

CHAPTER 6

LEGAL CONTROL OF OFFENCES AGAINST INTERNALLY DISPLACED WOMEN AND CHILDREN

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A. An Overview

In the previous chapter it has been observed how the Indian legislatures have developed the legal regime of human rights for the internally displaced women and children and how the state's executive organs framed delegated legislations as well as implemented rights protection mechanism for the internally displaced women and children population in our country. The role of judiciary and National Human Rights Commission (NHRC) in developing and protecting human rights of the internally displaced women and children population in India. The present chapter seeks to focus on the key issues related to the offences against internally displaced women and children. Displacement highlighted the systematic and specific targeting of women and children for sexual violence. Rape, sexual assault, forced prostitution, sexual slavery, forced pregnancy and other forms of sexual violence are used as a method of displacement.

Women account for around half of the world's 33.2 million internally displaced persons (IDPs).¹ In addition to the many general human rights violations faced by all IDPs, displaced women are often at greater risk than other affected populations. Internally displaced women face a range of protection issues on a daily basis. Most notably, sexual and gender-based violence is an unfortunate reality for many. Often without the protection of family and communities they had before displacement, internally displaced women can be vulnerable to rape, domestic violence, forced prostitution, trafficking and any number of other violent situations. Women who have lost their husbands to conflict, also face additional challenges and

¹ UNHCR, *Global Trends 2010: 60 years and still counting* (2011), Internal Displacement Monitoring Centre (IDMC), Global Overview 2014, <http://www.internal-displacement.org/publications/2014/global-overview-2014-people-internally-displaced-by-conflict-and-violence> ; IDMC "Girl Disrupted," March 2014, <http://www.internal-displacement.org/assets/publications/2014/201403-global-girl-disrupted-pic-brief-en.pdf>, Pg. 33.

responsibilities as heads of households, and often have to rely on basic survival skills.

The researcher had learnt that sexual and gender-based violence is most prevalent in environments where there is a general lack of respect for human rights. Sexual and gender-based violence is, of course, itself a human rights violation. Women and children, who are often most vulnerable to human rights abuses, are also the ones who suffer most from sexual and gender-based violence.

Bringing up the rear in the social hierarchy of a predominantly patriarchal world, however, more women and girls experience gender violence than do men or sexual minorities. Therefore, the slippage between gender violence and violence against women in everyday parlance as well as in academic and political writing is largely a reflection of the world as it is.

This brief concept paper identifies the main issues concerning the rights of displaced women and children. It aims to sharpen awareness of the gender dimensions to internal displacement and to provide initial guidance to UNICEF and other agencies on the appropriate gender response to the urgent and growing needs of internally displaced women. The subject clearly deserves in-depth analysis and further research, which this concept paper seeks to stimulate.

Gender concerns for internally displaced women and children primarily relate to two core issues of protection for safeguarding these people from rape, abduction, forced sexual slavery, genital mutilation, torture and murder; and upholding their rights to equal access and full participation in assistance programs. Gender violence is a common feature of displacement. Chronic physical and mental trauma persists because responsible parties fail to concern themselves with or to publicize the lasting effects of physical abuse. Agencies rarely examine protection issues in depth, much less initiate or support investigative research on gender violence in IDP populations.

In refugee work, the dedication and hard work of concerned international assistance organizations over the past decade are beginning to yield positive results on gender issues. But if we analyse the case of IDPs, such mechanisms do not yet exist. The Guiding Principles on Internal Displacement identify the rights and guarantees relevant to the protection of the internally displaced and offer a basis for protection and assistance. Although not a binding legal instrument, the Principles provide practical guidance to governments, NGOs and other agencies working on behalf of the internally displaced. The Guiding Principles are derived from extant human rights and humanitarian law, as well as refugee law by analogy.

B. United Nations Initiatives On Internally Displaced Women And Children, Peace And Security

A gender framework in humanitarian assistance is not complicated but does require a rudimentary understanding and acceptance of the basic premise upon which all gender theory rests. Gender simply refers to the female and male roles within a given culture; these roles and the expected behaviors of men and women are based on cultural practices formed over time. One cannot study gender by concentrating on females or males to the exclusion of the other sex; gender involves dynamic interactions between the women and men.

Internally displaced women and children face a unique set of challenges, and thus deserve attention as their own group. Unlike refugee women who may register with UNHCR and receive assistance from a range of humanitarian actors, internally displaced women and children remain within the borders of their own country and thus their national government is responsible for protecting and assisting them. Women are also more exposed to violence gender-based violence in particular—and face discrimination on many fronts, including housing, land and property, livelihoods, documentation and education. Displaced women and children living in camps may have also experienced violence from camp administrators or humanitarian workers which aggravates their situations. Thus, protection and assistance for internally displaced women and children may take different forms than protection and assistance for refugee women.

Serious violations of humanitarian law impose individual or superior criminal responsibility on the perpetrator or others responsible for their commission or omission even when applicable treaties do not overtly impose criminal sanctions. Many international crimes carry individual criminal responsibility, regardless of whether a state or non-state actor is involved.²

The principal international humanitarian law treaties that regulate contemporary armed conflicts are the 1907 Hague Conventions and Regulations,³ the four 1949 Geneva Conventions along with annexes to these conventions,⁴ and the two 1977 Additional Protocols to the Geneva Conventions.⁵ All or parts of these instruments are now recognized as comprising customary international law. International humanitarian law governs international, and increasingly non-international, armed conflicts. The characterization of a conflict as international, internal, or mixed often poses crucial legal questions, in part because the body of law pertaining to international conflicts is far more developed and codified than laws governing internal conflicts.⁶ Nevertheless, there is a palpable trend in humanitarian law to reduce the disparity between the two because “the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned.” Indeed, the Yugoslav Tribunal in particular has made unprecedented

² Diane F. Orentlicher, “*Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*”, Vol. 100 YALE Law Journal. 2537, 2552 (1991).

³ Convention Concerning the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 3 Martens Nouveau Recueil (ser. 3) 461. Essentially, Hague law governs the conduct of hostilities and duties of combatants. Article 19 of the 1954 Hague Cultural Property Convention provides for the application of certain parts of the Convention to non-international conflicts.

⁴ The Conventions signed at Geneva on August 12, 1949, consist of the following: Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 6 U.S.T. 3114, 75 U.S.T.S.31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T.3217, 75 U.N.T.S.85; Geneva Convention (III) Relative to the Treatment of Prisoners of War, , 6 U.S.T.3216, 75 U.N.T.S. 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, , 6 U.S.T.3216, 75 U.N.T.S.237. The 1949 Geneva Conventions supersede the 1864, 1906, and 1929 Geneva Conventions.

⁵ Additional Protocol I, Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, S. Treaty Doc. No. 100-2, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) [hereinafter Additional Protocol II].

⁶ Richard A. Falk, “Janus Tormented: The International Law of Internal War”, in *International Aspects of Civil Strife* ed. James N. Rosenau (Princeton: Princeton University Press, 1964), Pg. 185-248.

inroads in bridging these gaps in redressing crimes committed in international, internal, and mixed armed conflicts.⁷

There are substantial similarities and important distinctions between international humanitarian law, international criminal law, and international human rights law, although each body of law provides certain protections during armed conflict and there is significant overlap in their protections of individuals, including women and girls. International humanitarian law is only invoked once an armed conflict exists, whereas crimes against humanity and genocide do not need a connection to war in order to be prosecuted. International human rights and international humanitarian law prohibit torture and slavery, yet redress efforts depend upon which body of law is applied.

Even within the context of war, international human rights law can still provide protections. The Universal Declaration of Human Rights (UDHR)⁸ and the International Covenant on Civil and Political Rights (ICCPR) denounce all forms of slavery, torture, and inhuman or degrading treatment and the right to be free of these abuses is explicitly nonderogable.⁹ The Convention on the Rights of the Child obliges states to protect children from sexual assault and torture and to respect rules of humanitarian law.¹⁰ The Convention Against Torture prohibits torture at all times, stipulating that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."¹¹

Even in human rights instruments that focus specifically on women, most provisions continue to be applicable during wartime. The Convention on the Elimination of All Forms of Discrimination against Women (Women's Convention)

⁷ *The Prosecutor v. Zlatko Aleksovski, Judgement, IT-95-14/1-T, 25 June 1999.*

⁸ Universal Declaration of Human Rights, U.N. GAOR, 3d Sess. Part I, at arts. 1, 2, 3, 4, 5, 7, 12, U.N. Doc. A/810, 171, (1948).

⁹ International Covenant on Civil and Political Rights, Dec. 16 1966, arts. 4.2, 6-8, 999 U.N.T.S. 171, 174-5, 6 I.L.M. 368, 370-71 (1967) (entered into force on Mar. 23, 1976).

¹⁰ Convention on the Rights of the Child, Nov. 20 1989, arts. 34, 37, 38, 28 I.L.M. 1448, 1469-70 (enters into force on Sept 2 1990).

¹¹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, art. 2(2), S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85, 114 (entered into force June 26, 1987).

¹² prohibits discrimination and disparaging treatment on the basis of "sex." This prohibition extends to violence against women, as interpreted by the Committee on the Elimination of Discrimination Against Women (CEDAW).¹³ The Declaration on Elimination of Violence Against Women¹⁴ and the Inter-American Convention on Violence¹⁵ also provide protection against all forms of violence against women, including sexual violence, whether committed in so-called "peacetime" or in wartime, in the public sphere or in the private sphere. The Optional Protocol to the Women's Convention provides enforcement measures to monitor and ensure compliance with the Women's Convention.¹⁶

The principle of nondiscrimination, including "sex" discrimination, is enshrined throughout all human rights instruments and recognized as the most fundamental principle of human rights law.¹⁷ Therefore, these instruments may not be interpreted or applied in a manner discriminatory to women. While international humanitarian laws apply only in the context of an armed conflict, human rights laws, especially nonderogable rights, apply regardless of the presence of an armed conflict or public emergency. Common Article 2 to the 1949 Geneva Conventions stipulates that the articles of these conventions apply "[i]n addition to the provisions which shall be implemented in peacetime."¹⁸ The Martens Clause of the Hague Conventions provides additional support for the principle that fundamental human rights norms do not cease to be applicable during armed conflict.¹⁹ International human rights law thus supplements, reinforces, and complements international humanitarian law. As the Yugoslav Tribunal Appeals Chamber notes, "[b]oth human rights and

¹² Convention on the Elimination of all Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, 19 I.L.M. 33(entered into force Sept. 3, 1981).

¹³ *Ibid.*

¹⁴ Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. GAOR, 48th Sess., Supp. No. 49, vol. 1, at 217, U.N. Doc. A/48/49 (1993).

¹⁵ Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, 33 I.L.M. 1534.

¹⁶ Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, GA Res. A/54/4, 54th Sess., Supp. No. 4, U.N. Doc. A(01)/R3 (Oct. 6, 1999) (entered into force Dec. 22, 2000). The Optional Protocol has a communications procedure that allows women to submit claims for violation of the Women's Convention; it also has an inquiry procedure which enables the CEDAW Committee to initiate inquiries for gross violations when the state is a party to the Women's Convention and the Optional Protocol.

¹⁷ Thomas Buergenthal, "The Normative and Institutional Evolution of International Human Rights", Human Rights Quarterly, Vol. 19 No. 4, (1997), Pg.703.

¹⁸ First, Second, Third and Fourth Geneva Conventions, supra note 847, at art. 2.

¹⁹ *Supra note 3.*

humanitarian law focus on respect for human values and the dignity of the human person. Both bodies of law take as their starting point the concern for human dignity, which forms the basis of a list of fundamental minimum standards of humanity."²⁰

Additionally, several crimes, including genocide, war crimes, torture, slavery, and crimes against humanity, have achieved *jus cogens* status, making the crimes prohibited at all times, in all places.²¹ These peremptory norms supersede any treaty or custom to the contrary. *Jus cogens* norms constitute principles of international public policy, and serve as rules "so fundamental to the international community of states as a whole that the rule constitutes a basis for the community's legal system [I]t is a sort of international law that, once ensconced, cannot be displaced by states, either in their treaties or in their practice."²² In other words, these crimes (except for war crimes) do not need a nexus to a war and do not require ratification of a treaty; they are crimes that can be prosecuted by any state on the basis of universal jurisdiction. *Jus cogens* crimes subject to universal jurisdiction are justiciable by any state, even if such acts do not violate municipal law in the state in which they were committed, and even when the prosecuting state lacks a traditional nexus with the crime, offender, or victim.²³ As discussed *infra*, there is increasing evidence that sexual violence has now reached the level of a *jus cogens* norm.

A special report by UNICEF on Internally displaced women, the main problem faced by them include having to cope with new gender roles as a result of displacement (female head of house-hold), gender violence, break-up of families, and loss of social and cultural ties.²⁴ Gender violence probably represents the gravest problem for internally displaced women. As families are separated, unaccompanied women are more vulnerable to gender violence. This can take the form of rape, sexual slavery, forced female genital mutilation, or forced sale into

²⁰ *Prosecutor v. Zejnil Delalic, Judgement, IT-96-21-A, 20 Feb. 2001, at para. 149 [hereinafter Celebici Appeals Chamber Judgement].*

²¹ Jonathan I. Charney, "Universal International Law", *The American Journal of International Law*, Vol. 87, No. 4 (Oct 1993), Pg. 529, 541.

