFUGEES (June 1994) [hereinafter DRAFT GUIDELINES ON SEXUAL VIOLENCE].

6. Telephone Interview with Jennifer Moore, Associate Legal Officer, UNHCR, Washington, D.C. (Jan. 19, 1995).

7. UNHCR GUIDELINES, *supra* note 2, ¶ 94.

8. DEIRDRE WULF, REFUGEE WOMEN AND REPRODUCTIVE HEALTH CARE: REASSESSING PRIORITIES 13 (1994); see also UNHCR GUIDELINES, *supra* note 2, ¶ 94; CSW Report on Refugee and Displaced Women and Children, *supra* note 1, ¶ 34 (calling for measures to improve health conditions for women and children). In addition to calling for improvements in the provision and distribution of food rations, the CSW Report also recognizes that access to primary health care can be made much more difficult by a variety of factors, including the lack of female health care personnel, lack of rape counseling programs, inconvenient hours, the distant location of facilities, and an over-emphasis on curative health services rather than preventive health services for women and children. It also notes the absence of services targeted at gynecological problems and family planning. *Id.*

9. UNHCR GUIDELINES, *supra* note 2, ¶ 95.

services.<sup>10</sup> Based on empirical studies of refugee populations and on her own visits to refugee camps in at least eight countries, Wulf reports extremely high levels of fertility rates among women in refugee contexts where the initial emergency situation has been brought under control.<sup>11</sup>

Wulf concludes that there are major barriers in many refugee settings to the provision of such services, in spite of the language in the UNHCR Guidelines calling for improved access to family planning services. These obstacles include both cultural and religious practices in the refugee community as well as the particular focus of health care providers.<sup>12</sup> Although health workers have developed remarkable skills for providing emergency relief in life-and-death situations, they have been less successful in developing primary health care programs responsive to the longer-term needs of refugee populations.<sup>13</sup>

Images of death and devastation are permanently etched in the minds of health workers. Even after the initial emergency situation is brought under control and rates of mortality and malnutrition decline, it is difficult both for those relief agencies who provide primary health care services and for the survivors of human tragedy to think in terms of long-term family planning.<sup>14</sup> Moreover, in many refugee contexts, such as the Afghan refugee camps along the Pakistani border, women are considered the caretakers of their culture. They have been told by religious and political leaders that the greatest contribution they can make to the "jihad," or holy war, is by having more children, especially male children.<sup>15</sup>

Together, all of these factors create a particularly complex backdrop for evaluating how international standards can be applied more effectively to protect refugee women's reproductive rights.

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10. See generally WULF, *supra* note 8.

11. WULF, *supra* note 8, at 1, 7-8.

12. WULF, *supra* note 8, at 14-16.

13. WULF, *supra* note 8, at 13-14; see also REFUGEE POLICY GROUP, ENSURING THE HEALTH OF REFUGEES: TAKING A BROADER VISION 2 (1990) ("A persistent failing is the inability to establish refugee health programs that are sustainable over the long-term and that encourage refugees to become participants in the planning and execution of the activities that are so vital to their own well-being.").

14. Meeting with Deirdre Wulf, at U.S. Agency for International Development, Arlington, Va. (Oct. 14, 1994); see also WULF, *supra* note 8, at 15.

15. WULF, *supra* note 8, at 15-16; see also Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 620 (1991) (describing role of Third World women in fight against colonialism, writing that "[t]he need to rally around a national identity . . . required that local women . . . also take it upon themselves to be 'the guardians of national culture, indigenous religion and family traditions'") (quoting K. JAYAWARDENA, *FEMINISM AND NATIONALISM IN THE THIRD WORLD* 8 (1986)).

Furthermore, applying human rights standards as the basis for ensuring refugees access to vital social services, including reproductive health care, raises difficult questions regarding the scope of state responsibility for refugees and other nonnationals living within their borders.<sup>16</sup> The final Programme of Action from the International Conference on Population and Development in Cairo affirms the application of universally recognized human rights standards to all aspects of population programs.<sup>17</sup> Basic to the concept of reproductive rights enshrined in the Programme of Action is the notion that all individuals and couples should be able to decide freely and responsibly on the number, spacing, and timing of their children, to have the information and means to do so, and to have the right to attain the highest standard of reproductive health.<sup>18</sup> It also includes the right of all people to make decisions concerning reproduction free from coercion, discrimination, and violence.<sup>19</sup>

This Paper will examine how international human rights norms can be applied more effectively to protect and ensure the reproductive rights of refugee women. It will examine the gap between refugee law and the actual practice of UNHCR and international donors in responding to refugee women's needs. This examination explores the applicability of other legal and policy frameworks for addressing issues of sexual violence as well as reproductive health issues more generally. This Paper also will begin to explore the issue of transnational versus individual state responsibility for guaranteeing to refugee women, on a nondiscriminatory basis, the full range of civil, political, economic, social, and cultural rights to which they are entitled under international law.

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16. See, e.g., Beth Whitehouse, *L.I. Hispanics Fear California's 187: Immigrant Backlash Decried*, *NEWSDAY*, Nov. 11, 1994, at A6 (discussing California's Proposition 187, passed into law on November 8, 1994, which denies schooling, welfare, and all but emergency health care to undocumented immigrants and requires teachers, welfare, public health workers, and police to report suspected undocumented immigrants to the Immigration and Naturalization Service); see also Jennifer Dixon, *Benefits of Legal Immigrants Targeted*, *BOSTON GLOBE*, Nov. 22, 1994, at 3 (discussing how GOP's proposed "Contract with America" would deny welfare benefits and other government services, including 60 different health, education, job training, nutrition, housing, cash, and social service programs like Medicaid and Supplemental Security Income, to most legal immigrants, many of them elderly parents of U.S. citizens).

17. ICPD Programme of Action, *infra doc. biblio.*, ¶ 1.15.

18. ICPD Programme of Action, *infra doc. biblio.*, ¶ 7.3.

19. ICPD Programme of Action, *infra doc. biblio.*, ¶ 7.2.

## II. UNHCR, REFUGEE LAW AND THE PROTECTION OF REFUGEE WOMEN

### A. *UNHCR and the Refugee Convention*

Since 1951, The Office of the United Nations High Commissioner for Refugees has been responsible for protecting refugees and promoting lasting solutions to their problems. The Convention relating to the Status of Refugees (Refugee Convention) has been the governing legal standard under which the legal status, rights, and obligations of refugees traditionally have been defined and enforced.<sup>20</sup> Originally, the Refugee Convention applied only to refugee situations known to exist at the time of its adoption.<sup>21</sup> Moreover, many States opted to make the Convention's provisions applicable only to events occurring in Europe, thereby excluding refugees from other parts of the world.<sup>22</sup> With the emergence of new refugee situations, however, it became clear that the provisions of the Refugee Convention should be universalized.<sup>23</sup> On January 31, 1967, after consideration by the General Assembly of the United Nations, a Protocol relating to the Status of Refugees was opened for accession and entered into force on October 4, 1967.<sup>24</sup> By acceding to the Protocol, States undertook to apply the same substantive definition of refugee set forth in the Refugee Convention, but without the dateline or geographic limitations established in that Convention.<sup>25</sup>

The Refugee Convention is founded on the principles set forth in the Universal Declaration of Human Rights that "human beings shall enjoy fundamental rights and freedom without discrimination."<sup>26</sup> It

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20. See Convention on the Status of Refugees, 189 U.N.T.S. 137 (entered into force Apr. 22, 1954) [hereinafter Refugee Convention].

21. *Id.* art. 1(A)(1)-(2).

22. *Id.* art. 1(B) ("For the purposes of this Convention, the word 'events occurring before 1 January 1951' in Article 1, Section A, shall be understood to mean either: (a) 'events occurring in Europe before 1 January 1951' or 'events occurring in Europe or elsewhere before 1 January 1951' and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention."); see also James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 HARV. INT'L L.J. 129, 131, 149, 154-56 (1990).

23. 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 4 (1988) [hereinafter UNHCR HANDBOOK].

24. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267 (entered into force Oct. 4, 1967).

25. *Id.* pmb., ¶ 2.

26. See Refugee Convention, *supra* note 20, pmb., ¶ 1; see also Universal Declaration of Human Rights, *infra doc. biblio.*, art. 2 ("Everyone is entitled to all the rights and freedoms set

was entered into based on a commitment of the Contracting Parties of the United Nations "to assure refugees the widest possible exercise of these fundamental rights and freedoms."<sup>27</sup> Recognizing the social and humanitarian nature of the problem of refugees as well as the heavy burden that granting asylum may impose on certain countries, the Convention calls on States to do everything in their power to prevent refugee crises from becoming a cause of international tension and to seek solutions through international cooperation.<sup>28</sup> The Convention then proceeds to give a basic definition of who is (and who is not) a refugee and to define the legal status of refugees and their rights and duties in their country of refuge.<sup>29</sup>

Under the Refugee Convention, UNHCR is compelled to protect any person who,

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>30</sup>

Nevertheless, while application of this highly individualized definition of refugee still forms the core of UNHCR's work, its mandate has evolved to accommodate the evolving nature of refugee flows.<sup>31</sup>

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forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

27. Refugee Convention, *supra* note 20, pmb., ¶ 2.

28. Refugee Convention, *supra* note 20, pmb., ¶¶ 4-6.

29. Refugee Convention, *supra* note 20, art. 1.

30. Refugee Convention, *supra* note 20, art. 1(A)(2). Crucial to the legal-status determination is the principle of *non-refoulement*, as set forth in Article 33 of the Refugee Convention, which prohibits Contracting States from expelling or returning a refugee "in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group, or political opinion." *Id.* art. 33.

31. In 1969, the Organization of African Unity adopted a broader definition of refugee, which includes "every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality." OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, *adopted* Sept. 10, 1969, art. (I) (2), 1001 U.N.T.S. 14691 (entered into force June 20, 1974). This definition largely has been adopted by UNHCR in its work. Similarly, the Cartagena Declaration on Refugees, adopted by experts and representatives from 10 Latin American governments, broadens the definition of refugee to include "persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflict, massive violations of human rights or other circumstances which have seriously disturbed public order." Cartagena Declaration on Refugees, *Adopted at the Colloquium, entitled "Coloquio Sobre la Protección Internacional de los Refugiados en América Central, México y Panamá: Problemas Jurídicos y*

Thus, although many States in the developed world continue to apply the narrow definition of refugee found in the Refugee Convention, States in Africa and Latin America apply a broader definition, committing themselves to the principle of *non-refoulement* of individuals fleeing generalized violence. Similarly, UNHCR has, in practice, adopted this broader definition of refugee, basing its own intervention on an assessment of conditions in the refugee-producing country rather than on an analysis of each individual's claim.<sup>32</sup>

In its commitment to find lasting solutions to the problems of refugees, UNHCR seeks to ensure that those who qualify for refugee status are granted asylum and a legal status that takes account of their particular situation and needs.<sup>33</sup> UNHCR seeks to ensure that refugees are treated in accordance with recognized international standards and receive an appropriate legal status, including, where possible, the same economic and social rights as nationals of the country in which they have been granted asylum.<sup>34</sup> The Refugee Convention ensures to those who fall within the refugee definition a broad range of civil, political, economic, social, and cultural rights.<sup>35</sup> Although the rights of refugees are not always coextensive with the rights of nationals, the Convention creates in those refugees lawfully in the country of asylum a privileged class of nonnationals.<sup>36</sup> In addition to guaranteeing them certain civil and political rights,<sup>37</sup> it entitles them to the same economic, social, and cultural rights as nationals in a number of key areas, including the right to public relief,<sup>38</sup> the right to elementary education,<sup>39</sup> participation in ration-

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Humanitarians," held from Nov. 19-22, 1984, in Cartagena, Colombia [hereinafter Cartagena Declaration]. Although nonbinding, this Declaration has been accepted and applied by Latin American States and may constitute an emerging principle of customary international law in the region. See, e.g., UNHCR, *THE STATE OF THE WORLD'S REFUGEES: THE CHALLENGE OF PROTECTION* 166 (1993) [hereinafter *STATE OF THE WORLD'S REFUGEES*].