²² Mark W. Janis, "*An Introduction to International Law*", The University of Michigan, Aspen Publishers, 4th ed., 2003, Pg. 64.

²³ Kenneth C. Randall, "Universal Jurisdiction under International Law", *Texas Law Review*, No. 66, (1998), Pg. 785-788.

²⁴ UNICEF, *The Gender Dimension Of Internal Displacement: Concept Paper And Annotated Bibliography*, Office Of Emergency Programmes. Working Paper Series, New York, September 1998, Pg. 13-16.

marriage.²⁵ Forced female genital mutilation for instance can happen when internally displaced women move to an area where the practice is widespread and imposed on the female members of the community, including new ones. For instance, over 1,000 young internally displaced girls were forcibly circumcised in a mass ceremony in Sierra Leone in December 1996.²⁶

Problems which are specific to displaced women may be mentioned here, first, increased attention is now being paid to issues of reproductive health, an area often neglected.²⁷ Diseases such as HIV/AIDS are likely to spread more rapidly among refugee and internally displaced populations.²⁸ Secondly, some women face many problems when trying to reclaim their property or inherit property from a deceased husband.²⁹ Finally, it has been observed that internally displaced women did not really have the opportunity to participate in the organization of IDP camps, and this can have crucial implications in terms of the protection afforded to them.

When widespread abuses against women are reported, it is advisable to send a UN mission to monitor the situation and, where possible, deter further abuses. There is a range of strategies which can be employed to prevent gender-related violence, and some have already been used for refugee women. They start with simple measures such as providing lighting in camps, or modifying the layout of camps to ensure that women have separated quarters or at least separate washing facilities. Escort could also be provided to women who for instance have to collect fuel. Health services emphasis on family unity being preserved during displacement. When separated from their families, internally displaced children are at greater risk of exploitative labour, sexual abuse and forced recruitment by armed forces. In order to reduce exposure to such abuses, and in accordance with international humanitarian law,³⁰ efforts should be made to reunite separated families as soon as possible. In addition, the education of internally displaced children is interrupted as

²⁵ Guiding Principle 11(2).

²⁶ *Supra Note 2, Pg 3.*

²⁷ UNICEF, Expert Meeting on Gender Dimension of Internal Displacement, New York, June 1999, Pg. 13.

²⁸ M. J. Toole and R. J. Waldman, "The Public Health Aspects of Complex Emergencies and Refugee Situations", 18 Annual Review of Public Health, (1997), Pg. 296.

²⁹ Internally Displaced Persons: Report of the Representative of the Secretary-General, Mr. Francis M. Deng, E/CN.4/1996/52, 22nd February 1996, Para 50.

³⁰ Guiding Principle 17(3).

a result of displacement, which may impact heavily on their future prospects. One important issue is that of effects of malnutrition and psycho-social trauma are far greater in the case of children.

In view related to internally displaced children 'it is still rare to find consistent, analytical understanding across agencies for specific protection needs'. UNICEF, being the main agency responsible for the defense of children's rights, should continue to encourage other agencies to pay more attention to the protection needs of internally displaced children. UNICEF has interpreted the protection of internally displaced children as encompassing protection against physical and psycho-social harm, preserving their' identity and cultural, linguistic, and inheritance rights', and responding to their basic needs. Special need of these children is that of family unity and mental health support for children who suffer from severe trauma.³¹

Internally displaced children and other vulnerable children has been a subject of increasing concern in recent years. An Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts has been adopted to address this problem.³² Unlike refugee children, internally displaced children are often still present in active conflict zones. They represent an easy target for the warring parties in search of cheap and obedient recruits. Aid agencies should ensure that the special care to be taken for internally displaced children.

Customary international law also regulates armed conflict, mass violence, and situations of occupation or transition. Customary international law is based on state practice and grounded in the notion of implied agreement, derived from acceptance of or acquiescence to a legal obligation. Whereas customary international law is derived from state practice based on *opinio juris* (a sense of legal obligation), *jus cogens* norms have their foundation in upholding an international *ordre public*. In the *Siderman* case, a civil suit brought in the U.S. against Argentina for torture and other abuses inflicted by the military, Judge Fletcher noted that while "customary international law derives solely from the consent of states, the

³¹ UNHCR/ Brookings Institution/ OAU, Internal Displacement in Africa, Para, 46-47.

³² GA Res, 54/263, 25 May 2000.

fundamental and universal norms constituting *jus cogens* transcend such consent."³³ That crimes such as torture, genocide, slavery, crimes against humanity, and war crimes have attained *jus cogens* status reflects state condemnation of these crimes and the international community's desire to prevent and punish them.

a. The Guiding Principles on Internal Displacement

A number of standards and guidelines relating to internally displaced women and children have been developed over the past twenty years, covering such issues as reproductive health, sexual and gender-based violence and other cross-cutting issues.³⁴ The UN's Guiding Principles on Internal Displacement provide an overarching normative framework that applies international human rights and humanitarian law to IDPs. They were among the first international frameworks to outline specific rights relevant to women facing internal displacement, including:

- Non-discrimination and the right of expectant mothers, mothers of young children, and female heads of household to protection and assistance that “takes into account their special needs”³⁵
- Protection from SGBV and other forms of violence and exploitation
- The right to access all necessary documents, education and training
- The need for internally displaced women to actively participate in decision-making at all stages of displacement.³⁶

The Guiding Principles have also served as an important foundation for additional instruments and frameworks that address the needs of displaced women,

³³ *Siderman de Blake v. Republic of Argentina*, 965 F. 2d 699.715 (9th Cir. 1992).

³⁴ UNHCR, *Handbook for the Protection of Women and Girls* (2008); UNHCR, *Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons: Guidelines for Prevention and Response* (2003); IASC, *Guidelines for Gender-based Violence Interventions in Humanitarian Settings: Focusing on Prevention of and Response to Sexual Violence in Emergencies* (2005); Inter-agency Working Group on Reproductive Health in Crises, *Inter-agency Field Manual on Reproductive Health in Humanitarian Settings* (2010); UNHCR Executive Committee conclusion 105 (LVII) of 2006; the United Nations Principles on housing and property restitution for refugees and displaced persons; the Protocol on the Property Rights of Returning Persons in the Great Lakes Region; general recommendations No. 24 (1999) on women and health and No. 27 (2010) on the human rights of older women of the Committee on the Elimination of Discrimination against Women.

³⁵ Principle 4, para. 2;

³⁶ Principle 11, para.2; 19, para 2; 20, para.3; 23.

such as the Kampala Convention and the Inter-Agency Standing Committee (IASC) *Framework on Durable Solutions for Internally Displaced Persons*.³⁷ While these frameworks are important instruments in the legal protection of IDPs, much more needs to be done to ensure that they are translated into concrete measures which improve the lives of displaced women.

b. UN Security Council Resolution 1325

Various UN Security Council (UNSC) resolutions also address issues relating to internally displaced women, including:

- Access to protection and assistance³⁸
- Sexual violence³⁹
- Trafficking⁴⁰
- Peace, reconciliation and development⁴¹

UN resolutions on women, peace and security are particularly important tools for improving responses to the rights and needs of internally displaced women and children.⁴² Resolution 1325 of October 2000, which reaffirms the important role of women in solving conflict and maintaining peace, is a key example. Till date, 46 countries, as well as the European Union, OSCE and the North Atlantic Treaty Organization (NATO), have approved action plans, while many others are in the drafting phase.⁴³ Several countries facing internal displacement have already developed plans, including Côte d'Ivoire, Georgia, Nepal, Nigeria and the Philippines, and other countries such as Argentina, Japan, Jordan, Ireland and South Sudan are in the process of developing plans.⁴⁴ National action plans that put

³⁷ Brookings-Bern Project on Internal Displacement, *Inter-Agency Standing Committee Framework on Durable Solutions for Internally Displaced Persons*, April 2010, www.brookings.edu/reports/2010/04_durable_solutions.aspx.

³⁸ Security Council resolutions 1674 (2006), 1894 (2009) and 1379 (2001). See also Sanjula Weerasinghe and Elizabeth Ferris, *Security Council, internal displacement and protection: recommendations for strengthening action through resolutions* (Washington, D.C., Brookings-LSE Project, 2011).

³⁹ Security Council resolutions 1807 (2008) on the Democratic Republic of the Congo and 1556 (2004) on Sudan.

⁴⁰ Security Council resolution 1674 (2006).

⁴¹ Security Council resolutions 1265 (1999) and 1296 (2000).

⁴² Security Council resolutions 1820 (2008), 1889 (2009) and 2122 (2013).

⁴³ Website- <http://www.peacewomen.org/naps/list-of-naps>. Visited on 13.01.15.

⁴⁴ Website- <http://www.peacewomen.org/naps/upcoming-action-plans>. Visited on 13.01.15.

Resolution 1325 into action are valuable opportunities to include and engage internally displaced women and children, and these plans should be supported to make sure that women's benefits are maximized.

c. Mainstreaming Gender in Response to Internal Displacement of Women and Children

Over the years, there has been a growing tendency to mainstream gender into programs and activities. In other words, instead of setting up programs specifically targeting women, the priority is to ensure that women's perspectives are incorporated into all aspects of program design. But the reality is that humanitarian organizations are faced with a number of priorities jockeying for attention, and thus the specific concerns of internally displaced women do not always receive sufficient attention on the mainstream agenda.⁴⁵ If everyone is responsible for ensuring that women's needs are addressed, it can be difficult to determine responsibility when problems arise. Scholars, practitioners and policymakers now recognize that a "two-pronged approach" is needed to respond to the needs of internally displaced women. This means balancing programs that are specifically targeted at displaced women with efforts to ensure that gender issues are mainstreamed, and incorporated into all aspects of policies and programs.⁴⁶ In response to criticism that it was treating the displaced as "passive beneficiaries of aid" rather than "equal partners with rights,"⁴⁷ UNHCR issued a new Age, Gender and Diversity Policy in June 2011 and the accompanying Forward Plan for 2011–2016. These were meant to more fully address protection and assistance needs of internally displaced women. In order to ensure that gender is indeed fully mainstreamed, improved coordination between different actors is needed.⁴⁸

Gender often receives too little attention in budgets and areas relating to women are often disproportionately cut. In 2009, the Inter-Agency Standing Committee (IASC) introduced the "gender marker tool" to increase gender

⁴⁵ IASC Sub-Working Group on Gender and Humanitarian Action for analyses of gender mainstreaming efforts.

⁴⁶ UNHCR, "Age, Gender and Diversity Mainstreaming Forward Plan 2011-2016", p. 1; website-<http://www.unhcr.org/4e7762f19.html>. Visited on 17.02.15.

⁴⁷ UNHCR Executive Committee, Report on Age, Gender and Diversity Mainstreaming, EC/59/SC/CRP.14, Pg. 3.

⁴⁸ *Ibid.*

mainstreaming in the Consolidated Appeals Process. This tool was meant to track gender-sensitive funding, and to promote the development of projects more attuned to gender considerations. However, mainstreaming gender issues – including the rights and needs of displaced women – in budgeting processes will continue to require more institutional leadership, disaggregated data collection and training.⁴⁹

Gender mainstreaming must also be a part of national and local legislative processes if the rights of displaced women are to be more fully addressed. Governments that develop laws and policies for internal displacement – which is a move to be encouraged – should ensure that gender-sensitive planning is also part of the local, national and international conversation, especially in displacement-affected countries.

d. Addressing Key Protection Issues For Internally Displaced Women and Children

Internally displaced women are at a heightened risk for sexual and gender-based violence and have specific health needs that often go unmet. In displacement, they may find themselves without the protection they would normally have from their families and communities. Children in particular may be separated from family members and caretakers, putting them at increased risk for sexual abuse, exploitation and recruitment into armed groups. Even though much remains to be done, there has been progress on some key protection issues. The greatest strides have been in reproductive health services, which include neonatal and maternity care, as well as a range of other programs ranging from treatment for sexual violence and HIV/AIDS to more routine feminine hygiene/sanitary needs. The Inter-agency Field Manual on Reproductive Health in Humanitarian Settings and the Minimum Initial Service Package (MISP) has also helped to advance reproductive health services. Developed by the Inter-agency Working Group on Reproductive Health in Crises, these are tools to address reproductive health and sexual violence in emergency settings. The manual was revised in 2010 to better encompass IDPs

⁴⁹ IASC, 2012 *IASC Gender Marker: Analysis of Results and Lessons Learned*.

and others affected by humanitarian emergencies.⁵⁰ Based on the affirmation that reproductive health is an essential component of humanitarian response, the manual outlines a comprehensive approach to reproductive health risks and services by humanitarian workers.⁵¹

There has also been some progress in raising awareness of SGBV and developing tools for ensuring that it is addressed, including:

- Developing guidelines on prevention of and response to Sexual and Gender Based Violence (SGBV);⁵²
- Setting standards for the inclusion of sexual violence concerns in peace agreements and ceasefires;⁵³
- Implementing training programs to prevent sexual exploitation by peacekeepers and humanitarians;
- Rolling-out monitoring analysis and reporting arrangements in several countries pursuant to Security Council resolution 1960 (2010);
- Developing early warning indicators on sexual violence;⁵⁴ and
- Establishing targets to increase the proportion of female police officers in peacekeeping operations to 20 percent by 2014.

Some modest – but not yet entrenched – advances have been achieved on other protection issues, including:

- Integrating women into assistance distribution systems;⁵⁵
- Implementing fuel strategies to reduce displaced women’s exposure to violence when they collect firewood;⁵⁶

⁵⁰ Inter- Agency, “*Inter-agency Field Manual on Reproductive Health in Humanitarian Settings*”, 2010, website- <http://www.refworld.org/docid/4d08d5422.html>, visited on 17.02.15.

⁵¹ Website- www.who.int/reproductivehealth/publications/emergencies/field_manual/en/ . visited on 13.01.15.

⁵² 2005 IASC Guidelines for Gender-based Violence Interventions in Humanitarian Settings; 2003 UNHCR, *Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons: Guidelines for Prevention and Response*.

⁵³ Department of Political Affairs, *Guidance for Mediators: Addressing Conflict-Related Sexual Violence in Ceasefire and Peace Agreements* (2012).

⁵⁴ UN Women, *Gender-Responsive Early Warning: Overview and How-to Guide*, October 2012; UNDP, *Fourth Consolidated Annual Progress Report on Activities Implemented under the UN Action Against Sexual Violence in Conflict Fund – Report of the Administrative Agent of the UN Action Against Sexual Violence in Conflict Fund for the period 1 January – December 31, 2012*, May 31, 2013.

⁵⁵ IFRC, *Practical Guide to Gender-sensitive Approaches for Disaster Management* (2010).

- Upholding housing, land and property rights of displaced women, in some cases through measures such as the provision of legal aid to returnee women;
- Increased participation of internally displaced women in decision-making processes in some countries, including through the development of strong associations of displaced women, for example, in Colombia and the Philippines;⁵⁷
- Internationally, UNHCR convened its second global dialogue with women and engaged displaced women in this process for the first time in 2011;⁵⁸ and
- Collecting disaggregated data in conflict and post-conflict situations,⁵⁹ including through the establishment of Joint IDP Profiling Service (JIPS) which collects data disaggregated by age, sex and location, as well as other indicators such as the provision of protection and assistance to internally displaced women, their housing, land and property rights.

However, there are still gaps in the reproductive health response, including the provision of adequate maternal and reproductive health care for adolescent girls and women with disabilities; scaling up systematic and equitable coverage of the Minimum Initial Service Package; and sustaining these services in protracted crisis and the recovery phase.

⁵⁶ Such strategies recognize that simply providing firewood in absence of broader livelihoods support is inadequate as displaced women and girls without other viable livelihood options will still often gather wood to sell, exposing themselves to increased risk of harm: Buscher, “Refugee Women”, p. 16; tools of the IASC Task Force on Safe Access to Firewood and Alternative Energy in Humanitarian Settings, including the “Decision Tree Diagrams on Factors Affecting Choice of Fuel Strategy in Humanitarian Settings” (2009) and the “Matrix of Agency Roles and Responsibilities for Ensuring a Coordinated, Multi-Sectoral Fuel Strategy in Humanitarian Settings” (2009); World Food Programme’s Safe Access to Firewood and Alternative Energy in Humanitarian Settings (SAFE) stoves initiative.

⁵⁷ Brookings-Bern Project on Internal Displacement, *Moving Beyond Rhetoric: Consultation and Participation with Populations Displaced by Conflict or Natural Disasters* (2008).

⁵⁸ UNHCR, *Survivors, Protectors, Providers: Refugee Women Speak Out* (2011). The title of the global dialogue report does not reflect the participation of 80 IDPs from Colombia in the process.

⁵⁹ Department of Social and Economic Affairs (UNDESA), Statistics Division, *The World’s Women 2005: Progress in Statistics* (2006) ST/ESA/STAT/SER.K/17, pp. vii- ix.

Some of the other key challenges faced by internally displaced women, which are notable for their strategic significance or because they reflect important longstanding, neglected or emerging problems, include:⁶⁰

- Conducting and maintaining detailed and disaggregated data collection;
- Strengthening the links between gender and age-sensitive approaches, and other elements of diversity;
- Attention to gender dimensions of displacement linked to natural disasters and climate change;
- Preventing and responding to SGBV in the context of internal displacement;
- Implementing equitable documentation practices;
- Systematically training government officials, security actors and field staff in gender approaches;
- Implementing meaningful participatory approaches and supporting internally displaced women's participation;
- Engaging women in early warning systems and disaster preparedness strategies;
- Raising awareness of communities, especially host communities, about IDPs to avoid double stigmatization of displaced women (as IDPs and as women)
- Programming for early recovery;
- Supporting sustainable livelihoods;
- Ensuring access to justice and accountability towards internally displaced women;
- Enhancing gender-sensitive approaches to durable solutions; and
- Overcoming the “implementation gap” that curtails the practical impact of the frameworks developed to protect, assist and support the leadership role of internally displaced women.

It is therefore may be stated that, the most serious protection problems often occur far from the eyes of external observers. Where a government is persecuting a group of persons within its borders, it is unlikely that it will grant access to international observers and aid agencies. Therefore the gravest situations involve ‘countries that either do not acknowledge or do not permit international involvement

⁶⁰ Report of the Special Rapporteur on the human rights of internally displaced persons, by Chaloka Beyani, For analysis, see A/HRC/23/44, March 18, 2013, section C, website-http://ap.ohchr.org/documents/alldocs.aspx?doc_id=21520, visited on 18.02.15.

with displacement within their borders'. One should finally note that the protection strategies examined in this chapter can only provide short-term protection to internally displaced women and children whose human rights are at risk.

C. International Legal Regime For Internally Displaced Women And Children

Up to 80 % of the displaced populations in the world are women and children. These women are extremely vulnerable and exposed to abuses and dangers already mentioned. When women flee their homes, they have habitually lost the protection of their male relatives, have left behind the sources of their livelihoods and many of them carry children they have to take care of. In such a defenseless position they heavily depend on arrangements protecting their security. If these aren't provided, they become easy targets of sexual violence, as frequently they are forced to buy their way to their destination through sexual favours. However, even reaching displacement camps doesn't by itself mean reaching safety, as in these camps they are often violated by the same people who are meant to protect them and who take advantage of their vulnerability. Further dangers arise, if the camps authorities fail to address specific women needs. Simple facts, such as the location of washing and bathing facilities or of latrines, can play a major role in the protection of women against rape and other assaults. Women also have specific health requirements that must be met. Pregnant women are especially at risk without appropriate support services. With increased exposure to sexual violence and unhygienic conditions, women are more in danger of getting infected by HIV or other diseases. In addition, many of them are forced by circumstances to become single heads of households and for these women sustaining their livelihood can be especially difficult in the camps. Since habitually they are not considered to be (and are themselves not used to being) part of the 'public' life, they can be and often are discriminated against in food distribution and access to welfare services.⁶¹

⁶¹ Oishik Sircar, "Can the Women Flee? – Gender-based Persecution, Forced Migration and Asylum Law in South Asia", in edited book by In Behera, Navnita Chadha, "Gender, Conflict and Migration", New Delhi: Sage Publication, 2006;

Gender relationships and power structures are all too often detrimental to women. Extensive research has documented gender inequalities in access to, and control of, economic and natural resources. It is very fortunate to say that in Asia, women may have use rights over land and forests, but are rarely allowed to own and/or inherit the land they use. Given the gender-blindness of the planning process development projects typically build on the imbalance in existing gender relations. For affected communities development projects have widened gender disparities either by imposing a disproportionate share of social costs on women or through an inequitable allocation of the benefits generated.

In spite of the fact lies behind is that of many countries and funding agencies have adopted specific gender policies in recent years aimed at mainstreaming gender issues in their development interventions, actual project planning and implementation continue to overlook gender aspects.

An assessment by the Operations Evaluation Department of the World Bank of a number of projects funded by the Bank noted that gender aspect of resettlement were largely oblivious. Similarly, after the Asian Development Bank approved a gender policy in 1998, a review of its dam projects observed that the impacts on gender at the project preparation and implementation stages were often not considered. It may be here noted that the World Bank and the Asian Bank are two major donors for a large number of development projects in India. Where planning is insensitive to gender, project impacts can at best be neutral, and at worst aggravate existing gender disparities to the extent of radically affecting the pre project gender balance.⁶²

Many evidences shows that, development projects may create vulnerability through impoverishment, they disproportionately affect groups that are vulnerable to begin with, particularly indigenous groups and women. Human rights of vulnerable groups are protected generically in the International Bill of Human Rights. The ILO Convention 169 spells out protections for indigenous groups.

⁶²Website- <http://ncw.nic.in/pdfreports/Development%20Induced%20Displacement%20of%20Women.pdf>, visited on 18.02.15.

“Evidence suggests that for a vast majority of the indigenous/tribal peoples displaced by big projects, the experience has been extremely negative in cultural, economic, and health terms. The outcomes have included assetlessness, unemployment, debt-bondage, hunger, and cultural disintegration. For both indigenous and non-indigenous communities, studies show that displacement has disproportionately impacted on women and children”.⁶³

The travails of displaced women basically stem from the already existing gender inequalities within the Indian society and family. The laws, policies and government procedures also discriminate against women. It is a consequence of the unequal social and political set-up that men get preference over women in the matter of land, security, physical space, food intake, jobs, etc. within home, society and in the government. These inequalities accentuate in the event of a crisis situation like displacement resettlement.⁶⁴

Examining the involuntary nature of displacement from the urban slums of Delhi, it has found that displacement for women has brought emotional stress. Men migrate and women are left behind to look after the home and children. Control of women’s sexuality becomes a serious issue. When women migrate, they work as domestic workers, daily wage earners, etc. Their additional income is extremely important for the family since it is often used to finance their children’s education and health. They suffer great hardships in urban slums with regard to sanitation and privacy.⁶⁵

⁶³ Leopoldo J. Bartolome, “*Displacement, Resettlement, Rehabilitation, Reparation and Development*”, World Commission on Dams, Thematic Review, Social Issues 1.3, November 2000, website-

<http://siteresources.worldbank.org/INTINVRES/Resources/DisplaceResettleRehabilitationReparationDevFinal13main.pdf>, visited on 02.03.15.

⁶⁴ Hemadri, Ravi, Harsh Mander, Vijay Nagaraj, “*Dams, Displacement, Policy and Law in India*”, Contributing Paper for World Commission on Dams, Thematic Review 1.3 Displacement, Resettlement, Rehabilitation, Reparation and Development, (1999), website-
<http://siteresources.worldbank.org/INTINVRES/214578-1112885441548/20480074/DamsDisplacementPolicyandLawinIndiasoc213.pdf>, visited on 02.03.15.

⁶⁵ Mohammed Asif, Lyla Mehta and Harsh Mander, “Engendering Resettlement and Rehabilitation Policies and Programmes in India”, a Report of the Workshop held at the India International Centre, New Delhi on September 12 and 13, 2002 by the Institute of Development Studies and ActionAid, India with support from DFID. (2002), website- <https://www.ids.ac.uk/files/NarmadaWshop.pdf>, visited on 02.03.15.

As mentioned earlier, there is wide gender disparity in several respects in India. Thus, displacement may affect women differently. In a broad sense, displacement brings loss of access to common property resources, loss of access to livelihood, loss of access to services, lack of sanitation, breakdown of family life during transition period, additional burden of workloads and responsibilities, deteriorating health status, breakdown of community networks, problem of marriage of daughters, rise in alcoholism and increase in domestic violence, deterioration of social status of tribal women, sense of insecurity, breakdown of lifestyle etc. Here is an account of the major impacts of development induced displacement on women in the country.

a) An Overview of Sexual and Gender- Based Violence

Sexual and gender-based violence is a violation of human rights. This kind of violence perpetuates the stereotyping of gender roles that denies human dignity of the individual and stymies human development. The overwhelming majority of the victims/survivors of sexual and gender-based violence are women and girls.

Sexual and gender-based violence includes much more than sexual assault and rape. Although it may occur in public contexts, it is largely rooted in individual attitudes that condone violence within the family, the community and the State. The root causes and consequences of sexual and gender-based violence must be understood before appropriate programmes to prevent and respond to this violence can be planned.

i. Meaning of the term Sexual and Gender- Based Violence

Sexual violence, gender-based violence and violence against women are terms that are commonly used interchangeably. All these terms refer to violations of fundamental human rights that perpetuate sex stereotyped roles that deny human dignity and the self-determination of the individual and hamper human development. They refer to physical, sexual and psychological harm that reinforces female subordination and perpetuates male power and control.