32. *STATE OF THE WORLD'S REFUGEES*, *supra* note 31, at 170.

33. *STATE OF THE WORLD'S REFUGEES*, *supra* note 31, at 171.

34. *STATE OF THE WORLD'S REFUGEES*, *supra* note 31, at 171.

35. See Refugee Convention, *supra* note 20, art. 3 (establishing right to nondiscrimination); *id.* art. 4 (establishing right to freedom of religion); *id.* art. 8 (establishing right to exemption from exceptional measures taken against nationals of refugee's country of origin); *id.* art. 15 (establishing right to freedom of association); *id.* art. 16 (establishing rights of access to courts); *id.* ch. III (establishing right to gainful employment); *id.* ch. IV (establishing right to welfare).

36. See David A. Martin, *The Refugee Concept: On Definitions, Politics, and the Careful Use of a Scarce Resource*, in *REFUGEE POLICY: CANADA AND THE UNITED STATES* 30, 30-34 (1991), discussed in T. Alexander Aleinikoff, *From "Refugee Law" to the "Law of Coerced Migration,"* in *IMMIGRATION LAW: UNITED STATES AND INTERNATIONAL PERSPECTIVES ON ASYLUM AND REFUGEE STATUS* 25, 28 (Am. U. J. Int'l L. & Pol'y & Loy. L.A. Int'l & Comp. L.J. eds., 1994).

37. See *supra* note 35 (listing provisions of Refugee Convention that guarantee civil and political rights).

38. Refugee Convention, *supra* note 20, art. 23.

39. Refugee Convention, *supra* note 20, art. 22.



ing systems,<sup>40</sup> freedom of religion,<sup>41</sup> and generally, rights under labor and social security legislation, including maternity, sickness, and disability.<sup>42</sup> Together, the Refugee Convention, the 1967 Protocol, and the practice of UNHCR have created a framework to provide for the protection and assistance needs of refugees. Nonetheless, the narrow definition of refugee has, in many contexts, limited the access of most asylum seekers to the same social services as nationals of the host country.

### *B. The Human Rights of Refugee Women*

#### *1. Refugees and the application of human rights standards*

Until fairly recently, issues regarding the treatment of refugees in the host country were generally addressed through application of the Refugee Convention. There has been limited analysis, however, regarding the extent to which refugees living in host countries are entitled to the protection of other international covenants, including the International Covenant on Civil and Political Rights (Civil and Political Covenant),<sup>43</sup> the International Covenant on Economic, Social and Cultural Rights (Economic Covenant),<sup>44</sup> and the Convention on the Elimination of All Forms of Discrimination Against Women.<sup>45</sup> To the extent that the human rights of refugees have been addressed, it has generally been in the context of the violation of these rights by the country of origin.<sup>46</sup> Some of the reasons for this are apparent. Human rights law, a post-World War II phenomenon, developed largely in response to the recognized need by the international community to develop international norms and institutions to hold States accountable for abuses *against their own nationals*. Member States may be more reluctant to press claims against a host State that has opened its own borders to refugees and other asylum seekers fleeing violence and human rights abuses in

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40. Refugee Convention, *supra* note 20, art. 20.

41. Refugee Convention, *supra* note 20, art. 4.

42. Refugee Convention, *supra* note 20, art. 24. With regard to certain economic rights, including the rights to form trade unions and to engage in wage-earning employment, it guarantees refugees treatment equal to that accorded whatever category of alien receives the most favorable treatment by the host State. *See id.* arts. 15, 17.

43. Civil and Political Covenant, *infra doc. biblio.*

44. Economic Covenant, *infra doc. biblio.*

45. *See* REFUGEE POLICY GROUP, REFUGEES AND HUMAN RIGHTS: A RESEARCH AND POLICY AGENDA 7 (1989) [hereinafter REFUGEES AND HUMAN RIGHTS].

46. *See, e.g.,* G.J.L. Coles, *Human Rights and Refugee Law: Refugees and Human Rights*, 91 BULL. HUM. RTS. 63 (1992); Peter Nobel, *Blurred Vision in the Rich World and Violations of Human Rights: A Critical Assessment of the Human Rights and Refugee Linkage*, 91 BULL. HUM. RTS. 74 (1992).

their own country. Similarly, the fear of expulsion or return, as well as the generally powerless situation of most refugees, may limit their capacity to assert certain rights in the host country. In addition, because, by definition, a refugee claimant cannot invoke the protection of the country of origin, customary laws regarding responsibility for injury to aliens that are based on a State's ability to intercede on behalf of its own nationals are inoperable.<sup>47</sup>

Moreover, the whole area of aliens' rights has become extremely controversial in recent years, particularly in the West. Even where human rights standards have been applied to guaranty refugees certain civil and political rights, there are both political and legal obstacles to extending refugees' and other nonnationals' human rights guaranties to include economic, social, and cultural rights.<sup>48</sup> Article 2(3) of the Economic Covenant, for example, explicitly limits the duties of developing countries toward nonnationals by providing that "[d]eveloping countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to nonnationals."<sup>49</sup> Similarly, in 1986, when the U.N. General Assembly adopted the Declaration on the Human Rights of Non-Nationals,<sup>50</sup> while acknowledging that aliens enjoyed a broad range of civil rights,<sup>51</sup> it recognized only certain economic and social rights,

47. See, e.g., L. OPPENHEIM, *Position of Individuals in International Law*, in 1 INTERNATIONAL LAW: A TREATISE 636, 640 (Lauterpacht ed., 1955) ("[I]f individuals who possess nationality are wronged abroad, it is, as a rule, their home State only and exclusively which has a right to ask for redress, and these individuals themselves have no such right."). But see RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES part VII, introductory note (1987) [hereinafter RESTATEMENT (THIRD)] (noting convergence of human rights principles with customary law for responsibility for injury to aliens); THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW (R. Lillich ed., 1984).

48. See *supra* note 16; see also RESTATEMENT (THIRD), *supra* note 47, ¶ 711, cmt. (c). Comment (c) states:

The Universal Declaration proclaims also certain economic, social and cultural rights, later developed in the Covenant on Economic, Social and Cultural Rights . . . . The traditional responsibility of states under customary law does not include the obligation to extend such rights to foreign nationals. . . . Customary law, however, requires that foreign nationals be accorded the equal protection of the laws and forbids unreasonable distinctions between aliens and nationals. Distinctions between aliens and nationals in regard to some economic, social or cultural rights may not be unreasonable.

*Id.* It is worth noting that in the United States, the Republican Party's "Contract with America" barring most legal immigrants from a broad range of social services would not apply to individuals qualifying as refugees. See Dixon, *supra* note 16, at 3.

49. Economic Covenant, *infra doc. biblio.*, art. 2(3).

50. Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, adopted, Dec. 13, 1985, G.A. Res. 144, 40th Sess., U.N. Doc. A/RES/40/144 (1986) [hereinafter Declaration on the Human Rights of Nonnationals].

51. *Id.* art. 5.

including the rights to "health protection, medical care, social security, social services, education, rest and leisure"<sup>52</sup> for "aliens living lawfully in the territory of a state,"<sup>53</sup> and only insofar as they fulfilled certain regulatory requirements for participation and "undue strain is not placed on the resources of the State."<sup>54</sup>

Refugees—at least those who qualify for refugee status under the narrow definition set forth in Article 1 of the Refugee Convention—remain a privileged class of nonnationals under the Refugee Convention and international law in general, guaranteed certain civil and political rights as well as national treatment regarding most social benefits. Nonetheless, to the extent that the Refugee Convention is seen as the principle mechanism for ensuring the rights of refugees, the broader human rights concerns of refugees may be marginalized from the mainstream of human rights work. This is particularly true given that the Refugee Convention lacks enforcement provisions and that UNHCR plays largely an advisory role vis-a-vis member states.<sup>55</sup> While it is important to explore how the Refugee Convention can be used more effectively to address the rights and needs of refugees, other international covenants, including the Economic Covenant, the Civil and Political Covenant, and the Convention on the Elimination of All Forms of Discrimination Against Women may provide valuable mechanisms for addressing the rights and needs of refugee women.

Since the mid-1980s, both intergovernmental and nongovernmental organizations have begun to explore how human rights standards and humanitarian law can be applied more effectively to protect refugees

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52. *Id.* art. 8(1)(c).

53. *Id.* art. 8(1).

54. *Id.* The Declaration on the Human Rights of Nonnationals, although a nonbinding resolution, can be seen, in one sense, as an important advance for refugees and other nonnationals. In addition to recognizing that aliens enjoy many of the same civil and political rights as nationals, it also recognizes that a host government has certain obligations to lawful aliens for the provision of basic social services. Moreover, it explicitly provides that it does not prejudice the enjoyment by aliens of rights accorded under international law where it recognizes them to a lesser extent. *Id.* art. 2(2). Nonetheless, while the language on civil and political rights is quite broad, the language on economic and social rights is more restrictive than the language encountered in the Universal Declaration or the Economic Covenant and would appear to give states a solid justification under emerging customary law for treating different categories of nonnationals differently. Although it would recognize certain economic and social rights for those aliens "lawfully" living in a host country, it would allow a host government, consistent with the approach taken in Article 2(3) of the Economic Covenant, to consider the economic impact on the State in deciding how to allocate social services to "lawful" aliens. *Id.* art. 8(c). Moreover, by ensuring economic and social rights only to those "lawfully" within its territory, it creates an enormous loophole, enabling States to deny social benefits to undocumented aliens, including those with well-founded fears of returning to their homelands who may not qualify for refugee status.

55. See Hathaway, *supra* note 22, at 166 ("[T]here has been a steady decline in the legal authority of the UNHCR . . . to the point that UNHCR now has little more than an advisory role in protection decisions.").

and the displaced.<sup>56</sup> Nonetheless, the focus has been primarily on civil and political rights. More research is needed on the extent to which host governments and the international community as a whole can be held accountable under international law for the denial of refugees' economic, social, and cultural rights. The remainder of this Paper will examine the emergence of international norms applicable to refugee women, and in particular, will explore how the application of the human rights covenants and the Women's Convention to issues of sexual violence against refugee women can be extended to ensure the reproductive rights and reproductive health of refugee women.

## 2. *Refugee women and sexual violence*

In recent years, in light of well-publicized human rights abuses against women in Bosnia, parts of Africa, and other parts of the world,<sup>57</sup> UNHCR has begun to focus more attention on violations of the human rights of refugees, and in particular, refugee women. In the course of UNHCR's involvement in several large-scale refugee situations, UNHCR became aware of the use of systematic sexual violence against refugee women.<sup>58</sup> The UNHCR noted three scenarios in which such violence was occurring:

**RAPE AS A CAUSE OF FLIGHT.** The occurrence or the realistic fear of rape by members of military forces, in violation of humanitarian law, was one of the factors contributing to the flight of women and their families from many situations of armed conflict.<sup>59</sup>

**SEXUAL VIOLENCE DURING FLIGHT.** The Executive Committee, an advisory body of UNHCR made up of major refugee-receiving,

56. See, e.g., *Note on International Protection to General Assembly*, Executive Committee of the High Commissioner's Programme, 41st Sess. at 8, U.N. Doc. A/AC.96/750 (1990) ("[H]uman rights institutions and organizations should be utilized more actively and effectively by States, as well as by concerned refugee organizations to seek to address the human rights concerns in refugee situations."); Declaration of Human Rights of Nonnationals, *supra* note 50, annex, at 2 ("[T]he protection of human rights and fundamental freedoms provided for in international instruments should also be ensured for individuals who are not nationals of the country in which they live."); see also ROBERTA COHEN, HUMAN RIGHTS AND HUMANITARIAN EMERGENCIES: NEW ROLES FOR U.N. HUMAN RIGHTS BODIES (1992); LAWYERS COMMITTEE FOR HUMAN RIGHTS, THE HUMAN RIGHTS OF REFUGEES AND DISPLACED PERSONS: PROTECTIONS AFFORDED REFUGEES, ASYLUM SEEKERS AND DISPLACED PERSONS UNDER INTERNATIONAL HUMAN RIGHTS, HUMANITARIAN AND REFUGEE LAW (1991); REFUGEES AND HUMAN RIGHTS, *supra* note 45, at 6-8.

57. See, e.g., Claude Lewis, *Women Are Uniting to Battle Rape and Murder in War Zones*, PHILA. INQUIRER, Mar. 31, 1993, at A11; see also 5 AFRICA WATCH/WOMEN'S RIGHTS PROJECT, SEEKING REFUGE, FINDING TERROR: THE WIDESPREAD RAPE OF SOMALI WOMEN REFUGEES IN NORTH EASTERN KENYA NO. 13 (1993) [hereinafter SEEKING REFUGE, FINDING TERROR].

58. *Note on Certain Aspects of Sexual Violence Against Refugee Women*, *supra* note 5, ¶ 1; see also CSW Report on Refugee and Displaced Women and Children, *supra* note 1, ¶ 28 (recognizing that physical security of refugee women is at risk both during flight and after they have found asylum).

59. CSW Report on Refugee and Displaced Women and Children, *supra* note 1, ¶ 12; see also STATE OF THE WORLD'S REFUGEES, *supra* note 31, at 70.

refugee-producing, and donor States, noted many incidents of sexual violence against women during flight, including violence committed by bandits, smugglers, border guards, police, members of the military, and irregular forces, and elements of local populations.<sup>60</sup>

*IN THE COUNTRY OF ASYLUM.* Women refugees in certain refugee camps have been subject to widespread sexual violence at the hands of bandits, security forces, and other refugees.<sup>61</sup>

This Paper will focus on violence against women in the country of asylum.

Refugee women usually arrive in the country of asylum completely destitute, often without documentation, and with no effective access to legal or administrative resources.<sup>62</sup> Moreover, the social disruption caused by flight often means that women and girls do not benefit from the traditional protection provided by community, clan, and family.<sup>63</sup> UNHCR has confronted the abuse of women by soldiers who kidnap refugee children and demand sex from their mothers as ransom for their return.<sup>64</sup> In other situations, camp guards demand sex from refugee women in exchange for access to food or health care.<sup>65</sup> UNHCR also has encountered prostitution of refugee women by camp officials or other refugees. Unaccompanied girls are especially vulnerable. The victims of sexual violence or abuse also may suffer ostracism by their communities.<sup>66</sup> Where there is no meaningful opportunity for employment or where women have no voice in the distribution of foodstuffs or camp design, women may be induced to exchange sex for basic foodstuffs or access to health care. The breakdown of traditional norms and the confinement of camp life can lead to increased sexual abuse within the family.<sup>67</sup>

The UNHCR has begun to take measures to combat the problem of sexual violence against refugee women. In May 1993, the High Commissioner presented to the Executive Committee's Sub-Commit-

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60. See *Note on Certain Aspects of Sexual Violence Against Refugee Women*, *supra* note 5, ¶ 13; see also UNHCR GUIDELINES, *supra* note 2, ¶ 31.

61. See *Note on Certain Aspects of Sexual Violence Against Refugee Women*, *supra* note 5, ¶¶ 14-15; see also SEEKING REFUGE, FINDING TERROR, *supra* note 57, at 2.

62. See *Note on Certain Aspects of Sexual Violence Against Refugee Women*, *supra* note 5, ¶ 14.

63. *Note on Certain Aspects of Sexual Violence Against Refugee Women*, *supra* note 5, ¶ 14; see also UNHCR GUIDELINES, *supra* note 2, ¶ 37.

64. See *Note on Certain Aspects of Sexual Violence Against Refugee Women*, *supra* note 5, ¶ 16.

65. *Note on Certain Aspects of Sexual Violence Against Refugee Women*, *supra* note 5, ¶ 16.

66. *Note on Certain Aspects of Sexual Violence Against Refugee Women*, *supra* note 5, ¶ 18.

67. *Note on Certain Aspects of Sexual Violence Against Refugee Women*, *supra* note 5, ¶ 19; see also UNHCR GUIDELINES, *supra* note 2, ¶ 38 ("Heightened levels of domestic violence are frequent where refugees have lived for extended periods of time in the artificial environment of a refugee camp.").

tee of the Whole on International Protection the Note on Certain Aspects of Sexual Violence Against Women.<sup>68</sup> As a result, the Working Group on Refugee Women and Children was convened by the Chairman of the Executive Committee, who requested:

the High Commissioner, given the diversity and persistent character of certain obstacles hampering the protection of refugee women and children, in consultation with the Chairman of the Executive Committee, to convene an informal working group of the committee to examine these obstacles, as well as review options and propose concrete measures to overcome them.<sup>69</sup>

In the Conclusions of the Executive Committee of UNHCR, issued in October 1993, the Executive Committee notes the "widespread occurrence of sexual violence in violation of the fundamental right to personal security as recognized in international human rights and humanitarian law."<sup>70</sup> The Committee stressed "the importance of international instruments relating to refugees, human rights and humanitarian law for the protection of asylum seekers, refugees and returnees against sexual violence."<sup>71</sup> It strongly condemned persecution through sexual violence, which it recognized as "a gross violation of human rights," "a grave breach of humanitarian law" when committed in the context of armed conflict, and "a particularly serious offense to human dignity."<sup>72</sup> Explicitly recognizing the human rights of refugees both in the country of origin and the country of refuge, it called upon States "to respect and ensure the fundamental right of all individuals within their territory to personal security, *inter alia* by enforcing relevant national laws in compliance with international legal standards."<sup>73</sup>

Implicitly recognizing the critical link between protection and assistance, it called upon States to adopt concrete measures to prevent and combat sexual violence, and upon States and UNHCR to ensure equal access of women and men to refugee status determination procedures, and to all forms of personal documentation relevant to refugee freedom of movement, welfare, and civil status.<sup>74</sup> The Executive Committee has emphasized that

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68. See *supra* note 5; see also UNHCR Working Group on Refugee Women & Children, Discussion Paper (UNHCR) ¶ 1 (Apr. 15, 1994).

69. U.N. ESCOR, Executive Committee of the High Commissioner's Programme, 44th Sess., ¶ 19(y), U.N. Doc. A/AC.96/XLIV/(RP.3) (1993) [hereinafter 44th Session of the Executive Committee of the High Commissioner's Programme].

70. *Id.* ¶ 21, pmbl.

71. *Id.*

72. *Id.* ¶ 21(a).

73. *Id.* ¶ 21(b).

74. *Id.* ¶ 21(c).

*there can be no doubt* that when rape or other forms of sexual violence committed for reasons of race, religion, nationality, political opinion, or membership of a particular social group is condoned by the authorities, it *may* be considered persecution under the definition of the term "refugee" in the 1951 Convention.<sup>75</sup>

UNHCR encouraged States to recognize as refugees those persons whose claims to refugee status are based on a well-founded fear of persecution through sexual violence on one of the five grounds, called on States to treat victims of sexual violence with particular sensitivity, and called for training programs designed to ensure that those involved in refugee status determinations are sensitized to issues of gender and culture.<sup>76</sup> UNHCR encouraged the participation of refugee women in decisions relating to the adoption of durable solutions to their problems.<sup>77</sup> Finally, UNHCR called on the High Commissioner, in cooperation with other bodies and organizations dealing with human rights, to increase awareness of the rights and needs of refugee women and promote full implementation of the Guidelines on the Protection of Refugee Women.<sup>78</sup>

On March 8, 1995, in recognition of International Women's Day, UNHCR released detailed Guidelines on the Prevention of and Response to Sexual Violence Against Refugees.<sup>79</sup> Designed to assist field staff and implementing partners with the protection and assistance of refugees,<sup>80</sup> the Guidelines define sexual violence,<sup>81</sup> its

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75. See *Note on Certain Aspects of Sexual Violence Against Refugee Women*, *supra* note 5, ¶ 29 (emphasis added). The limited advisory role that UNHCR exercises over the procedures that States employ in determining refugee status is apparent from the use of the word "may" by the Executive Committee here, rather than more compulsory terms such as "must" or "should." See also *Conclusions on the International Protection of Refugees*, Conclusion No. 39 (XXXVI), U.N. HCR, Executive Committee of the High Commissioner's Programme, U.N. Doc. HCR/IP/2/Eng/Rev.1991 (1985) (recognizing that "States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh and 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' . . .") [hereinafter Conclusion No. 39].

76. 44th Session of the Executive Committee of the High Commissioner's Programme, *supra* note 69, ¶ 21(d), (g), (i).

77. 44th Session of the Executive Committee of the High Commissioner's Programme, *supra* note 69, ¶ 21(c).

78. 44th Session of the Executive Committee of the High Commissioner's Programme, *supra* note 69, ¶ 21(k).

79. See UNHCR Update, UNHCR Issues Guidelines on Responding to Sexual Violence Against Refugees, Geneva, Switz. (Mar. 7, 1995); see also DRAFT GUIDELINES ON SEXUAL VIOLENCE, *supra* note 5; Telephone Interview with Ann Howarth Wiles, Senior Coordinator for Refugee Women, UNHCR, Geneva, Switz. (Jan. 9, 1995). The new Guidelines were released as this article was going to press, and were not yet available in Washington, D.C. for my review. Thus, my analysis is based largely on the Draft Guidelines released in June 1994, on the March 7, 1995 press release, and on conversations with UNHCR officials.