The term gender-based violence is used to distinguish common violence from violence that targets individuals or groups of individuals on the basis of their gender. Gender-based violence has been defined by the CEDAW Committee as violence that is directed at a person on the basis of gender or sex. It includes acts that inflict physical, mental or sexual harm or suffering, threat of such acts, coercion and other deprivations of liberty.

The term violence against women refers to any act of gender-based violence that results in, or is likely to result in, physical, sexual and psychological harm to women and girls, whether occurring in private or in public. Violence against women is a form of gender-based violence and includes sexual violence.

Sexual violence, including exploitation and abuse, refers to any act, attempt or threat of a sexual nature that results, or is likely to result, in physical, psychological and emotional harm. Sexual violence is a form of gender-based violence.

UNHCR employs an inclusive conception of sexual and gender-based violence that recognizes that, although the majority of victims/survivors are women and children, boys and men are also targets of sexual and gender-based violence.

Sexual and gender-based violence is largely rooted in unequal power relations. These perpetuate and condone violence within the family, the community and the State. The distinction made between public and private spheres should not serve as an excuse for not addressing domestic violence as a form of SGBV. The exclusion of women and girls from the public arena only increases their vulnerability to violence within the family. Domestic violence reinforces gender based discrimination and keeps women subordinate to men.

ii. Definition and the Key concept of sexual and Gender- Based violence

Sexual and gender-based violence includes much more than sexual assault and rape. To understand its root causes and consequences, it is essential to define and distinguish between the terms gender and sex.

The term sex refers to the biological characteristics of males and females. These characteristics are congenital and their differences are limited to physiological reproductive functions.

Gender is the term used to denote the social characteristics assigned to men and women. These social characteristics are constructed on the basis of different factors, such as age, religion, national, ethnic and social origin. They differ both within and between cultures and define identities, status, roles, responsibilities and power relations among the members of any society or culture. Gender is learned through socialisation. It is not static or innate, but evolves to respond to changes in the social, political and cultural environment.

People are born female or male (sex); they learn how to be girls and boys, and then become women and men (gender). Gender refers to what it means to be a boy or girl, woman or man, in a particular society or culture. Society teaches expected attitudes, behaviours, roles and activities. Gender defines the roles, responsibilities, constraints, opportunities and privileges of men and women in any context. This learned behaviour is known as gender identity.

Women around the world are usually in a disadvantaged position compared to men of the same social and economic levels. Gender roles and identities usually involve inequality and power imbalance between women and men. Violence against women, and its acceptance within society and cultures, is one of the manifestations of this inequality and power imbalance.

A comprehensive prevention and response plan should focus on the roles and needs of both women and men and how both can become agents of change. Focusing only on women when addressing sexual and gender-based violence tends to place the responsibility for prevention and response on the victims/survivors.

Violence is a means of control and oppression that can include emotional, social or economic force, coercion or pressure, as well as physical harm. It can be overt, in the form of a physical assault or threatening someone with a weapon; it can

also be covert, in the form of intimidation, threats, persecution, deception or other forms of psychological or social pressure. The person targeted by this kind of violence is compelled to behave as expected or to act against her will out of fear.

An incident of violence is an act or a series of harmful acts by a perpetrator or a group of perpetrators against a person or a group of individuals. It may involve multiple types and repeated acts of violence over a period of time, with variable durations. It can take minutes, hours, days or a lifetime.

Abuse is the misuse of power through which the perpetrator gains control or advantage of the abused, using and causing physical or psychological harm or inciting fear of that harm. Abuse prevents persons from making free decisions and forces them to behave against their will.

Coercion is forcing, or attempting to force, another person to engage in behaviors against her will by using threats, verbal insistence, manipulation, deception, cultural expectations or economic power.

Power is understood as the capacity to make decisions. All relationships are affected by the exercise of power. When power is used to make decisions regarding one's own life, it becomes an affirmation of self-acceptance and self-respect that, in turn, fosters respect and acceptance of others as equals. When used to dominate, power imposes obligations on, restricts, prohibits and makes decisions about the lives of others. To prevent and respond to sexual and gender-based violence effectively, the power relations between men and women, women and women, men and men, adults and children, and among children must be analysed and understood.

In humanitarian crises, affected populations depend on the protection and assistance of institutions. Humanitarian aid workers, government, security and law enforcement officials are in a privileged position as they have the power to make decisions that will affect the well-being of the persons they are assisting. Exploitation and abuse occurs when this disparity of power is misused to the detriment of those persons who cannot negotiate or make decisions on an equal

basis. Exploitation and abuse can take the form of physical and psychological force or other means of coercion (threats, inducements, deception or extortion) with the aim of gaining sexual or other favours in exchange for services.

Consent is when a person makes an informed choice to agree freely and voluntarily to do something. The phrase against her will is used to indicate an absence of informed consent. There is no consent when agreement is obtained through the use of threats, force or other forms of coercion, abduction, fraud, deception, or misrepresentation.

The use of a threat to withhold a benefit, or a promise to provide a benefit, in order to obtain the agreement of a person is also an abuse of power; any agreement obtained this way is not considered to be consensual. There is also no consent if the person is below the legal (statutory) age of consent or is defined as a child under applicable laws.

A perpetrator is a person, group, or institution that directly inflicts, supports and condones violence or other abuse against a person or a group of persons. Perpetrators are in a position of real or perceived power, decision-making and/or authority and can thus exert control over their victim.

It is a myth that sexual and gender-based violence is usually perpetrated by strangers. In fact, most acts of sexual and gender-based violence are perpetrated by someone known to the survivor, and many violent incidents are planned in advance.

Sexual and gender-based violence can also be perpetrated by family and community members. States and institutions condone and perpetrate sexual and gender-based violence when discriminatory practices are not challenged and prevented, including through the use of legal and policy instruments. During war and conflict, sexual and gender-based violence is frequently perpetrated by armed members from warring factions.

iii. Types of Sexual and Gender- Based Violence

The following table describes some of the more common forms of sexual and gender-based violence. The list is neither exhaustive nor exclusive. It is a practical tool that can be used in each location to help identify the different forms of sexual and gender-based violence that exist. Acts of sexual and gender-based violence have been grouped into five categories:

- Sexual violence.
- Physical violence.
- Emotional and psychological violence.
- Harmful traditional practices.
- Socio-economic violence.

Table 6.1 Sexual Violence

Type Of Act	Description/ Examples
Rape and marital rape	The invasion of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body by force, threat of force, coercion, taking advantage of a coercive environment, or against a person incapable of giving genuine consent (International Criminal Court).
Child sexual abuse, defilement and incest	Any act where a child is used for sexual gratification. Any sexual relations/interaction with a child.
Forced sodomy/anal rape	Forced /coerced anal intercourse, usually male-to-male or male-to-female.
Attempted rape or attempted forced sodomy/anal rape	Attempted forced/coerced intercourse; no penetration.
Sexual abuse	Actual or threatened physical intrusion of a sexual nature, including inappropriate touching, by force or under unequal or coercive conditions.
Sexual exploitation	Any abuse of a position of vulnerability, differential power, or trust for sexual purposes; this includes profiting momentarily, socially or politically from the sexual exploitation of another (IASC); Sexual exploitation is one of the purposes of trafficking in persons (performing in a sexual manner, forced undressing and/or nakedness, coerced marriage, forced childbearing, engagement in pornography or prostitution, sexual extortion for the granting of goods,

	services, assistance benefits, sexual slavery).
Forced prostitution (also referred to as sexual exploitation)	Forced/coerced sex trade in exchange for material resources, services and assistance, usually targeting highly vulnerable women or girls unable to meet basic human needs for themselves and/or their children.
Sexual harassment	Any unwelcome, usually repeated and unreciprocated sexual advance, unsolicited sexual attention, demand for sexual access or favours, sexual innuendo or other verbal or physical conduct of a sexual nature, display of pornographic material, when it interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive work environment.
Sexual violence as a weapon of war and torture	Crimes against humanity of a sexual nature, including rape, sexual slavery, forced abortion or sterilisation or any other forms to prevent birth, forced pregnancy, forced delivery, and forced child rearing, among others. Sexual violence as a form of torture is defined as any act or threat of a sexual nature by which severe mental or physical pain or suffering is caused to obtain information, confession or punishment from the victim or third person, intimidate her or a third person or to destroy, in whole or in part, a national, ethnic, racial or religious group.

It is very pathetic to mention that, during armed conflict social structures are disrupted. Women and children face the additional risks of being subjected to sexual and gender-based violence when fleeing the fighting and seeking asylum. Family members are often dispersed during flight, leaving children separated from the rest of their families and women as solely responsible for protecting and maintaining their households. The following chart, adapted from a table developed by S. Purdin, describes the types of violence that can occur during the various phases of the refugee cycle.

Table 6.2 Types of Violence

Phase	Type of Violence
During conflict, Prior to flight	Abuse by persons in power; sexual bartering of women; sexual assault, rape, abduction by armed members of parties in conflict, including security forces; mass rape and forced pregnancies.
During flight	Sexual attack by bandits, border guards, pirates; capture for trafficking by smugglers, slave traders.

In the country of asylum	Sexual attack, coercion, extortion by persons in authority; sexual abuse of separated children in foster care; domestic violence; sexual assault when in transit facilities, collecting wood, water, etc.; sex for survival/forced prostitution; sexual exploitation of persons seeking legal status in asylum country or access to assistance and resources, resumption of harmful traditional practices.
During repatriation	Sexual abuse of women and children who have been separated from their families; sexual abuse by persons in power; sexual attacks, rape by bandits, border guards, forced/coerced repatriation.
During reintegration	Sexual abuse against returnees as a form of retribution; sexual extortion in order to regularize legal status, exclusion from decision-making processes; denial of or obstructed access to resources, right to individual documentation and right to recover/own property.

iv. Sexual Violation Against Children

Rape and other forms of sexual violence against children, both boys and girls, are serious violations of international human rights law and may amount to grave breaches of international humanitarian law.⁶⁶ Acts of sexual violence may constitute a war crime, a crime against humanity or a constitutive act with respect to genocide. In 2009, the Security Council, in resolution 1882, added sexual violence against children as an additional trigger for listing parties to conflict in the Secretary-General's Annual Report on Children and Armed Conflict. The Office of Children and Armed Conflict, together with partners prepared field guidance for its subsequent implementation.

Rape and other forms of sexual violence during armed conflict are prohibited under the Geneva Conventions and their Additional Protocols. Child-specific

⁶⁶ 'Rape and other forms of sexual violence' is not specifically listed in article 147 of 4th Geneva Conventions casting some doubt in some scholars' minds as to its status as a "grave breach" of the Geneva Conventions. Nevertheless most scholars, international and national courts that have decided on the matter conclude that it falls within the reasonable understanding of 'torture or inhuman treatment' or 'serious injury to body or health.'

provisions of these treaties specifically forbid sexual violence against children.⁶⁷ The obligation of humane treatment under Common Article 3 implicitly prohibits rape or any other sexual violence, be it against adults or children. Article 27 of the 4th Geneva Convention explicitly prohibits such acts stating that: “Women [including girls] shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”⁶⁸

The ICCPR and the Convention for the Elimination of all Forms of Discrimination Against Women (1979) (CEDAW) affirm a women’s right to liberty and security of person and to be free from discrimination.⁶⁹ The CRC and its Optional Protocol on Trafficking and Exploitation unequivocally affirm that children must enjoy protection from torture, cruel, inhuman or degrading treatment, a protection broadly accepted as encompassing acts of rape and sexual violence.⁷⁰ Regional human rights instruments such as the African Charter on the Rights and Welfare of the Child (1990) also explicitly forbid sexual violence against children.⁷¹

v. Rape And Other Forms Of Sexual Violence As International Crimes

International criminal law explicitly criminalizes rape and sexual violence during wartime and judicial recognition of its customary status in international law came in 1998 with a number of ground-breaking judgments by the ICTY.⁷² The statutes of the SCSL (Special Court for Sierra Leone), ICTR (International Criminal Tribunal for Rwanda) and ICTY (International Criminal Tribunal for the former Yugoslavia) all cite rape and sexual violence as war crimes and crimes against humanity.⁷³

⁶⁷ Article 27(2) Geneva IV; art. 75(2), 76(1), 77(1) AP I; art. 4(2)(e) AP II—which specifically adds “rape” to the list of forms of indecent assault.

⁶⁸ Specific provisions in the Geneva Conventions relating to protection against rape and sexual abuse include: Common art. 3; art. 12, 50 Geneva I; art. 12, 51 Geneva II; art.13, 17, 87, 89 Geneva III; art.5, 27, 32, 147 Geneva IV; art. 75 AP I; art. 4(1) AP II; and Rules 87, 89-92 of: ICRC, *Customary International Humanitarian Law*, p. 306.

⁶⁹ Art. 2, 3, 6 ICCPR; art. 1-3 CEDAW.

⁷⁰ Art. 34, 35, 37 CRC, Art. 3, CRC’s Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2000).