80. DRAFT GUIDELINES ON SEXUAL VIOLENCE, *supra* note 5, at 2-3.

causes and effects,<sup>82</sup> and the situations where it may occur,<sup>83</sup> then discuss preventive measures that can be taken by refugees themselves and those responsible for their cases, including refugee workers and the host government.<sup>84</sup> The Guidelines also propose practical measures for responding to incidents of sexual violence.<sup>85</sup> Finally, the Guidelines discuss possible remedies under local and international law, as well as the effect of sexual violence on the refugee status determination process.<sup>86</sup>

### 3. *Expanding human rights protection for refugee women*

#### a. *A brief history*

The international community's growing commitment to developing an integrated approach to meeting refugee women's protection and assistance needs was reflected in the final document to the 1984 World Conference on Women in Nairobi, Kenya.<sup>87</sup> The Nairobi Forward Looking Strategies for the Advancement of Women recognized the problems faced by refugee and displaced women and children and called on the international community to continue to provide relief assistance and launch special relief programs providing legal, educational, social, humanitarian, and moral assistance.<sup>88</sup>

In April 1985, UNHCR hosted a Roundtable on Refugee Women.<sup>89</sup> That year, at its thirty-sixth session, UNHCR's Executive Committee issued Conclusion No. 39, the first to recognize the special protection and assistance needs of refugee women. It called upon States and UNHCR to redefine old programs and develop new ones to safeguard the physical integrity and safety of refugee women and their equality of treatment, and encouraged the participation of

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81. DRAFT GUIDELINES ON SEXUAL VIOLENCE, *supra* note 5, at 4.

82. DRAFT GUIDELINES ON SEXUAL VIOLENCE, *supra* note 5, at 7-9.

83. DRAFT GUIDELINES ON SEXUAL VIOLENCE, *supra* note 5, at 4-6.

84. DRAFT GUIDELINES ON SEXUAL VIOLENCE, *supra* note 5, at 10-15.

85. DRAFT GUIDELINES ON SEXUAL VIOLENCE, *supra* note 5, at 16-23.

86. DRAFT GUIDELINES ON SEXUAL VIOLENCE, *supra* note 5, at 24-30; *see infra* note 107 and accompanying text.

87. *Report of the World Conference to Review and Appraise the Achievements of the N Decade for Women: Equality, Development and Peace, Nairobi, Kenya, 15-26 July 1985*, ch. V, ¶¶ 298-299, U.N. Doc. A/Conf. 15 Sept., U.N. Sales No. E.85.IV.107 [hereinafter *Nairobi Forward Looking Strategies*].

88. *Id.*

89. *See* Conclusion No. 39, *supra* note 75, ¶¶ a, h; *see also* *Conclusions on the International Protection of Refugees*, Conclusion No. 46 (XXXVIII), U.N. HCR, Executive Committee of the High Commissioner's Programme, U.N. Doc. HCR/IP/2 (1987) (recognizing that refugee women have special protection and assistance needs, as well as special resources, and calling on States and concerned agencies to support efforts to give special attention to refugee women with view to improving existing protection and assistance programs).



refugee women in the design and implementation of programs.<sup>90</sup> In 1987, the Economic and Social Council selected the issue of refugee and displaced women and children for discussion by the Commission on the Status of Women at its thirty-fifth session. In 1989, in response to a conclusion of the Executive Committee calling for the appointment of an active senior-level steering committee on refugee women,<sup>91</sup> UNHCR appointed a Senior Coordinator for Refugee Women, whose task it would be to integrate appropriate programming for refugee women within ongoing UNHCR processes.<sup>92</sup> That same year, at its Fortieth Session, the Executive Committee requested the High Commissioner to provide at its following session a policy framework and organizational work plan for mainstreaming refugee women's issues within the organization.<sup>93</sup> An Expert Group Meeting took place in Vienna from July 2-6, 1990.<sup>94</sup> The meeting, organized in cooperation with UNHCR, was attended by experts from a number of countries, including countries that are host countries for refugees, countries with a special concern for refugees and the displaced, and organizations that provide resettlement assistance or have analyzed the problems of refugees.<sup>95</sup>

The Secretary General's Report on the Meeting concluded that while many of the problems of flight, survival, and adjustment faced by refugee women were gender-neutral, in practice, refugee women and children faced special problems.<sup>96</sup> The Report called for the reaffirmation of the civil, political, economic, social, and cultural rights of refugee and displaced women and children under international conventions, and for their implementation through laws, policies, and programs.<sup>97</sup>

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90. Conclusion No. 39, *supra* note 75, ¶ 1 h.

91. *Conclusions on the International Protection of Refugees*, Conclusion No. 54 (XXXIX), U.N. HCR, Executive Committee of the High Commissioner's Programme, U.N. Doc. HCR/IP/2 (1988) (recognizing special vulnerability of refugee women and requesting High Commissioner to provide detailed progress report on implementation of UNHCR's policies and programs for refugee women).

92. *See Making the Linkages: Protection and Assistance Policy and Programming to Benefit Refugee Women*, U.N. ESCOR, Executive Comm. of the High Commissioner's Programme, ¶ 5, U.N. Doc. E/CN.6/SC.2/CRP.16 (1993) [hereinafter *Making the Linkages*].

93. *Conclusions on the International Protection of Refugees*, Conclusion No. 560 (XL), U.N. HCR, Executive Committee of the High Commissioner's Programme, U.N. Doc. HCR/IP/2 (1989).

94. *See CSW Report on Refugee and Displaced Women and Children*, *supra* note 1. The Expert Group was organized by the Division for the Advancement of Women, Centre for Social Development and Humanitarian Affairs, UN Office at Vienna, in cooperation with UNHCR, and with financial assistance from UNIFEM.

95. *CSW Report on Refugee and Displaced Women and Children*, *supra* note 1, ¶ 4.

96. *CSW Report on Refugee and Displaced Women and Children*, *supra* note 1, ¶ 5.

97. *CSW Report on Refugee and Displaced Women and Children*, *supra* note 1, ¶ 6. The report calls for higher priority to be given by the international community to extending international protection to refugee women and children, including improvements in the procedures and

On August 20, 1990, UNHCR adopted its Policy on Refugee Women, which sets out the policy framework for the elaboration of an organizational work plan for integrating refugee women into all aspects of programming.<sup>98</sup> The Executive Committee also invited UNHCR to develop detailed guidelines on the protection of refugee women in order to give effect to this policy and urged that all action on behalf of refugee women be guided by human rights principles.<sup>99</sup>

In July 1991, UNHCR issued a document entitled Guidelines on the Protection of Refugee Women, which, in ratifying the conclusions reached by the Expert Group Meeting the previous year and implementing UNHCR's own Policy on Refugee Women, as well as Executive Committee recommendations, was issued to help the staff of UNHCR and its implementing partners identify the specific protection issues, problems, and risks facing refugee women.<sup>100</sup> The Guidelines assess the particular situation of refugee women, detailing both physical security and legal protection problems faced by refugee women. They also explore improvements that can be made in the adjudication of refugee women's asylum claims and in the delivery of assistance programs.

*b. The role of UNHCR protection officers*

In addressing protection issues faced by refugee women, the emphasis of UNHCR legal officers in recent years has been on a broader application of the Refugee Convention to legal status determinations involving gender-related claims. This has been a crucial development in refugee law and for refugee women's rights around the world. In 1991, UNHCR Guidelines on the Protection of Refugee Women established a framework for evaluating gender-related asylum claims that recognize both the particular nature of

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methods of determining refugee status. It recognizes that women who fear persecution because they have transgressed social norms or laws face particular difficulties in obtaining refugee status, because the determination of refugee status does not include persecution based on gender as a legitimate basis. It calls for measures to ensure greater protection from physical violence, sexual abuse, abduction, and the circumstances that force women and children into prostitution. It also recognizes the close link between protection and assistance measures, calling for greater attention to protection concerns in planning and implementing assistance programs. It called upon the main international organizations concerned, including UNHCR, UNICEF, UNDP, and WHO, to increase their capacity to respond to the needs of refugee and displaced women and children.

98. *UNHCR Policy on Refugee Women*, U.N. HCR, Executive Committee of the High Commissioner's Programme, 41st Sess., U.N. Doc. A/AC.96/754 (1990).

99. *Conclusions on the International Protection of Refugees*, Conclusion No. 64 (XLI), U.N. HCR, Executive Committee of the High Commissioner's Programme, U.N. Doc. HCR/IP/2 (1990) [hereinafter Conclusion No. 64].

100. UNHCR GUIDELINES, *supra* note 2, ¶ 16.

abuses suffered by women as well as some of the impediments and inequities faced by women in the asylum adjudication process.<sup>101</sup> A broadening of the definition of refugee to include the particular claims of women has been embraced by the Canadian government, which adopted its own guidelines on gender-related asylum claims in 1993.<sup>102</sup> Furthermore, at the time of this writing, the U.S. Immigration and Naturalization Service (INS) was preparing its own internal guidelines for the adjudication of gender-specific asylum claims.<sup>103</sup>

Nonetheless, while the importance of these developments for women's asylum claims cannot be overexaggerated, the broader human rights of women refugees and other forced migrants, especially in terms of the challenges they face in host countries, must not be overlooked. Whereas the central role of most UNHCR protection officers has been to engage in these threshold status determinations under the Refugee Convention, they have placed less focus on ensuring women refugees and asylum seekers the full range of rights and benefits set forth in the Refugee Convention and other human rights instruments.<sup>104</sup> When UNHCR's protection staff has expanded the scope of its work, the focus has been principally on violations of the right to life and personal security. Questions regarding the right of refugee women to adequate food, shelter, health care, and other benefits generally have been addressed as assistance issues rather than within a rights-based framework.

As one report notes, as of last year, only a small number of protection staff had attended People Oriented Planning (POP) workshops, due, evidently, to a perception by managers that POP training was assistance-focused, "rather than a planning tool to link assistance to physical and legal protection."<sup>105</sup> People Oriented

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101. UNHCR GUIDELINES, *supra* note 2, ¶¶ 53-76. This subject has been treated effectively in other publications, and will not be reexamined here. See, e.g., Jacqueline R. Castel, *Rape, Sexual Assault and the Meaning of Persecution*, 4 INT'L J. REFUGEE L. 39 (1992); Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 511 (1993); Pamela Goldberg, *Anyplace but Home: Asylum in the United States for Women Fleeing Intimate Violence*, 26 CORNELL INT'L L.J. 565 (1993); Pamela Goldberg, *Asylum Law and Gender-Based Persecution Claims*, 94 IMMIGR. BRIEFINGS 1 (Sept. 9, 1994); Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT'L L.J. 565 (1993); Nancy Kelly, *Guidelines for Women's Asylum Claims*, 71 INTERPRETER RELEASES 813 (June 27, 1994) [hereinafter Kelly, *Guidelines for Women's Asylum Claims*].

102. See *Women Refugee Claimants Fearing Gender-Related Persecution*, Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act, Immigration and Refugee Board, Ottawa, Can. (Mar. 9, 1993).

103. See Kelly, *Guidelines for Women's Asylum Claims*, *supra* note 101, at 813; Meeting with Owen Cooper, Assistant General Counsel, Immigration and Naturalization Service (Feb. 1, 1995).

104. See, e.g., *Making the Linkages*, *supra* note 92.

105. *Making the Linkages*, *supra* note 92, ¶ 46.

Planning is the refugee-specific analytic framework that serves as a needs assessment tool for gender-sensitive refugee programming. Introduced into the work of UNHCR in 1990, the goal of POP has been to achieve an in-depth knowledge of the distinct needs and resources of the refugee population and to ensure that different groups in a refugee community can benefit equally from protection and assistance activities. Employing a needs assessment process more traditionally associated with development organizations, it has been the tool used by UNHCR to develop greater understanding by UNHCR staff of the UNHCR Guidelines and implement these guidelines in the field.<sup>106</sup> It is essential that the holistic approach adopted by UNHCR through POP for developing integrated programming for refugee women successfully integrate protection concerns.

The focus of UNHCR protection officers may have changed somewhat in recent years with greater attention to the problems of sexual violence against refugee women. For example, the new Guidelines on Sexual Violence explicitly adopt a rights-based approach to deal with the problems of sexual violence against refugee women.<sup>107</sup> Furthermore, in 1990, the Executive Committee concluded:

[A]ll action taken on behalf of women who are refugees must be guided by the relevant international instruments relating to the status of refugees as well as other applicable human rights instruments, in particular, for parties thereto, the UN Convention on the Elimination of All Forms of Discrimination Against Women.<sup>108</sup>

It is in this context that application of international human rights standards to the reproductive needs of refugee women becomes feasible.

### III. REFUGEE WOMEN AND REPRODUCTIVE RIGHTS

A rights-based approach can be used effectively to protect refugee women from sexual violence and abuse. The new Guidelines on Sexual Violence are an important step in that they explore the utility (and limits) of national and international law for achieving effective legal redress for sexual violence and propose preventive measures, as well as measures that should be taken in the event an incident of sexual violence occurs. They recognize explicitly the applicability of local and international enforcement mechanisms for refugee women.

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106. See *Making the Linkages*, *supra* note 92, ¶ 6.

107. See DRAFT GUIDELINES ON SEXUAL VIOLENCE, *supra* note 5, at 24-30.

108. See Conclusion No. 64, *supra* note 99 (citing Women's Convention, *infra doc. biblio.*).

A rights-based approach also can be applied to promote the progressive realization of refugee women's economic, social, and cultural rights, including the right to decide freely and responsibly the number, spacing, and timing of their children, to have the information and means to do so, and to have the right to attain the highest standard of reproductive health.

The ICPD Programme of Action adopted by member states at Cairo emphasizes that it does not create any new rights. Rather, the concept of reproductive rights embraces "certain human rights that are already recognized in various international human rights documents and in other documents reflecting international consensus."<sup>109</sup> It also affirms the application of all the rights and freedoms set forth in the Universal Declaration of Human Rights to all human beings, "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."<sup>110</sup>

UNHCR Guidelines on the Protection of Refugee Women demonstrate the extent to which human rights norms have been applied to address abuses suffered by refugee women, while highlighting UNHCR's recognition of particular health problems faced by refugee women and strategies for addressing these problems. Although the Guidelines do not adopt explicit rights language throughout, they clearly implicate the full array of economic, social, cultural, civil, and political rights set forth in the Women's Convention, the Economic Covenant, the Civil and Political Covenant, and regional conventions. Nonetheless, the Guidelines tend to adopt a needs-based, rather than rights-based approach to addressing women's concerns over food, shelter, and access to health care.

This section, which will build upon the model developed by Rebecca Cook in *Women's Health and Human Rights*<sup>111</sup> and other publications, will examine how human rights standards can be applied more effectively to achieve fuller realization of refugee women's right to reproductive health and related human rights. It also will explore the role UNHCR can play in ensuring their implementation.

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109. ICPD Programme of Action, *infra doc. biblio.*, ¶ 7.3.

110. ICPD Programme of Action, *infra doc. biblio.*, ch. II, princ. I.

111. REBECCA J. COOK, *WOMEN'S HEALTH AND HUMAN RIGHTS* (1994); see also Rebecca J. Cook, *Human Rights and Reproductive Self-Determination*, 44 AM. U. L. REV. 975 (1995); Rebecca J. Cook, *International Protection of Women's Reproductive Rights*, 24 N.Y.U. J. INT'L L. & POL. 647 (1992).

### A. *The Right to Survival, Liberty, and Security*

Violence against women and girls does not necessarily abate when refugee women reach an asylum country. The abuse may be as flagrant as outright rape and abduction or as subtle as an offer of protection, documents or assistance in exchange for sexual favours. Perpetrators of such violence may include military personnel from the host country and resistance forces, as well as male refugees.<sup>112</sup>

UNHCR has found that sexual violence in the refugee context, where tolerated or condoned by the authorities, constitutes a serious violation of women's human rights, and may constitute a violation of humanitarian principles in the context of armed conflict.<sup>113</sup> Sexual violence against women violates a whole series of nonderogable rights. It is a grave violation of the fundamental human right to security of person.<sup>114</sup> It also may be a violation of the right to life if it results in the death of the victim.<sup>115</sup> Male security guards and camp administrators have been reported to demand sexual favours in exchange for access to basic food and health services. Women and young girls may be forced into prostitution to survive. In the case of forced prostitution, the right to freedom from slavery also is violated.<sup>116</sup>

In the context of armed conflict, whether internal or external, international humanitarian law also may be violated. Article 27 of the Fourth Geneva Convention of 1949 states that "women shall be especially protected against rape, enforced prostitution, or any form of indecent assault."<sup>117</sup>

Refugee women's rights to life, liberty, and security of person also are violated in less obvious ways. When rape and other forms of

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112. UNHCR GUIDELINES, *supra* note 2, ¶ 33.

113. See *Note on Certain Aspects of Sexual Violence Against Refugee Women*, *supra* note 5, ¶ 26.

114. See Universal Declaration of Human Rights, *infra doc. biblio.*, art. 3; see also African Charter, *infra doc. biblio.*, arts. 4, 6; American Convention, *infra doc. biblio.*, art. 7; Civil and Political Covenant, *infra doc. biblio.*, art. 9; European Convention, *infra doc. biblio.*, art. 5.

115. See African Charter, *infra doc. biblio.*, art. 5; American Convention, *infra doc. biblio.*, art. 4; European Convention, *infra doc. biblio.*, art. 2; Universal Declaration of Human Rights, *infra doc. biblio.*, art. 4.

116. See Women's Convention, *infra doc. biblio.*, art. 6; American Convention, *infra doc. biblio.*, art. 6; Convention for the Suppression of Traffic in Persons and the Exploitation of the Prostitution of Others, *adopted* Mar. 21, 1950, 575 U.N.T.S. 1342 (1966).

117. See Convention Relative to the Protection of Civilian Persons in Time of War, *adopted* Aug. 12, 1949, art. 27, 6 U.S.T. 3516 (entered into force Oct. 21, 1950); see also Protocol Additional to the Geneva Conventions of Aug. 12, 1949, *adopted* June 8, 1977, arts. 75, 75(2)(b), 76(1), 1977 U.N. Jurid. Y.B. 95 [hereinafter Protocol I] (entered into force Dec. 7, 1978); Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *adopted* June 8, 1977, art. 4(2)(e), 1977 U.N. Jurid. Y.B. 135 [Protocol II] (entered into force Dec. 7, 1978).

sexual violence result in infection with the HIV/AIDS virus, the ultimate consequence is also a violation of the right to life. Moreover, victims of rape often face unwanted pregnancies. When women are forced to carry these pregnancies to term, their right to liberty and security of person is violated, and where refugee women and young girls are at particularly high risk of maternal mortality, their right to survival also may be jeopardized.

In addition to the impact of sexual violence on refugee women's reproductive health, refugee women's reproductive rights are violated by the denial or lack of basic family planning services, which makes women vulnerable to unwanted pregnancies and STDs. Similarly, the lack of education on family planning services makes high risk refugee women and girls vulnerable to maternal mortality and morbidity.

As Rebecca Cook has noted:

The collective right to survival of women in groups at risk raises the question of whether States have a positive obligation to offer these groups appropriate health services, or, at least, education and counseling services that alert them both to risks and to means to minimize risks.<sup>118</sup>

In its Guidelines on Assistance in Emergency Situations, issued in June 1994, the United Nations Population Fund (UNFPA) found that family planning and reproductive health care are vital health and human rights concerns of populations affected by natural or man-made disaster, including refugee populations. Recognizing that access to reproductive health care and family planning is based on the right to physical integrity and security of person set forth in human rights documents, it called on the international community to safeguard these rights during relief efforts.<sup>119</sup>

*B. The Right to be Free from Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment*

In some cases, women and girls seeking asylum are incarcerated with hardened criminals. Closed facilities or camps are often surrounded by barbed wire, giving the appearance and reality of being prisons with prison-like lack of regard for individual

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118. COOK, WOMEN'S HEALTH AND HUMAN RIGHTS, *supra* note 111, at 24.

119. United Nations Population Fund, *UNFPA Assistance in Emergency Situations*, U.N. Doc. UNFPA/CM/94/43 (1994); *see also* Judy Mann, *Sex Happening in Refugee Camps Too*, WASH. POST, May 25, 1994, at E19 (discussing position paper issued in January by Brian Atwood, the director of U.S. Agency for International Development (USAID), in which it was written: "Early disaster relief may include feeding programs, disease control and emergency medical services, including immunizations, child survival interventions, and maternal and reproductive health care.").

freedoms. Inhuman surroundings can encourage inhumane actions.<sup>120</sup>

Heightened levels of domestic violence are frequent where refugees have lived for extended periods of time in the artificial environment of a refugee camp. There is evidence that psychological strains for husbands unable to assume normal cultural, social and economic roles can result in aggressive behavior towards wives and children.<sup>121</sup>

Sexual violence against refugee women also violates the right not to be subjected to torture or other cruel, inhuman, or degrading treatment or punishment, as well as the general prohibition on violence to person, cruel treatment, and torture and degrading treatment set forth in the Fourth Geneva Convention.<sup>122</sup> When sexual violence committed for reasons of race, religion, nationality, political opinion, or membership of a particular social group is condoned by the authorities, the Executive Committee has concluded that "there can be no doubt" that such violence may be considered persecution under the definition of "refugee" in the Refugee Convention.<sup>123</sup>

Unaccompanied adolescent girls and women are particularly vulnerable to sexual violence and abuse at the hands of military personnel, other refugees, and even camp guards.<sup>124</sup> Violence against and cruelty towards refugee women also occurs within the family. When increased levels of domestic violence against refugee women are tolerated by camp authorities, this also is violative of women's right to be free from torture and other cruel, inhumane, or degrading treatment or punishment.<sup>125</sup> The new Guidelines on Sexual Violence, while recognizing the social, cultural, and institutional barriers to successfully prosecuting cases of sexual violence, propose

120. UNHCR GUIDELINES, *supra* note 2, ¶ 36.

121. UNHCR GUIDELINES, *supra* note 2, ¶ 38.

122. See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, arts. 1, 2, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Supp. No. 51, at 197, U.N. Doc. E/CN.4/72, Annex (1984) (entered into force June 26, 1987) [hereinafter Convention Against Torture]; African Charter, *infra doc. biblio.*, art. 5; American Convention, *infra doc. biblio.*, art. 2; European Convention, *infra doc. biblio.*, art. 3; Civil and Political Covenant, *infra doc. biblio.*, art. 7; Universal Declaration of Human Rights, *infra doc. biblio.*, art. 5.