⁷¹ Art. 27, African Charter on the Rights and Welfare of the Child (1990).

⁷² *Prosecutor v. Furundzija*, ICTY (1998).

⁷³ War crimes: art. 3(e) SCSL; art.4(e) ICTR; art. 2 ICTY. Crimes Against Humanity: art.2(g) SCSL; art.3(g) ICTR; art.5(g) ICTY.

Sexual violence against civilians has been prosecuted by several international tribunals established to punish the perpetrators of international crimes. It was the first time in history that an international tribunal convicted individuals solely on charges of sexual violence against women and girls.⁷⁴ In addition, the SCSL(Special Court for Sierra Leone) established that “forced marriage” is also an offence under international criminal law when it found three militia leaders guilty of crimes against humanity for forcing girls into marriage.⁷⁵ The Rome Statute of the ICC states that rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or “other forms of sexual violence of comparable gravity” may constitute war crimes and crimes against humanity.⁷⁶ Jean Pierre Bemba Gombo, a former leader of a Congolese armed group, is currently standing trial at the ICC on war crimes and crimes against humanity charges resulting from allegations of rape and other abuses by troops under his command.⁷⁷

The offenses included in Article 3 of the ICTY Statute derive primarily from Hague law, there is broad consensus that "laws or customs of war" also encompass the Geneva Conventions, Additional Protocols, and customary international law.¹⁰³ War crimes include grave breaches of the Geneva Conventions and serious violations of other laws (including Hague and Geneva Conventions and Additional Protocols) and customs of war.

I. Grave Breaches (ICTY, Art. 2)

Each of the 1949 Geneva Conventions provide a list of acts considered “grave breaches” and violation of these provisions is considered among the most egregious violations of international humanitarian law. The Geneva Conventions expressly confer criminal liability for violations of the articles of the Convention enumerating the grave breaches. The language ascribing criminal liability to the

⁷⁴ *Prosecutor v. Anto Furundzija*, ICTY 10 December (1998): The ICTY Trial Chamber noted that prohibition of rape and serious sexual assault in armed conflict under customary international law has gradually crystallized. The Tribunal found the accused guilty of a violation of the laws and customs of war (outrages upon dignity, including rape).

⁷⁵ *Prosecutor vs. Alec Tamba Brima, Brazzy Camara and Borbor Kanu* (SCSL, 20 June 2007).

⁷⁶ Art. 7(1)(c), 7(1)(g), 8(2)(b), 8(2)(c), 8(2)(e) Rome Statute.

⁷⁷ *Prosecutor v. Jean- Pierre Bemba Gombo*, International Criminal Court, 12-15 January 2009.

grave breaches is contained in the article immediately preceding the enumeration of grave breaches. Article 146 of the Fourth Geneva Convention provides:

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering, to be committed, any of the grave breaches.

Article 147 of the Fourth Geneva Convention, which protects the civilian population, enumerates the grave breaches as: “willful killing, torture or inhumane treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or unlawful confinement of a protected person.”⁷⁸ The caveat in each Convention is that the grave breach must be committed against “persons or property protected by” the particular Convention. Article 50 of the First Geneva Convention, Article 51 of the Second Geneva Convention, and Article 130 of the Third Geneva Convention list identical grave breaches to those included in Article 147 of the Fourth Geneva Convention. Protocol II does not mention grave breaches, although Additional Protocol I in Article 11(4) and in Article 85 includes and expands upon them.

The Geneva Conventions do not specifically list any form of sexual violence as a grave breach, although case law confirms that sex crimes are covered by the grave breaches provisions, particularly the prohibitions of “torture,” “inhuman treatment,” “willfully causing great suffering,” and “serious injury to body or health.”⁷⁹ The grave breach language is intentionally expansive to provide as much protection as possible to persons protected by the Conventions, and there is general consensus that the provisions should be interpreted liberally.

In practice, the ICTY has limited its Article 2 “grave breach” charges in indictments. Instead, it has simply brought most war crimes charges under Article 3 of its Statute, which means that the prosecution does not have to prove that the conflict was international in nature at the time and place charged in the indictment,

⁷⁸ Fourth Geneva Convention, *supra* note 4, at art. 147.

⁷⁹ *Prosecutor v. Delalic, Judgement*, IT-96-21- T, 16 Nov. 1998, at para. 394 [hereinafter *Celebici Trial Chamber Judgement*.]

as such proof may entail a lengthy and arduous evidentiary process. Prerequisites for Article 3 crimes merely require proof that the crime was committed in either an international or internal armed conflict and was “closely related” to the armed conflict.⁸⁰ Grave breaches are not included within the terms of the ICTR Statute because the conflict in Rwanda in 1994 is generally regarded as non-international in character.

II. Violations of the Laws or Customs of War (ICTY, Art. 3)

Serious violations of the laws and the customs of war may be prosecuted as war crimes. Article 3 of the ICTY Statute has been interpreted as having a “catch-all” residual function.⁸¹ Originally, there was some discussion as to whether serious violations of the Geneva Conventions outside the grave breach provisions carry criminal penalties. Article 146 of the Fourth Geneva Convention requires each state to “take measures necessary for the suppression of all acts contrary to the provisions of the . . . convention other than the grave breaches.” Thus, simply because the grave breaches are specifically attributed “war crime” status does not mean that criminal responsibility cannot attach to other provisions. The ICTY Appeals Chamber has articulated the requirements for when an act constitutes a serious violation of the laws or customs of war:

- (i) the violation must constitute an infringement of a rule of international humanitarian law;
- (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met . . . ;
- (iii) the violation must be 'serious', that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. . . ;
- (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.⁸²

⁸⁰ *Prosecutor v. Tadic*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, IT-AR72, at paras. 70.

⁸¹ *Ibid*, Para 91.

⁸² *Ibid*, Para 94.

It is now beyond dispute that serious violations of Hague and Geneva law, the Additional Protocols, and customary international law, impose criminal responsibility upon the individuals and superiors responsible for the violations. The ICTY has expressly noted that violations of the provisions of the Fourth Geneva Convention and Additional Protocols expressly prohibiting rape, enforced prostitution, and any other form of indecent assault, may be prosecuted.⁸³ In practice, however, most gender or sex crimes have been prosecuted under Article 3 of the ICTY Statute and Article 4 of the ICTR Statute, through the Common Article 3 provisions.

III. Common Article 3 to the Geneva Conventions (ICTR, Art. 4)

The term “Common Article 3” refers to the identical language found in Article 3 of each of the four 1949 Geneva Conventions. Common Article 3 is regarded as a “mini convention” within the Geneva Conventions, as it was originally intended to be the article in the Conventions dedicated to dictating the treatment of persons in internal conflicts. However, Common Article 3 is now recognized as part of customary international law, applicable to both internal and international armed conflicts alike.⁸⁴ Additional Protocol II, which governs internal conflicts, and which is also included within the jurisdiction of the Rwanda Tribunal, uses similar language.⁸⁵ Common Article 3 requires that humane treatment be afforded to “persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause.” It explicitly prohibits the following acts: “Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; . . . Outrages upon personal dignity, in particular humiliating and degrading treatment.”⁸⁶

⁸³ *Prosecutor v. Kvočka*, Judgement, IT-98-30-T, 2 Nov. 2001, at para. 63-64 & n.409 [hereinafter *Kvočka Trial Chamber Judgement*].

⁸⁴ *Prosecutor v. Tadić*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, IT-AR72, at paras. 98-127

⁸⁵ Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, S. Treaty Doc. No. 100-2, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978) [hereinafter *Additional Protocol II*], art. 4(2).

⁸⁶ *Supra note 847*, Common Article 3 to the 1949 Geneva Conventions.

The ICTR has contributed little to developing the law relating to serious violations of Common Article 3 and Additional Protocol II. To date, not a single person has been convicted of a war crime by the ICTR, largely because the ICTR has erroneously articulated, interpreted, and applied the war crimes prescriptions. However, in 2001, the ICTR Appeals Chamber rejected the Trial Chambers' formulation and interpretation of the war crime provisions under its Statute, allowing subsequent Appeals Chamber decisions to reverse applicable war crimes acquittals or Trial Chambers to provide for convictions at first instance.⁸⁷ Thus, there will presumably be at least marginal development of the war crime provisions regarding internal armed conflict in future ICTR decisions. This development will be especially useful because most contemporary armed conflicts are internal rather than international in character.

IV. Crimes Against Humanity (ICTY, Art. 5; ICTR, Art. 3)

The term “crimes against humanity” first appeared in an international instrument in the Nuremberg Charter, when it was included as a means of prosecuting the German Nazi leaders for the gross atrocities committed against certain members of the civilian population, including German citizens, during the Second World War. Although the IMT, IMTFE, CCL10, ICTY, ICTR, and ICC Statutes or Charters have defined the scope of the crime differently, in essence, a crime against humanity consists of an inhumane act (typically a series of inhumane acts such as murder, rape, and torture) committed as part of a widespread or systematic attack that is directed against a civilian population.⁸⁸ It can consist of crimes committed by a state against its own citizens and often has a discriminatory purpose. In practice, persecution and extermination appear to be the most common manifestations of crimes against humanity, and this coupling often results in genocide charges as well. Rape may be a crime against humanity when committed as part of a widespread or systematic attack; sexual violence also regularly forms part of the inhumane acts committed against an enemy group. Rape crimes may also

⁸⁷ *Prosecutor v. Akayesu*, Judgement, ICTR-96-4-A, 1 June 2001, at paras. 442-45 [hereinafter *Akayesu Appeals Chamber Judgement*].

⁸⁸ Theodor Meron, “*Rape as a Crime Under International Humanitarian Law*”, Vol. 87, *American Journal of International Law*, (1998) Pg. 424-427.

be prosecuted as a crime against humanity under the persecution, torture, enslavement, or inhumane acts provisions.⁸⁹

Although the ICTY Statute requires a nexus to an armed conflict, the Statute simply imposes that element as a jurisdictional requirement, thus proof of an armed conflict is not a constituent element of the crime in other courts. And although the ICTR Statute stipulates that the attack be committed on national, political, ethnic, racial, or religious grounds, the common Appeals Chamber has interpreted this requirement as being necessary to prove only for the persecution charge. Moreover, the ICC Statute appropriately recognizes "gender" as one of the discriminatory grounds for the crime of persecution.⁹⁰

The case law has confirmed that the particular act alleged (for example, rape) does not need to be committed in a widespread or systematic manner the act needs simply form part of a widespread or systematic attack. Thus, it is the attack that must be widespread or systematic, not each persecuting or criminal act forming part of the attack.⁹¹

The ICTY Appeals Chamber has confirmed that under customary international law, and as applied by the Tribunal, the general (chapeau) requirements for crimes against humanity are: "(i) there must be an attack; (ii) the acts of the perpetrator must be part of the attack; (iii) the attack must be directed against any civilian population; (iv) the attack must be widespread or systematic; and (v) the perpetrator must know that his acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and know that his acts fit into such a pattern."⁹²

The Tribunals have interpreted the core legal requirements of crimes against humanity and applied them to the facts of each case, copiously developing the

⁸⁹ *Prosecutor v. Kvočka, Judgement, IT-98-30-T, 2 Nov. 2001, at para. 180 & n.343.*

⁹⁰ Rome Statute of the International Criminal Court, 1998 Sess. at arts. 7 (h).

⁹¹ ICTY, *The Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, IT -96-23 and IT-96/1, Appeals Chamber Judgement, 12 June 2002, at paras. 419, 419, website-<https://www.icrc.org/casebook/doc/case-study/icty-kunarac-kovac-vukovic-case-study.htm>, visited on 15.03.15.

⁹² *Ibid*, at paras. 85-105.

jurisprudence of this crime. Perhaps the most contentious issue was whether "systematic" required the existence of a plan or policy. The ICTY Appeals Chamber has recently answered in the negative, stating that a plan or policy may be indicative of the systematic nature of the crime and thus be "evidentially relevant", but it is not a legal element of the crime.⁹³

V. Genocide (ICTY, Art. 4; ICTR, Art. 2)

The ICTY, ICTR, and ICC Statutes have all reproduced the definition of genocide contained in the Genocide Convention. Article II of the Genocide Convention defines genocide as:

Any one of the following acts, when committed with an intent to destroy, in whole or in part, a national, ethnical, racial or religious group: (a) killing, members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group.⁹⁴

Genocide is an international crime imposing individual criminal responsibility upon those committing or facilitating the commission of the crime.⁹⁵ It is predominately defined by intent. This intent must be to destroy, wholly or partially, a national, ethnic, racial, or religious group, as such, by any act that fits into the aforementioned list.⁹⁶ Although genocide is also considered a crime against humanity,⁹⁷ the trend has been to separate the crimes.

⁹³ *Ibid*, Para. 98.

⁹⁴ Convention on the Prevention and Punishment of the Crimes of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).

⁹⁵ *Ibid*, Art. 1.

⁹⁶ *Ibid*, Art. 11.

⁹⁷ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Nov. 26, 1968, art. 1(b), 754 U.N.T.S. 73.