123. See Note on Certain Aspects of Sexual Violence Against Refugee Women, *supra* note 5, ¶ 29.

124. See UNHCR GUIDELINES, *supra* note 2, ¶ 33.

125. See Convention Against Torture, *supra* note 122, art. 1 ("[T]he term 'torture' means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . punishing him [sic] for an act he [sic] or a third person has committed or is suspected of having committed, or intimidating or coercing him [sic] or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." (emphasis added)).



a series of measures by which UNHCR protection officers, host governments, and relief organizations can effectively use international mechanisms both to prevent and to redress incidents of sexual violence and abuse of refugee women.

The denial of reproductive health care to refugee women or the imposition of an unwanted health status also may be cruel and inhumane.<sup>126</sup> When a refugee woman who has been raped is forced to carry an unwanted pregnancy to term, her rights are violated regardless of whether the pregnancy results from ethnic cleansing and forced impregnation or because health care providers (such as those with religious mandates) will not make reproductive health services available. As will be discussed in Part G, enforcement measures also are needed to ensure that UNHCR field staff and implementing partners comply with the Guidelines on the Protection of Refugee Women.

### *C. The Right of Women to be Free from All Forms of Discrimination*

Refugee women without proper documentation are particularly susceptible to exploitation and abuse. In many refugee situations, women are not routinely provided documents showing that they are legally in the country. The male head of household may have been given a document but he is not always present. If a military or police unit stops a refugee woman who has no documentation, she may find herself incarcerated even if she has permission to reside in the country. Alternatively, she may find it impossible to obtain international assistance or work authorization without the documentation and may turn to prostitution or other illegal pursuits to feed herself and her family.<sup>127</sup>

The Preamble to the Women's Convention notes that "in situations of poverty women have the least access to food, health, education, training and opportunities for employment and other needs."<sup>128</sup> This is particularly true in the refugee context, where, as the Guidelines note, "Refugee women who are unable to feed, clothe and shelter themselves and their children will be more vulnerable to manipulation and to physical and sexual abuse in order to obtain such necessities."<sup>129</sup> The Guidelines note that "the planning and implementation of assistance programmes can have direct, and sometimes adverse, consequences for the protection of refugee women if

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126. COOK, WOMEN'S HEALTH AND HUMAN RIGHTS, *supra* note 111, at 29.

127. UNHCR GUIDELINES, *supra* note 2, ¶ 41.

128. Women's Convention, *infra doc. bibl.*, pmb., ¶ 8.

129. UNHCR GUIDELINES, *supra* note 2, ¶ 9.

they ignore their special needs."<sup>130</sup>

UNHCR Guidelines indicate that decisions about food and the distribution of other items are usually made by international organizations and host governments in consultation with male leaders.<sup>131</sup> Inadequate processes for registering refugee women and providing them with documentation put refugee women at risk and create obstacles to their access to assistance measures, including health care.<sup>132</sup>

UNHCR has cited inappropriate health services as one of the principle obstacles to the good health of refugee women.<sup>133</sup> Relief agencies often focus on curative health services, where men, such as injured soldiers, are the primary users. Such facilities are at the expense of preventive efforts to improve the health status of women and children.<sup>134</sup> Where health services are provided to women, women's needs typically are met in their role as mothers, but other female-specific needs are often ignored, subordinating them to a reproductive role.<sup>135</sup>

As Rebecca Cook has noted, the standard set forth in the Women's Convention of eliminating all forms of discrimination against women, including private discrimination, goes beyond the principle of nondiscrimination outlined in the Universal Declaration, the Civil and Political Covenant, and other international instruments. It recognizes that women are subject to pervasive and subtle forms of sex and gender discrimination woven into the political, cultural, and religious fabrics of their societies.<sup>136</sup> Societal practices, such as those described above, may limit women's access to appropriate assistance measures including adequate health care. As I discuss below, the design of health care programs in the refugee context must be undertaken with women in mind, to ensure that they are responsive to their particular needs.

#### D. *The Right to Health*

Existing health services . . . often overlook female-specific needs. For example, gynecological services are frequently inadequate as are child-spacing services. Basic needs, such as adequate cloth and washing facilities for menstruating women, are overlooked. Serious

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130. UNHCR GUIDELINES, *supra* note 2, ¶ 10.

131. UNHCR GUIDELINES, *supra* note 2, ¶ 83.

132. UNHCR GUIDELINES, *supra* note 2, ¶ 41.

133. UNHCR GUIDELINES, *supra* note 2, ¶ 91.

134. UNHCR GUIDELINES, *supra* note 2, ¶¶ 96-97.

135. See WULF, *supra* note 8.

136. See COOK, WOMEN'S HEALTH AND HUMAN RIGHTS, *supra* note 111, at 20.

problems, such as infections and cervical cancer, and harmful practices such as female circumcision go all but undetected.<sup>137</sup>

The Women's Convention explicitly extends the nondiscrimination principles discussed above to the provision of health care and family planning services. States have the obligation under Article 12 of the Women's Convention to "take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning."<sup>138</sup> Similarly, Article 12 of the Covenant on Economic, Social and Cultural Rights entitles "everyone to the enjoyment of the highest attainable standard of physical and mental health."<sup>139</sup> The ICPD Programme of Action, basing its definition of reproductive health on that developed by the World Health Organization, defines reproductive health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity in all matters relating to the reproductive system."<sup>140</sup> It recognizes that migrants and displaced persons in many parts of the world have limited access to reproductive health care and may face serious threats to their reproductive health and rights. Highlighting the importance of the issue of sexual violence, it states that services must be sensitive to the needs of individual women and responsive to their often powerless situation.<sup>141</sup> Chapter X on International Migration deals specifically with the needs of refugee women, and calls for providing them access to adequate accommodation, education, health services, including family planning, and other necessary social services.<sup>142</sup> Chapter X, consistent with the empowerment principles set forth in Chapter IV,<sup>143</sup> also states that refugee women should be involved in the planning of refugee assistance activities and their implementation.<sup>144</sup>

Even where States are cutting back on many social services provided to nonnationals, refugees are entitled under international law to adequate social services, including health services, which encompass family planning services. Deirdre Wulf's study, however, indicates that family planning has not been viewed as a priority in refugee settings. The fact that in many contexts there does not appear to be an

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137. UNHCR GUIDELINES, *supra* note 2, ¶ 94.

138. Women's Convention, *infra doc. biblio.*, art. 12(1).

139. Economic Covenant, *infra doc. biblio.*, art. 12.

140. ICPD Programme of Action, *infra doc. biblio.*, ¶ 7.1.

141. ICPD Programme of Action, *infra doc. biblio.*, ¶ 7.11.

142. ICPD Programme of Action, *infra doc. biblio.*, ¶ 10.25.

143. ICPD Programme of Action, *infra doc. biblio.*, ¶ 4.1.

144. ICPD Programme of Action, *infra doc. biblio.*, ¶ 10.25.

overwhelming demand for the provision of family planning services has been one of the reasons given by health workers for not making such services available.<sup>145</sup> Indeed, as set forth in the ICPD Programme of Action, reproductive rights include the right to make decisions concerning reproduction free from coercion.<sup>146</sup> Relief assistance often is provided without consultation with the refugee community, and almost always without women's input. Pressuring refugee women who may have lost children in the emergency stages of a refugee crisis to use family planning services in the refugee context because rates of fertility are high is considered abhorrent by many relief workers, and viewed as a form of coercion.<sup>147</sup>

Nonetheless, fundamental to the concept of reproductive rights set forth in the ICPD Programme of Action is the right to attain the highest standard of sexual and reproductive health.<sup>148</sup> Where all available evidence indicates that health services provided in the refugee context tend to overlook most female-specific needs, including basic needs such as adequate cloth and washing facilities for menstruating women as well as treatment of serious conditions, such as vaginal infections and cervical cancer, refugee women's right to health, including refugee women's right to be free from all forms of discrimination in the delivery of health care services, is violated.<sup>149</sup> Women refugee's right to health also is violated by policies and practices that emphasize curative health services rather than preventive efforts that would improve the health of refugee women. It is violated by MCH services that respond only to women's needs as mothers. Moreover, the failure to provide adequate information on the benefits to high risk refugee women and girls of birth spacing and family planning may subject them to higher rates of maternal mortality and morbidity. The UNHCR Guidelines note that few, if any, programs focus on the needs of adolescent girls, even though early marriages and pregnancy are a reported cause of poor health.<sup>150</sup> Failure to offer adequate reproductive health care, or at least, education and counseling services alerting refugee women and girls to the risks of early or closely spaced pregnancies and harmful practices such as female genital mutilation violates their right to reproductive health.

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145. WULF, *supra* note 8, at 15.

146. ICPD Programme of Action, *infra doc. biblio.*, ¶ 7.3.

147. WULF, *supra* note 8, at 15.

148. See ICPD Programme of Action, *infra doc. biblio.*, ¶ 7.3.

149. See UNHCR GUIDELINES, *supra* note 2, ¶ 94.

150. UNHCR GUIDELINES, *supra* note 2, ¶ 94.

*E. Freedom from Sexual Stereotypes*

Relief officials often point to cultural constraints in involving women in decision-making, particularly where women have had a limited role in the country of origin. Looking to women as decision-makers under these circumstances, they argue, amounts to tampering with the culture of the group.<sup>151</sup>

Inappropriate or inaccessible health services can be obstacles to good health among refugee women and their families. The absence of female health practitioners has been one of the principal barriers to health care, particularly where cultural values prevent a woman from being seen by a man who is not a member of her immediate family.<sup>152</sup>

In some cases, the refugees are reluctant to use birth control because of cultural constraints or unfamiliarity.<sup>153</sup>

In a number of camps, non-governmental agencies provide health services, including those relating to maternal and child health and health education, but they are unable, because of their own religious or cultural constraints, to include family planning in their programs.<sup>154</sup>

As Deirdre Wulf's report indicates, many health workers are opposed to the whole concept of imposing family planning in the refugee context.<sup>155</sup> Health workers argue that they are not there to interfere with cultural and religious practices, and furthermore, that this is simply not what refugee women want. Refugee women, they say, want to rebuild the families they have lost. Moreover, religious and cultural leaders often consider childbearing the greatest contribution women can make to their culture.<sup>156</sup> The Guidelines also note that relief officials often point to cultural constraints in involving women in decisionmaking, particularly where women have had a limited role in their country of origin.<sup>157</sup> Moreover, when women's health needs are met, it is generally in their role as mothers. Implementing partners whose religious mandates prevent the provision of family planning services create an additional obstacle.<sup>158</sup>

Article 5(a), perhaps the most controversial and potentially far-reaching provision of the Women's Convention, requires that States

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151. UNHCR GUIDELINES, *supra* note 2, ¶ 13.

152. UNHCR GUIDELINES, *supra* note 2, ¶ 91.

153. UNHCR GUIDELINES, *supra* note 2, ¶ 94.

154. UNHCR GUIDELINES, *supra* note 2, ¶ 95.

155. WULF, *supra* note 8, at 15; see also Meeting with Deirdre Wulf, *supra* note 14.

156. WULF, *supra* note 8, at 15.

157. UNHCR GUIDELINES, *supra* note 2, ¶ 13.

158. UNHCR GUIDELINES, *supra* note 2, ¶ 95.

Parties commit themselves to take all appropriate measures

[t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.<sup>159</sup>

It is critical that this provision of the Women's Convention be integrated into the delivery of assistance programs to refugee women. Communal support systems for women in the country of origin generally have broken down in the refugee context, making women particularly vulnerable.<sup>160</sup> The policies and practices of implementing partners have tended to exacerbate many cultural stereotypes. Service providers' so-called sensitivity to cultural difference often has negative consequences for the delivery of assistance measures to refugee women. For example, the practice of principally consulting with male leaders in the design of the refugee camp and the distribution of food, health care, and other services, often means that women are denied access to such services.<sup>161</sup> Food and other supplies often are diverted to resistance forces or to sale on the black market.<sup>162</sup>

UNHCR and implementing partners must be sensitive to this reality in the delivery of assistance measures, including health care. Existing procedures must be revised, and women must be included in decisionmaking processes and, regardless of their marital status, provided with the documentation needed for access to services. Women—including the refugee women themselves—must be involved in the delivery of health care programs to refugee women to ensure that, in those societies where cultural values prevent a woman from being seen by a man, women are not denied adequate health care. Cultural practices harmful to women's reproductive health, such as female genital mutilation, also must be specifically addressed.<sup>163</sup>

Furthermore, UNHCR must ensure that the religious mandates of certain Christian-based relief organizations are not invoked to prevent the delivery to women of a broad range of reproductive health care services. It also is important that relief organizations' sensitivity to cultural and religious practices not be used as a smokescreen by segments within the Christian faith who share with certain Islamic

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159. Women's Convention, *infra doc. biblio.*, art. 5(a).

160. UNHCR GUIDELINES, *supra* note 2, ¶ 14.

161. UNHCR GUIDELINES, *supra* note 2, ¶ 83.

162. UNHCR GUIDELINES, *supra* note 2, ¶ 85.

163. UNHCR GUIDELINES, *supra* note 2, ¶ 102.

groups a vision of women as inferior and of men as in charge.<sup>164</sup> MCH services that respond to refugee women's health needs as mothers but overlook other female-specific needs tend to perpetuate stereotypical roles for refugee women in violation of the Women's Convention.

### *F. The Right to Information and Education*

Counselling regarding sexually-transmitted diseases is generally inadequate for both women and men.<sup>165</sup>

Access to family-planning information and devices is limited in most refugee camps even where it is available to women and men in the host country . . . . Refugee women may not be given sufficient information to provide informed consent to the use of birth control.<sup>166</sup>

One of the principal reasons given by health workers for not making family planning services more widely available to refugee women is that it is not what women want. Imposing family planning services on refugee women who are already in a particularly powerless situation would, they argue, amount to coercion.<sup>167</sup> Both the UNHCR Guidelines as well as the ICPD Programme of Action note this as a potential problem. The Guidelines state that "[r]efugee women may not be given sufficient information to provide informed consent to the use of birth control."<sup>168</sup> The ICPD Programme of Action notes that family planning services must be sensitive to the needs of refugee women and responsive to their powerless situation.<sup>169</sup>

While these concerns are legitimate, they tend to overlook the fact that one of the greatest obstacles to refugee women's access to family planning services has been the lack of information regarding the availability and utility of such services.<sup>170</sup> Particularly significant for refugee women is Article 10(h) of the Women's Convention, which ensures women the right "to specific educational information to help to ensure the health and well-being of families, including information and advice on family planning."<sup>171</sup> The ICPD Programme of Action defines reproductive rights to encompass the right of individuals and

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164. Frances Kissling, *The Challenge of Christianity*, 44 AM. U. L. REV. 1345 (1995).

165. UNHCR GUIDELINES, *supra* note 2, ¶ 94.

166. UNHCR GUIDELINES, *supra* note 2, ¶ 95.

167. Meeting with Deirdre Wulf, *supra* note 14.

168. UNHCR GUIDELINES, *supra* note 2, ¶ 95.

169. ICPD Programme of Action, *infra doc. biblio.*, ¶ 7.11.

170. ICPD Programme of Action, *infra doc. biblio.*, ¶ 7.3.

171. Women's Convention, *infra doc. biblio.*, art. 10(h).

couples to have the information to decide freely and responsibly the number, spacing, and timing of their children, as well as the right to attain the highest standard of reproductive health.<sup>172</sup> As Sandra Coliver points out in her Paper, information about family planning and general education are critical in preventing STDs, reducing unwanted pregnancies, and spacing births.<sup>173</sup>

Without adequate information and counseling, refugee women cannot be expected to make informed choices about family planning. It is essential that reproductive health services and information on such services be made available to refugee women within the context of women's empowerment, and not as a means of population control. Both UNHCR Guidelines and the ICPD Programme of Action endorse an empowerment model. The Programme of Action recognizes that improving the status of women enhances their decisionmaking capacity at all levels in all spheres of life, especially in the area of sexuality and reproduction.<sup>174</sup> It also recognizes that education is one of the key means for empowering women with the knowledge, skills, and self-confidence necessary to participate more fully in the development of their communities.<sup>175</sup> Similarly, UNHCR Guidelines recognize the need to consult with women to design health programs and protection programs appropriate to them. "Programs which are not planned in consultation with the beneficiaries, nor implemented with their participation cannot be effective. . . . [I]t is essential that [refugee women] be involved in planning and delivery of assistance activities if these are to be properly focused on their needs."<sup>176</sup>

Refugee women, like all women, need information to exercise their reproductive rights effectively. As Coliver notes in her paper, when women are denied access to information or when debate is limited by different forms of censorship, the end result often is the adoption of policies and programs coercive to women or unresponsive to their needs.<sup>177</sup>

### G. Enforcement Mechanisms

The previous sections have demonstrated how a rights-based framework for protecting and promoting women's reproductive health

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172. ICPD Programme of Action, *infra doc. biblio.*, ¶ 7.3.

173. Sandra Coliver, *The Right of Access to Information About Reproductive Health Under International Law*, 44 AM. U. L. REV. 1279 (1995).

174. ICPD Programme of Action, *infra doc. biblio.*, ¶ 4.1.

175. ICPD Programme of Action, *infra doc. biblio.*, ¶ 4.2.

176. UNHCR GUIDELINES, *supra* note 2, ¶ 11.

177. See Coliver, *supra* note 173.



is especially relevant in addressing the health concerns faced by refugee women. As I have noted above, UNHCR's Executive Committee recognizes that the activities of UNHCR and its implementing partners must be guided by relevant human rights instruments, including the Women's Convention. The challenge, however, lies in enforcement.

The international human rights system largely has been constructed on the basis of concepts of state responsibility. Existing international mechanisms hold *States* accountable when they violate international norms. In the refugee context, however, this paradigm is of limited value, especially in terms of ensuring refugee women nondiscriminatory access to health care and other vital social services. The Guidelines on Sexual Violence are an important development in that they invoke local and international enforcement mechanisms for protecting refugee women against sexual violence, prosecuting the perpetrators, and, where necessary, holding States accountable. For too long, refugee women have been marginalized from these processes. The Guidelines on Sexual Violence also call upon UNHCR field staff to take measures to ensure their implementation.

Nonetheless, this model of enforcement is of limited value in ensuring the economic and social rights of refugee women. While in many parts of the developed world refugees and other nonnationals have been entitled to a wide array of state benefits, in most developing countries that host refugee populations, the provision of health care and other social services largely has been assumed by UNHCR and its implementing partners. When refugee women are denied nondiscriminatory access to health care, it is not necessarily the State that should be held accountable.

Critics have charged that while the Guidelines on the Protection of Refugee Women are impressive on paper, they have not been implemented effectively by field staff or by implementing partners.<sup>178</sup> Some form of enforcement or monitoring mechanism is needed to ensure that UNHCR's field staff and its implementing partners comply with UNHCR policies and operating procedures.

One potential model that UNHCR should consider is the World Bank Inspection Panel, which was established in 1993 to provide people adversely affected by the Bank's failure to follow its own policies and procedures with an independent forum for bringing

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178. Conversation with former consultant to UNHCR, Nov. 11, 1994 (Washington, D.C.).

complaints.<sup>179</sup> The Inspection Panel may investigate complaints<sup>180</sup> and report its findings and recommendations, if any, to the Executive Directors.<sup>181</sup> The Bank, in turn, must inform the complainant of the results of the investigation and disclose the complaint, the findings and recommendations of the Panel, and the Executive Directors' final decision, to the public.<sup>182</sup>

As Daniel Bradlow and Sabine Schlemmer-Schulte have noted, this is a novel development in international law for a number of reasons. In spite of the international community's increased reliance on international organizations to solve common problems, the law regarding the international responsibility of international organizations is not well-developed.<sup>183</sup> The few examples that exist are in the area of U.N. peacekeeping operations, space law, the law of the sea, and European Community law.<sup>184</sup> The World Bank Inspection Panel is the first permanent forum in which a group of individuals can bring their claims against an international organization.<sup>185</sup> It recognizes the right of an individual to bring a complaint to an international forum without the participation of a sovereign state.<sup>186</sup> It is considered a recognition by the Bank of its international responsibility.<sup>187</sup>

In light of these developments and given the challenges UNHCR has faced in ensuring implementation of its own guidelines, UNHCR should consider the adoption of some form of monitoring or

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179. INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, THE INSPECTION PANEL OPERATING PROCEDURES 5 (1994).

180. International Bank for Reconstruction and Development, Res. No. 93-10, ¶ 12 (Sept. 22, 1993).

181. *Id.* ¶ 22.

182. *Id.* ¶¶ 25-26.

183. Daniel Bradlow & Sabine Schlemmer-Schulte, *The World Bank's New Inspection Panel: A Constructive Step in the Transformation of the International Legal Order*, 54 HEIDELBERG J. INT'L L. 392, 409-10 (1994).

184. *Id.* at 410 (citing BASIC DOCUMENTS ON U.N. AND RELATED PEACE-KEEPING FORCES (Siekman ed., 1985) (including D.W. Bowett, *UN Forces* (1964) (discussing U.N. responsibility for damages related to peacekeeping operations); B. Amrallah, *The International Responsibility of the UN for Activities Carried Out by UN Peace-keeping Forces*, 32 REVUE EGYPTIENNE DE DROIT INTERNATIONAL 57 (1976); provisions on the liability of the U.N. for injuries to individuals by operations of U.N. peacekeeping forces in the Status of Forces Agreements); Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, *opened for signature* Jan. 27, 1967, arts. VI, VII, 18 U.S.T.S. 2410 (stating that international organizations as well as states are responsible for activities carried out in outer space); Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, art. 139, U.N. Doc. A/CONF.62/122 (1982) (stating that international organizations are also liable for damages resulting from treaty activities causing injuries); Treaty Establishing the European Economic Community, art. 215(2) (1957)).