The process of destruction of an intended target group is not limited to physical extermination. An intent to destroy--wholly or partially, physically or mentally--any protected group can be evidence of genocide. The possible sub-elements of the crime of genocide are not mutually exclusive, and more than one sub-element committed during the process of destruction can and usually does apply. Sexual violence can fall under each of the sub-elements, although the most common means of using sex crimes as instruments of genocide are: (b), causing serious bodily or mental harm to the group (such as by raping or otherwise violating women); (c), inflicting conditions of life on members of the group to bring about a slow death (such as having HIV/AIDS-infected persons repeatedly rape the victims); and (d) imposing measures intended to prevent births within the group (such as forced abortion or miscarriage, forced impregnation, sexual mutilation, or rape by a different ethnic group when custom dictates that the father determines the ethnicity of the child).

Various forms of sexual violence may meet the elements of genocide, even when only a single member of the protected group is harmed. If the intent is to seriously harm (that is, destroy, in whole or in part) a member of the protected group by any of the aforementioned methods, targeted as such because of their membership in the group, that should constitute genocide. Often the destructive act will be one of many linked to a broader pattern of both systematic and intentionally random destruction.

The ICTR has most extensively developed the law on genocide. Each Indictment in the Rwanda Tribunal has charged genocide and prosecution has been largely successful. In contrast, only a small percentage of ICTY cases allege genocide, and thus far, there has been only one successful genocide conviction in the Yugoslav Tribunal. By and large, the ICTR Akayesu case and the ICTY Krstic case contribute a majority of the Tribunal's jurisprudence on the elements and scope of genocide.⁹⁸

⁹⁸ *Prosecutor v. Radislav Krstic, Judgement, IT-98-33-T, 19 April 2004, website-http://www.icty.org/x/file/Legal%20Library/jud_supplement/supp49-e/krstic.htm, visited on 15.03.15.*

vi. Specific forms of sexual and gender-based violence used against children

Children can be victims/survivors of most forms of sexual and Gender-based violence. However, children are often victims of the following forms of violence:

- Harmful traditional practices.
- Trafficking.
- Child prostitution.
- Sexual violence within the family.
- Sexual exploitation, abuse and violence by persons having unhindered access to children.

Displaced children, particularly unaccompanied and separated children, are at risk of being forcibly or deceptively trafficked, often for commercial sexual exploitation. Trafficking of a child means the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation. It is not necessary to show that force, deception or coercion was used for trafficking to have occurred.⁹⁹

The *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organised Crime*, 2000 excludes the possibility of “consent” to trafficking by any person under the age of 18. In many cases, trafficking may involve giving payment or benefits to win the consent of the person(s) who have control over the child. Trafficked children may face serious consequences after their escape and/or upon return, including reprisals or retaliation from trafficking rings or individuals, the possibility of being re-trafficked, physical punishment or further deprivation of liberty, ostracism from the community or family, or severe discrimination.¹⁰⁰

⁹⁹ “*Sexual and Gender- Based Violence against Refugees, Returnees and Internally Displaced Persons*”, Guidelines for Prevention and Response, May 2003. United Nations High Commissioner for Refugees, Pg. 76.

¹⁰⁰ *Ibid.*

I. The Key Issues On The Impact Of Internally Displaced Women And Children

Displacement has severe consequences for all but for women and children those are particularly devastating. Women and children bear the brunt of the forced move a lot more than the male members of their families. Many problems that women and children face in displacement situation stem from the gender bias, especially in developing countries.¹⁰¹ The effects of displacement depend on its duration, but immediate manifestations include family separations, exposure to gender violence, trauma associated with the deaths of family members, impaired health, and the loss of the home and possessions. Displacement may affect women's rights to inherit land and property. Over time, the cumulative effects of personal loss may result in depression and physical deterioration. Post-traumatic stress syndrome is a common ailment among women who have been displaced for more than a few months. The long-term impact of displacement on women may mean the permanent loss of social and cultural ties, the termination of career and regular employment, and disruption or loss of educational opportunities. Some marriages do not survive the stress of displacement; divorces are common in IDP settings. Children suffer most when displacement spans periods of several years. They miss education during their formative years, undergo immeasurable trauma and psychological stress, suffer stunted growth due to extended poor nutrition, and have difficulties in socialization.¹⁰²

Effects of Displacement on Women and Children

1. Changes of Gender roles

Displacement also changes gender roles as families separated, relatives are killed, and homes are destroyed. When such events occur, women become heads of families and find themselves forced into unaccustomed roles and responsibilities for

¹⁰¹ Hari Manohar Mathur, "Resettling People Displaced by Development Projects: Some Critical Management Issues" Vol 36 No.1 Social Change(2006), pg 37-38.

¹⁰² Judy A. Benjamin, "The Gender Dimensions of Internal Displacement: Concept Paper and Annotated Bibliography", Women's Commission for Refugee Women and Children, Office of Emergency Programmes, UNICEF November 1998. Pg 13.

which they are ill prepared. Women and girl child are presents to sexual exploitation, domestic violence, and rape increases as gender roles shift. Different agencies needed to consider the potential of domestic violence when planning program made them exclude the male members of the household.

Assistance agencies need to consider the potential of domestic violence when planning assistance programs that exclude the male members of the household.

2. Breakdown of Family

During the transition period of actual displacement women and children suffer more being homeless. During this period the displaced people continue to have two houses. Experience shows from the field it reveals that, it is mostly the women, the aged and the children who are left behind adding to the responsibilities of women at both locations.¹⁰³ Men may be unable to find work or may become involved in the conflict leaving the women responsible for the household often and unaccustomed role for which she may be ill prepared.

3. Loss of Social and Cultural Ties

Displaced women generally lack community support; in many instances, the community is fragmented. Key opinion holders, respected elders, and important role models are frequently absent. The disintegration of community unity increases the vulnerability of women and children and weakens their coping mechanisms. Women and adolescent girls become easy targets for abuse when they are separated from normal support systems, husbands and other male family members. Internally displaced women continue to require protection against further displacement and abuses even after they return home. Women especially need support from their communities to defend their rights and cope with their plight. When families lose their support networks they may fall victim to crime and violence.

¹⁰³ Balaji Panday and Bianya Kumar Rout, “*Development Induced Displacement in India: Impact on women*”, National Commission for Women, 4, Deen Dayal Upadhyaya Marg, New Delhi (2004), Pg. 24.

4. Gender Violence

When we take into account that internal displacement is a function of conflict, disasters and development projects, then, even leaving out other forms of forced migration such as trafficking, we can say that the number of internally displaced women and children is extremely large, even if we cannot provide an authoritative figure.

This had been considered as violation of Fundamental human right to mental and physical integrity as protected under the Universal Declaration of Human Rights¹⁰⁴, CEDAW¹⁰⁵, and the Convention against Torture and Other Cruel, inhuman or Degrading Treatment or Punishment. Women and girls make up the majority of those internally displaced, it is commonplace to say. But one of the challenges of working in this field is that both the aggregate numbers and the gender disaggregated percentages are estimates at best. Typically news reports cover flight after conflict or disasters. Displacement as a result of development projects whether it is infrastructure construction like roads or dams or the purchase of land for setting up special economic zones, is largely undocumented. What we know is that cities across the subcontinent take in vast numbers of displaced persons who need to find new homes and new livelihoods. Informal settlements house them, outside the administrative and legal purview of municipal authorities.

During conflicts, women often not only lack the protection of their families and spouses, but also are under threat by armed soldiers, who may regard them as spoils of war. Displacement does not allow an individual the luxury of moving with their property or community. Moreover, international norms on evacuation posit a hierarchy of needs, with the sick and wounded evacuated first, followed by women, children and elderly. Adult and young men and boys are left behind, vulnerable to fire as well as recruitment. The result is that women outnumber men in most conflict displacement contexts.

¹⁰⁴ Universal Declaration of Human Rights, General Assembly, A/RES/17 A (III), 10 December 1948 (UDHR).

¹⁰⁵ The Convention to Eliminate all Discrimination Against Women, A/RES/34/180, 18 December 1979 (CEDAW).

Women suffer violations of their human rights disproportionately when the normal codes of social conduct are ignored because of conflict. Gender-based violence may be classified in several ways: domestic violence, rape, and forced prostitution and marriages. Although rape and other sexual abuses are recognized as serious crimes in early humanitarian laws, only recently the international community has addressed these forms of violence as serious infringements of fundamental women's rights. As noted earlier, internally displaced women and girl child are more vulnerable to sexual abuse than are refugees because few institutional mechanisms are in place to protect them.

Broken families may be further decimated in the course of flight. Landmines, bandits, abduction, trafficking, illness turning fatal due to lack of medical facilities and separation en route contribute to decimating an individual's support structure. Adolescent and little girls are most vulnerable in these circumstances to sexual abuse and exploitation, to abduction and sexual slavery by militias and to forced marriages. Adult women too, however, face similar threats. It is very hard for women and children to stay safe from gender violence and sexual predators when their social support network has been shattered.¹⁰⁶

Rape is a deliberate tactic used in war to dehumanize and dishonor not only the woman but also her husband and the entire community. The incidence of rape against refugee and internally displaced women is even higher than reported; women IDPs are often reluctant to report rape for fear of retribution from the perpetrators. Other forms of sexual coercion are rife in IDP settings; young girls are often abducted, forced into marriage, sold, or forced into prostitution. Special programs are needed to reduce the likelihood of such occurrences. Therefore, programs for displaced women need to pay special attention to situations where displaced women are highly mobile.¹⁰⁷

¹⁰⁶ Swarna Rajagopalan, "*Gender Violence, Conflict, Internal Displacement And Peacebuilding*", website- www.wiscomp.org/pp-v3/pdfs/swarna.pdf, visited on 16.02.15, Pg. 5.

¹⁰⁷ Website- [www.internaldisplacement.org/8025708F004CE908/\(httpPages\)/22FB1D4E2B196DAA802570BB005E787C](http://www.internaldisplacement.org/8025708F004CE908/(httpPages)/22FB1D4E2B196DAA802570BB005E787C), visited on 15.02.15.

Rape has been a part of violent conflict through human history but scholars have come to recognize the systematic, planned acts of rape often gang-rape, carried out before witnesses, intended to subjugate and humiliate during conflict as a separate category, sometimes described as genocidal rape. A securitization act, the point of rape's has profound impact on both the individual who is raped and her/his community. Rhonda Copelon however, argues that this view, somewhat reflected in international law, not only allows rape to be invisible once more and obscures its gendered dimension, it also obscures the reality that war rape shares characteristics in common with gang-rape and marital rape.¹⁰⁸

In addition to being recognized as gendered violence during the conflict, rape should be recognized as including all forms of sexual torture, humiliation and violence that women and men experience, beyond just vaginal penetration. Women activists appear, by all accounts, to be singled out for particularly brutal treatment.¹⁰⁹ In addition to underscoring their subjugation in custody and humiliating them, it appears that sexual violence against women activists is designed to diminish their political significance and their agency.

In Krog's very moving article, she writes about many factors contributing to silence on the part of otherwise vocal women—the kind of humiliation, a culture where some vocabulary was meant to be private—and the invisibility of their pain. Krog writes, quoting South African activists who shared their experiences with her:

“Female premiers, ministers, business women—they all kept silent. Some of them had been tortured, some of them raped. All of them are formidable women. Yet they did not come forward. They did not speak. ‘How can I?’ one asked me. ‘The police force is my provincial portfolio. I don’t want to know that when I address them, that they look at me thinking...’ Some gave other reasons: ‘The day I became involved in the struggle I made a choice and I fully understood

¹⁰⁸ Rhonda Copelon, “*Surfacing Gender: Reconceptualizing Crimes against Women in Time of War*,” in edited book by Lois Ann Lorentzen and Jennifer Turpin, “*The Women and War Reader*”, (New York: New York University Press, 1998), 64, 75.

¹⁰⁹ Antjie Krog, “*Locked into Loss and Silence: Testimonies of Gender and Violence at the South African Truth Commission*,” in edited book by Caroline O.N. Moser and Fiona C. Clark, “*Victims, Perpetrators or Actors? Gender, Armed Conflict and Political Violence*”, (New Delhi: Kali for Women, 2001), Pg. 206.

the consequences of it.' ... 'I didn't tell a single soul about it. I don't want them to pity me. I don't want them to call me names.'"¹¹⁰

Related to rape is the idea that forcibly impregnating women can help wipe out a community. Children in most societies are thought to inherit the ethnicity of their father; when raped women give birth to the enemy's children, they are seen as contributing to the destruction of their community. Gender violence, especially prostitution and domestic violence, becomes more common in the context of militarization and militarism.

More invisible yet more pervasive, the presence of conflict correlates positively to increasing levels of domestic violence. This is attributed to two factors. The first is that weapons are more easily available in times of war, especially if there are demobilized combatants in the household. Notwithstanding the rhetoric of those who defend the right of individuals to bear arms, the fact is that when weapons are available, they get used against whoever is present and vulnerable. The second factor Men compensate for their loss of power by hitting out at women." This is true both in the conflict and post-conflict phase. Powerlessness comes from several factors: the loss of livelihood and home; injury; being displaced; and the experience of subjugation at the enemy's hands.¹¹¹

For women, the breakdown of social networks due to conflict is an important reason why they are so much more vulnerable in times of conflict. In a sense, conflict creates opportunity and impunity together an opportunity-impunity window, we might say. Sexual harassment, exploitation, trafficking, forced marriage, domestic and intimate partner violence and rape are all more common in conflict situations than before or after. But there are two kinds of impunity that really make this possible. The first is that with broken or separated families and extended community networks, there is no one to challenge gender violence. Parents, siblings, neighbours, cousins that network, if it were a protective one, are likely in disarray. But even more there is a climate of impunity that works at multiple levels. First of

¹¹⁰ *Ibid*, Pg. 205-06.

¹¹¹ Swarna Rajagopalan, "Gender Violence, Conflict, Internal Displacement And Peacebuilding", website- www.wiscomp.org/pp-v3/pdfs/swarna.pdf, visited on 16.02.15, Pg. 12-13.

all, the rhetoric of hostilities sometimes sanctions gender violence, as we have seen. It may not always be organized or on a large scale, but where there is sanction for violence against the other community it extends also, maybe especially, to gender violence. Secondly, conflict's end rises the challenging of building peace over a recent history of bitter hostility. Truth commissions and war crimes trials may or may not recognize gender violence as a separate category of crimes. But impunity really comes with the promise of political amnesty. For all gender violence committed in the name of conflict, amnesty is available as it is for other political acts.¹¹²

D. Trafficking For Sexual Exploitation Among Internally Displaced Women And Children

The researcher had further address the “lack of consent of the victim,” for rape as an international crime, it is necessary to examine international criminal treaties that govern specific criminal regimes, notably of slavery and slavery-like practices, genocide, torture and trafficking in human beings. In these contexts, rape conduct that regional courts acknowledge can be instrumental in the determination of human rights violations such as torture, could also comprises evidentiary indicia of international crimes, such as trafficking. The prime analogy that is consistent with the penalization of rape, is trafficking, whose policy interest inherently seeks to outlaw all forms of sexual exploitation.

Displaced women and children are particularly vulnerable to internal trafficking for sexual exploitation. Since women and children make up 80 percent of camp populations, they often become the sole source of income for their families. A lack of income-generating activities forces them, either on their own accord or on that of their parents and/ or husbands who barter their bodies, into prostitution and trafficking as a means of survival. Armed conflict causes an amplification of the factors that make women and children vulnerable to trafficking in non-conflict situations. In conflict-affected areas, sexual violence is often deliberately employed as a war strategy. When women and children are forced to languish in IDPs camps

¹¹² *Ibid*, Pg. 12.

with no opportunities for work and inadequate protection, they are particularly vulnerable to being trafficked internally and used for a variety of purposes, including as combatants, labourers, spies, or trainers. No matter the purpose, sexual violence is almost always part of their exploitation.

In the camps straddling the Thai-Cambodian border in the 1980s, girls were routinely trafficked by insurgent groups to be servants, ‘wives’ and porters. In a particularly chilling case, girls were also believed to be trafficked to clear mines—that is, the girls were forced to walk in front of columns of soldiers so they would detonate mines instead of the combatants.¹¹³

In the Chiapas State of Mexico, the displacement of 40,000 indigenous peasants led to a 50 percent increase in internal trafficking of women and young girls into forced prostitution between 1992 and 2002. In some cases, these women and girls were lured on false promises of employment and shelter, while in others they are abducted or sold by their parents in an effort to escape poverty and hunger.¹¹⁴ The Internal Displacement Monitoring Center reports that in Colombia, where an estimated 3.9 million people are internally displaced, women and girls as young as 12 are victims of sexual slavery, which often involves forced birth control and abortions. In Kenya, women collect firewood in the keen forest for cooking; if caught by rebel groups they are subjected to imprisonment and forced sexual slavery.

In many cases, abducted women are ‘married’, or forced into sexual slavery, to soldiers or military men. Trafficking for sexual exploitation does not stop when the conflict ends. In fact, post conflict regions offer ideal conditions for traffickers, as they are frequently characterized by the absence of law, political instability,

¹¹³ Susan Martin And Amberr Callaway, “*Internal Displacement And Internal Trafficking: Developing A New Framework For Protection*”, in edited book by Khalid Koser, Susan Martin, “*The Migration-Displacement Nexus: Patterns, Processes, and Policies*”, Vol. 32, Forced Migration, Refugee & Migration Studies, Development Studies, 2011, website-<https://books.google.co.in/books?isbn=0857451928>, visited on 18.03.15, Pg. 230.

¹¹⁴ Susan Martin And Amberr Callaway, “*Internal Displacement And Internal Trafficking: Developing A New Framework For Protection*”, in edited book by Khalid Koser, Susan Martin, “*The Migration-Displacement Nexus: Patterns, Processes, and Policies*”, Vol. 32, Forced Migration, Refugee & Migration Studies, Development Studies, 2011, website-<https://books.google.co.in/books?isbn=0857451928>, visited on 18.03.15, Pg. 230.

increased criminal activity, and dysfunctional law enforcement institutions. This highly volatile environment, coupled with social disintegration, destruction of livelihoods and a lack of economic activities following a war, offer a large collection of highly vulnerable people who are struggling to reconstruct their lives.

Trafficking for sexual exploitation does not stop when the conflict ends. Post-conflict regions offer ideal conditions for traffickers, as they are frequently characterized by the absence of law, political instability, increased criminal activity, and dysfunctional law enforcement institutions. This highly volatile environment, coupled with social disintegration, destruction of livelihoods and a lack of economic activities following a war, offer a large collection of highly vulnerable people who are struggling to reconstruct their lives.

The post-conflict countries generally do not have the government systems in place to combat trafficking. Establishing the rule of law through functioning policing are not available. A sudden increase in trafficking for sexual exploitation often occurs when foreign or international peacekeeping or civilian forces are deployed to a war zone. Foreign soldiers bring money and time to post-conflict settings where both are regarded as priceless commodities. With an increase of demand for sexual services comes an increase in supply. Traffickers and local authorities in post-conflict regions are quick to enter and benefit the emerging lucrative market, which represents an economic opportunity in a situation where few other opportunities to earn an income exist.¹¹⁵

The Guiding Principles also have important provisions regarding the rights of the internally displaced that are particularly important for internal victims of trafficking. The Guiding Principles specify that ‘internally displaced persons shall be protected from discriminatory arrest and detention as a result of their displacement’. Since internal trafficking victims who are forced into prostitution and other illegal activities are often arrested and detained for these coerced actions, this

¹¹⁵ Susan Martin And Amberr Callaway, “*Internal Displacement And Internal Trafficking: Developing A New Framework For Protection*”, in edited book by Khalid Koser, Susan Martin, “*The Migration-Displacement Nexus: Patterns, Processes, and Policies*”, Vol. 32, Forced Migration, Refugee & Migration Studies, Development Studies, 2011, website-<https://books.google.co.in/books?isbn=0857451928>, visited on 18.03.15, Pg. 231.

provision would help to establish the principle that the victims, as distinct from the perpetrators, should not be subject to prosecution. The Trafficking Protocol is not specific on this point.¹¹⁶

The Guiding Principles also specify that internally displaced persons have ‘the right to be protected against forcible return to or resettlement in any place where their life, safety, liberty and /or health would be at risk.’ This would benefit ‘internal trafficking victims who may return to their home communities without an adequate assessment of the risks that they may face. The Protocol encourages States to take these factors into account in determining whether to repatriate international victims, but it has no comparable language for internal victims of trafficking.

The Guiding Principles also specify that ‘internally displaced persons who have returned to their homes or places of habitual residence or who have resettled in another part of the country shall not be discriminated against as a result of their having been displaced. They shall have the right to participate fully and equally in public affairs at all levels and have equal access to public services.’ This provision is particularly important for internally trafficked victims that suffer from social stigmas after being forced into prostitution.

The other provisions of Guiding Principles relate particularly to children who have been trafficked internally: ‘Families which are separated by displacement should be reunited as quickly as possible. All appropriate steps shall be taken to expedite the reunion of such families, particularly when children are involved. The responsible authorities shall facilitate inquiries made by family member and encourage and cooperate with the work of humanitarian organisations engaged in the task of family reunification.’ The Guiding Principles also reiterate the right of children to an education, which is important both in preventing trafficking for labour exploitation and to help victims gain access to education once rescued from traffickers.

¹¹⁶ *Ibid*, Pg. 234.

Traffickers often take documentation from their victims in order to enforce their control, the Guiding Principles that relate to the responsibilities of States in this regard are also useful: the authorities concerned shall issue to them all documents necessary for the enjoyment and exercise of their legal rights, such as passports, personal identification documents, birth certificates and marriage certificates. In a particular, the authorities shall facilitate the issuance of new documents or the replacement of documents lost in the course of displacement without imposing unreasonable conditions, such as requiring the return to one's area of habitual residence in order to obtain these or other required documents.¹¹⁷

The Protocol and Guiding Principles provide a good normative framework for protecting trafficked persons out they still lack strong legal enforcement measures. The Protocol's provisions related to protection of trafficking victims are far more tentative than those related to the prosecution of traffickers. The States are encouraged to take measures to protect the victims, the language is very general and is often framed in a way that refers more specifically to those trafficked across borders, leaving much greater government discretion with regards to internal trafficking victims. The Guiding Principles fill many of the gaps in setting out a legal framework for addressing the protection of the internally trafficked, but they are not legally binding, except to the extent that the Principles are based on existing international law. Enforcing compliance in the case of internal trafficking runs into the same sovereignty constraints as is true with other forms of internal displacement.¹¹⁸

Thus in some respect, internal trafficking is to transnational trafficking what internal displacement is to refugee movements. Although the number of those displaced internally are larger than those forced to move internationally,

¹¹⁷ Susan Martin And Amberr Callaway, *Internal Displacement And Internal Trafficking: Developing A New Framework For Protection*, in edited book by Khalid Koser, Susan Martin, *The Migration-Displacement Nexus: Patterns, Processes, and Policies*, Vol. 32, Forced Migration, Refugee & Migration Studies, Development Studies, 2011, website-<https://books.google.co.in/books?isbn=0857451928>, visited on 18.03.15, Pg. 234-35.

¹¹⁸ Susan Martin And Amberr Callaway, *Internal Displacement And Internal Trafficking: Developing A New Framework For Protection*, in edited book by Khalid Koser, Susan Martin, *The Migration-Displacement Nexus: Patterns, Processes, and Policies*, Vol. 32, Forced Migration, Refugee & Migration Studies, Development Studies, 2011, website-<https://books.google.co.in/books?isbn=0857451928>, visited on 18.03.15, Pg. 235.

international attention, legal frameworks and institutional responses have typically been focused on those who are forced to cross borders. Far greater attention has been paid to those who have been internationally trafficked, particularly for sexual exploitation, than has been given to the often even more hidden forms of internal trafficking.

Constraints of sovereignty undoubtedly make it far more difficult to address trafficking when it occurs within national boundaries. During the past ten years, governments with large IDP populations increasingly find themselves challenged to improve the protection of all of their citizens, including those who have been internally displaced. The Guiding Principles are not binding, they have great normative value in pushing States towards adhering to the protection principles incorporated into them.

E. Trafficking For Sexual Exploitation Among Internally Displaced Women And Children Under Indian Criminal Acts And Rights

Several studies have made already clear that trafficking is essentially a gender and age specific phenomenon in South Asia. It affects women and children particularly. There are undoubtedly instances of trafficking of men within the region as well. However, the movement of men and the profits to agents facilitating the transportation of men occurs primarily as smuggling or illegal/undocumented migration. Trafficking of boys and men in South Asia in no way approximates the dimensions that trafficking in women and girls has acquired in the region.¹¹⁹ It is also interesting to note that although both women and men are smuggled or illegally transported for economic gain, men are more likely to have consented to this migration whereas women and children are trafficked.

¹¹⁹ Jyoti Sanghera, “*Trafficking of Women and Children in South Asia: Taking Stock and Moving Ahead – A Broad Assessment of Anti-Trafficking Initiatives in Nepal, Bangladesh and India*”, (UNICEF, ROSA and Save the Children Alliance, South and Central Asia, 1999), 7. Website-http://www.childtrafficking.com/Docs/sanghera_unicef_stc_allianc.pdf, visited on 20.03.15.

India is a source, destination and transit for both in-country and cross border trafficking. It also witnesses increase in forced/distress migration and trafficking of women and children for labour and child marriage, adoption and to work as domestic labour throughout the country. Though numerous laws have been enacted by the Government of India to curb trafficking, bonded labour etc, it does not have the adequate infrastructure to combat the issue of trafficking, when compared to the magnitude of the problem. The problem also lies in the failure of the State in complying with the minimum international standards for elimination of trafficking.

a. Definition of trafficking under Indian concept

The definition of trafficking can be found in the various sections of ITPA. Section 5 speaks about procuring, taking and even inducing a person for the sake of prostitution. According to this section, even attempt to procure and attempt to take or cause a person to carry on prostitution amounts to trafficking. Therefore 'trafficking' has been given a broad scope.