185. Bradlow & Schlemmer-Schulte, *supra* note 183, at 413.

186. Bradlow & Schlemmer-Schulte, *supra* note 183, at 412-13.

187. Bradlow & Schlemmer-Schulte, *supra* note 183, at 409.

enforcement mechanism to ensure the compliance by field staff and implementing partners with UNHCR policies and operating procedures. My conclusions here are preliminary. Further research is needed on what type of model is most suited to UNHCR's structure and mandate. Procedures are needed for deciding who has standing to bring a complaint (i.e., refugees, relief organizations, human rights monitors) and to whom such complaints should be made (i.e., protection officers, special field staff); for channeling complaints and taking remedial measures; and for deciding which complaints warrant further investigation. I will mention briefly several possible models in the hopes that they will generate further discussion.

- The monitoring function could be performed by the Office of the Senior Coordinator for Refugee Women, which could establish a Refugee Oversight Committee in Geneva. In order to integrate assistance activities for refugee women with protection concerns, Protection Officers, in addition to their responsibility for making status determination decisions, could also be charged with receiving complaints from refugees. These complaints could either be investigated by field staff or by human rights monitors or sent to a central office in Geneva, where the Refugee Oversight Committee would review these complaints and determine which warranted further investigation.

In connection with their activities in facilitating the establishment and empowerment of women's groups, UNHCR field staff should provide training and information to women regarding complaint procedures. Procedures should be established for ensuring the existence of adequate mechanisms for bringing complaints. Local women's groups could provide an important channel for bringing complaints.

Evidence of a systematic pattern of abuse would call for a full-scale investigation by the central office staff. Isolated complaints could be resolved at the local level. The results of full-scale investigations along with recommendations for remedial action would be reported to the High Commissioner, who would make a final decision regarding remedial measures. The results of her decision would be reported annually or semi-annually to the Economic and Social Council, which would make public the work of the Refugee Oversight Committee in an annual report.

- Alternatively, the Executive Committee could establish an independent Refugee Oversight Subcommittee which would receive complaints from individuals or groups of refugees claiming that their rights had been violated by field staff or implementing partners. Local mechanisms, such as those discussed above, would need to be established for receiving and channeling such complaints. Decisions to investigate particular complaints would

require the approval of the Executive Committee. Acting in close coordination with the Office of the Senior Coordinator for Refugee Women, teams would be dispatched to investigate and report on particular complaints. The Subcommittee would recommend remedial actions, subject to the approval of the Executive Committee and the High Commissioner. The findings of the Subcommittee would be made public.

- A private organization, such as the Women's Commission on Refugee Women and Children or the U.N. Volunteers, with the financial support of UNHCR, private foundations, and member states, could monitor compliance with UNHCR Guidelines on a systematic basis and report its results to the Senior Coordinator for Refugee Women, who would recommend remedial action to the High Commissioner.

#### IV. CONCLUSIONS AND RECOMMENDATIONS

As Alex Aleinikoff points out in a recent essay, refugee law, like international law generally, largely has been state-centered. It is based on the notion that

individuals need to belong to a state both to ensure their protection and acquisition of rights and to permit the system of states to ascertain which particular state has responsibility for (or control over) which persons.<sup>188</sup>

Such an approach, when applied to the problems faced by refugee women is problematic. Some of the obstacles to applying human rights norms to refugee women in the host country arise because the state-centered paradigm of refugee law does not adequately address questions of the scope of state responsibility for refugees living within its borders. It is particularly ineffective in addressing mass migrations of refugees from one developing country to another or in responding to their needs in the host country. Although, as discussed in Part II, the Refugee Convention entitles refugees to national treatment with regard to a whole range of economic and social rights, including the right to health care under social security legislation, this right is illusory in most parts of the developing world, where nationals have little access to such services.

While refugee law and human rights law in general speak to *States'* obligations to promote and protect human rights, in the refugee context, this role has been assumed largely by the international community, acting through UNHCR, the World Health Organization,

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188. T. Alexander Aleinikoff, *State-Centered Refugee Law: From Resettlement to Containment*, 14 MICH. J. INT'L L. 120 (1992).

and other intergovernmental and nongovernmental relief organizations. Despite the role played by UNHCR in alleviating mass suffering around the world, and the financial commitment by member states, including the United States and the European Community, in aiding in this endeavor, the state-centered paradigm of international law persists. The concept of a refugee having human rights *vis-a-vis* a host state is workable. The idea that intergovernmental institutions or the international community have responsibility under international law for ensuring the protection of these rights is more problematic, in spite of UNHCR's mandate to provide international protection to refugees and to seek permanent solutions to their problems.<sup>189</sup> UNHCR and state governments may recognize the need to provide refugee women with greater access to reproductive health services and information regarding these services, but may be particularly resistant to do so based on notions of responsibility under international law.

Although it is not disputed that an international organization has certain responsibilities under international law, as noted above, the law in this area is not well-developed. Nonetheless, the law regarding the international responsibility of international organizations may be entering a new, dynamic phase. The World Bank Inspection Panel, which creates the first mechanism allowing private individuals to bring a complaint against an international institution, may serve as a model for other international organizations wishing to improve their internal operations. To the extent that UNHCR, like the World Bank, does not always receive complete, accurate, and up-to-date information regarding its operations in different parts of the world, a Refugee Oversight Committee empowered to receive and investigate private complaints could contribute to the effective implementation of UNHCR's policies and operating procedures.

What role, then, can rights play in promoting the reproductive health of refugee women? Monica Sharma, Senior Advisor for UNICEF, notes in her article *What Role Can Rights Play in the Work of International Agencies?*<sup>190</sup> that the Convention on the Rights of the Child, which guarantees to children a full range of social and economic as well as civil and political rights, has been incorporated into the mandate of UNICEF. UNICEF, in turn, has developed timebound goals to translate these rights into action. Similarly, although UNHCR Guidelines on the Protection of Refugee Women

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189. Statute of the Office of the United Nations High Commissioner for Refugees, ch. 1, art. 1.

190. Monica Sharma, *What Role Can Rights Play in the Work of International Agencies?*, 44 AM. U. L. REV. 1097 (1995).

rarely use the language of rights, they are consistent with the norms set forth in the Women's Convention. Moreover, the Executive Committee has explicitly stated that all action taken on behalf of refugee women must be guided by applicable human rights instruments, including the Women's Convention. Human rights standards can provide one framework to guide intergovernmental agencies and member states in the design and implementation of policies for promoting the reproductive health of refugee women. The existence of monitoring or enforcement mechanisms can help to ensure that these standards are being implemented by field staff and relief organizations.

As Lynn Freedman and Deborah Maine discussed in their presentation, *Facing Facts: The Role of Epidemiology in Reproductive Rights Advocacy*,<sup>191</sup> the goal is to move from law to the development of policy, and from there, to programmatic reality in ways that are consonant with the reality of women's lives. Policy victories that do not yield real benefits for the lives and health of refugee women are hollow victories at best. Rights should be the standard against which these institutions measure their performance and the performance of implementing partners in developing reproductive health care programs for refugee women. It is critical, however, that policymakers and implementing partners adopt an interdisciplinary approach that incorporates an effective needs-assessment strategy. In designing and implementing reproductive health care programs, they should work with local partners, including public health workers and women refugees, to identify both the principle causes of maternal mortality and morbidity in the refugee context as well as the particular concerns expressed by refugee women.

Currently, the U.S. State Department, through the newly created Office of Population, Refugees and Migration, is exploring how best to serve the reproductive health needs of refugee women. The creation of this office, which was one of the offices principally involved in drafting the ICPD Programme of Action, has helped raise attention to the long-overlooked issue of refugee women's reproductive health needs. Although increased attention to this issue has met with resistance from some religious-based organizations who worry that refugee moneys will be diverted to so-called "population control," other relief assistance organizations that already have begun to incorporate family planning into their mandates, such as CARE, have

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191. Lynn Freedman & Deborah Maine, *Facing Facts: The Role of Epidemiology in Reproductive Rights Advocacy*, 44 AM. U. L. REV. 1085 (1995).

been more receptive. In what one official described as a Catch-22 situation, the State Department has not included reproductive health care in its proposal guidelines for health care services to refugee populations because public relief organizations traditionally had not made such services available. Public relief organizations, in turn, in bidding on projects, did not submit proposals to provide such services because they were not in the guidelines. At the time of this writing, the State Department was planning a meeting with refugee relief organizations to explore the possibility of providing reproductive health care as part of, or parallel to, health care services to refugee populations. It also was considering funding pilot programs in coordination with UNHCR. The challenges to be faced in funding such programs under the new Congress and in designing an integrated health care system that takes account of women's reproductive health needs warrant further examination.

The following are some general recommendations that could guide the U.S. Government, UNHCR, and other intergovernmental and nongovernmental agencies in their work:

- Any family planning program must be implemented in cooperation and consultation with refugee women, and in such a way that educates refugee women regarding their rights and regarding the benefits of family planning. Ultimately, the decision regarding the number, spacing, and timing of children must be made by the individual or couple involved, but it is essential that women have the information and means necessary to make this decision in a timely and responsible manner. Such a program should be implemented consistent with both the People Oriented Planning methodology currently used by UNHCR and the empowerment model embraced in the ICPD Programme of Action.
- In assessing the particular needs of refugee communities, the staff of UNHCR, in conjunction with local partners and public health workers, must focus greater attention on gathering epidemiological data on both the causes and rates of maternal mortality and morbidity.
- While recognizing the critical role played over the years by religious-based relief organizations in the delivery of emergency assistance to refugee populations, UNHCR and member states should not allow religious mandates to interfere with the adequate provision of reproductive health services and information on such services. Where organizations that provide health services, including maternal health services, are unable to include family planning in their programs, effective policies for the referral of patients to reproductive health service providers must be developed and enforced. Where deference to the religious mandates of health

care providers results in a failure to provide such services, this can have harmful consequences for the reproductive health and reproductive rights of refugee women.

- The international community and UNHCR in particular have begun to focus greater attention on the issue of violence against women as a human rights violation and on the effects of that violence on women's lives and on their reproductive health. The new Guidelines on Sexual Violence are an important development in that they recognize the importance of local and international human rights mechanisms in redressing this serious problem. It may be possible to use the issue of sexual violence against refugee women to focus greater attention on the reproductive rights of refugee women more generally.

- While alert to the sensitivity of offering family planning services to the survivors of human tragedy, UNHCR should issue a strong policy statement reaffirming the broader reproductive health needs of refugee women and should update the Guidelines on the Protection of Refugee Women (which are already quite good) to incorporate fully the principles set forth in the ICPD Programme of Action. In coordination with UNFPA, the World Health Organization, and other U.N. agencies, it should work to ensure implementation of these guidelines at the local level. Any program must be consistent with the needs of refugee women, be implemented free from coercion, and be consonant with the reproductive rights set forth in the ICPD Programme of Action. The upcoming Symposium on Reproductive Health in Refugee Situations, tentatively scheduled for May 1995, and co-sponsored by UNHCR and UNFPA, may provide a timely forum for issuing such a policy statement and for developing effective strategies to move from policy to programmatic reality.

- UNHCR should consider the adoption of an independent enforcement or monitoring mechanism, either through the Office of the Senior Coordinator for Refugee Women or through the Executive Committee, to ensure that UNHCR's field staff and its implementing partners comply with UNHCR's own policies and operating procedures, including the Policy on Refugee Women, the Guidelines on the Protection of Refugee Women, and the new Guidelines on Prevention of and Response to Sexual Violence Against Refugees.