Definition of trafficking is available in the Goa Children's Act 2003. Though it is focused on child trafficking, the definition is comprehensive. Under section 2 (z), "child trafficking" means "*the procurement, recruitment, transportation, transfer, harbouring or receipt of persons, legally or illegally, within or across borders, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of giving or receiving payments or benefits to achieve the consent of a person having control over another person, for monetary gain or otherwise*".

b. The offence of trafficking, essentially, has the following ingredients

- **Displacement of a person from one community to another:** The displacement could be from one house to another, one village to another, one district to another, one state to another or from one country to another. Displacement is also possible within the same building. An example will clarify the point. Presume that the brothel keeper controls several young

women who are inmates and that one of the women has a teenage daughter staying with her. If the brothel keeper, by duress or bribe, manages to get the mother to agree to allow the teenager to be used for CSE, the teenager has been moved out of the 'mother's community' and into the 'brothel community'. This displacement is adequate to constitute trafficking.

- **Exploitation of the trafficked person:** The ITPA and related laws envisage sexual exploitation of the trafficked person. The process of exploitation may be manifest, as in a brothel, or latent, as in certain massage parlours, dance bars, etc, where it takes place under the facade of a legitimate commercial activity.
- **Commercialization of the exploitation and commodification of the victim:** The trafficked victim is exploited as if she is a commodity. The exploiters generate revenue out of the exploitation. They may share a part of the revenue with the victim too. The victim who is getting a share of the money generated is often 'branded' as an accomplice and arrested/charge-sheeted and even convicted. The trafficked victim, whose freedom even to think, let alone move out, is dictated by the exploiters, should never be treated as an accomplice. Even if she gets a share of the 'earnings', the fact that she has been trafficked to CSE does not alter her status as a victim.
- **The organized crime of trafficking:** Human trafficking is a crime of crimes. It is a basket of crimes. In this basket one can dig out the elements of abduction, kidnapping, illegal detainment, illegal confinement, criminal intimidation, hurt, grievous hurt, sexual assault, outraging modesty, rape, unnatural offences, selling and buying of human beings, servitude, criminal conspiracy, abetment etc. Therefore, multiple abuse and abusers located at different points of time and place together constitute the organized crime of trafficking. A host of human rights violations like denial of privacy, denial of justice, denial of access to justice, deprivation of basic rights and dignity etc constitute other part of the exploitation. Therefore, there is no doubt that trafficking is an organized crime.

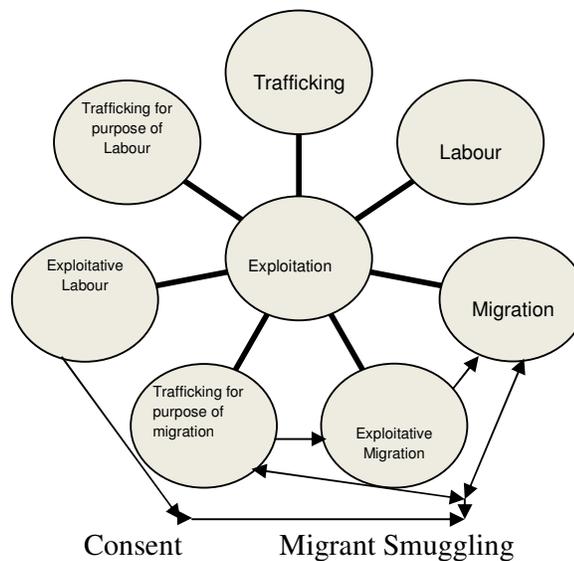
- **The trafficked person:** In the context of ITPA (especially S.5 ITPA) and related laws, a trafficked person could be **a male or a female of any age** who has been trafficked for CSE in a brothel or any place where CSE (Commercial Sexual Exploitation) takes place. ITPA provides punishment even for attempt to traffic a person. **Therefore, even before the person is physically trafficked, the law comes into operation.**
- **Child:** Child is a person who has not attained the age of 18 years. Any child who is vulnerable to trafficking is considered a “person in need of care and protection” under the Juvenile Justice (Care and Protection of Children) Act, 2000 (JJ Act). Law enforcement agencies are duty bound to rescue such children, produce them before the Child Welfare Committee and extend all care and attention.
- **Trafficked adult:** Regarding adults, the mere consent of the person does not exclude the possibility of trafficking. If the consent was obtained under duress, coercion, fear or any pressure, then the consent has no meaning and, therefore, all such instances amount to trafficking. Thus, even when an adult woman is ‘picked up’ from a brothel on the charge of ‘soliciting’, it cannot be presumed that she is guilty of soliciting unless and until the ‘*mens rea*’ (i.e., the intention) is investigated. **A woman trafficked for CSE is a victim of CSE and not an accused.**

c. Factors Leading to Trafficking

Table 6.3 “Poverty is not the only cause”¹²⁰

<p>SUPPLY FACTORS</p> <ul style="list-style-type: none"> - Poverty - Female - Foeticide / Infanticide - Child marriage - Natural Disasters (floods, cyclones etc.) - Domestic violence - Unemployment - Lure of job / marriage with false promises - Domestic servitude - Traditional / Religious prostitution (Devdasi) - Lack of Employment opportunities 	<p>TRAFFICKING</p>	<p>DEMAND FACTORS</p> <ul style="list-style-type: none"> - Migration - Hope for jobs / marriage - Demand for cheap labour - Enhanced vulnerability due to lack of awareness - Creation of need and market by sex traffickers for ‘experimental’ and ‘tender’ sex. - Sex tourism - Internet pornography - Organized crime generating high profits with low risk for traffickers.
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Figure 4.1 Interplay between exploitation, trafficking, migrations, Smuggling, labour and consent



d. Effects of Trafficking of Internally Displaced Women and Children

¹²⁰ Dr.(Mrs) Intezar Khan, “Child Trafficking in India: A Concern”, P. 10, website- http://jmi.ac.in/upload/publication/Child_Trafficking_in_India.pdf, visited on 20.03.15.

i. Impact of Trafficking

In the absence of awareness of human rights, the economically and socially deprived people at the grassroots have become easy prey to the trafficking trade. Migrating populations have become most vulnerable to exploitation by traffickers. It's mainly the women, children and poor people from rural area who are the victims of trafficking. Similarly further the impact spoils ones life and polluted the society.

ii. Impact on Individual

Trafficked persons are reportedly traumatized by their experiences. Depression and suicidal thoughts are commonly reported. The mental and emotional state of the survivors may include malevolence, helplessness and withdrawal, disassociation, self-blame and identification with the aggressor, whereby the victims convince themselves that their experiences had to happen instead of viewing them as traumatic.

Some of the psychiatric disorders among survivors of trafficking are listed as post-traumatic stress disorder, depressive disorder, dissociative disorders, psychotic disorders and eating. Girls are made to bear the responsibility of upholding the family honour through their sexual purity/chastity. If they are trafficked into CSE (commercial sexual exploitation), they face additional stress because of the prevalent morality.

iii. Impact on society

The crime of trafficking involves the violation of a whole scope of laws and human rights. It becomes a threat to society because traffickers operate across borders with impunity, with the growing involvement of organized criminals and by generally undermining the rule of law. Trafficking 'threatens the very fabric of society' because it involves not only criminals but also law enforces.

e. Legal Foundation- National Laws

India has a fairly wide framework of laws enacted by the Parliament as well as some State legislatures, apart from provisions of the Constitution which is the basic law of the country.

Legal Framework to Address Trafficking in India

The phenomena of prostitution including girl child prostitution have not only continued, but grown during the long periods of its operation. It has undergone a series of changes in terms of demand for prostitutes, forms of prostitution factors contributing to prostitution, roles played by the prostitutes and social attitude towards prostitution along with various socio-economic and technological changes. Child prostitution has presently become a commercial vice on an open and organized scale often involving ruthless third party interest of the procurers pimps brothel keepers and others, sometimes even of the families.

The increasing trans-nationalisation of the problem of the sale of children has called for greater attention due to the linkages between supply and demand, criminality and their chain effect. Many of the western countries have emerged as a potential market for supplies of children. The sale of children is one of the heinous crimes in the society. Criminal elements vary from small scale operators to large scale multinational network. Many countries suffer from poor law enforcement, and close relation between State, National and International law enforcement bodies is lacking.

Trafficking in women and children is a crime which often transcends international boundaries calling for universal jurisdiction and therefore it cannot be inconsistent with the condition of jurisdictional limitations arising out of the nationality of offenders. In accordance with the provision of U.N. trafficking Protocol as well as the optional protocol to the Convention on the Rights of Child there is a need for extraterritorial legislation. An offence under this Act should have a universal jurisdiction. A crime by anybody in India should be made triable in the country where he/she belongs to, subject to dual criminality.

Article 34 of the Convention states that “State Parties should undertake to protect the child from all forms of sexual exploitation and sexual abuse”. There are other International instruments¹²¹ as well as media focusing renewed attention on their sexual exploitation and trafficking of children, especially the girl child.

The Constitution of India, the fundamental law of the land, forbids trafficking in persons. Article 23 of the Constitution specifically prohibits “traffic in human beings and beggar and other similar forms of forced labour”. Article 24 further prohibits employment of children below 14 years of age in factories, mines or other hazardous employment. Other fundamental rights enshrined in the Constitution relevant to trafficking are Article 14 relating to equality before law, Article 15 that deals with prohibition of discrimination on grounds of religion, race, caste, sex or place of birth, Article 21 pertaining to protection of life and personal liberty and Article 22 concerning protection from arrest and detention except under certain conditions.

The Directive Principles of State Policy articulated in the Constitution are also significant, particularly Article 39 which categorically states that men and women should have the right to an adequate means of livelihood and equal pay for equal work; that men, women and children should not be forced by economic necessity to enter unsuitable avocations; and that children and youth should be protected against exploitation. Further, Article 39A directs that the legal system should ensure that opportunities for securing justice are not denied to any citizen because of economic or other disabilities. In addition to this, Article 43 states that all workers should have a living wage and there should be appropriate conditions of work so as to ensure a decent standard of life.

¹²¹ Universal Declaration of Human Rights-1948; Convention for the Suppression of Traffic in Person and of the exploitation of the prostitution of others-1949; the International Covenant on Human Rights-1966; the World Declaration on the Survival, Protection and Development of children and its Plan of Action-1990; the 1992 Programme of Action of the United Nations Commission on Child Pornography; the 1995 Copenhagen Declaration and Platform for action of Fourth-World Conference on Women; the (draft) Programme of action of the UN Commission on Human Rights on the Traffic in persons and the Exploitation of Prostitution of Others and the recommendations of the Committee of the Rights of the Child and the UN Special Rapporteur on the Sale of Children.

The judiciary too has played an active role in preventing and combating trafficking by pronouncing some landmark judgments in “Public Interest Litigations”. Prominent among them are the 1990 case of *Vishal Jeet v. Union of India*¹²² and the 1997 case of *Gaurav Jain v. Union of India*.¹²³ In the former case, on the directions given by the Supreme Court, the Government constituted a Central Advisory Committee on Child Prostitution in 1994. Subsequently, State Advisory Committees were also setup by State Governments.

The judicial decisions have more seriously tried to fill the gap between morality and law in the context of amelioration of the interests of prostitutes and rehabilitation of the Child prostitutes or children of prostitutes. *Upendra Baxi*¹²⁴ and *Gourav Jain* cases point out this trend of development. The Supreme Court in *Gourav Jain* observed, “The prostitute has always been an object and was never seen as complete human being with dignity of person; as if she had no needs of her own, individually and collectively. Their problems are compounded by coercion laid around them and tortuous treatment meted out to them. When they make attempts either to resist prostitution or relieve themselves from the trap, they succumb to the violent treatment and resultantly many a one settle for prostitution.”¹²⁵

India has the Juvenile Justice Act of 1986¹²⁶ which deals with neglected juveniles found in conditions of social maladjustment delinquency or neglect. This act is used to release young girls less than 18 years in brothels. The Indian Penal Code prohibits procuring minor girls, selling or buying of girls for the purpose of prostitution. India has formulated the Suppression of Immoral Traffic in Women and Girls Act, 1956. The Act was amended in 1978 and again in 1986 under the name of Immoral Traffic (Prevention) Act to rectify some of the inadequacies in the earlier Act. The limited circumstances of penalty upon prostitutes include: carrying on prostitutes in or in the vicinity of public place, places of public religious worship, educational institution hostel hospital, nursing home or other notified public place and seducing or soliciting for purposes of prostitutes. The punishment could be

¹²² (1990) 3 SCC 318.

¹²³ (1997) 8 SCC 114.

¹²⁴ *Upendra Baxi (II) V. State of .P;* (1986) 4 SCC 106; 1986 SCC (Cri) 381; AIR 1987 SC 191.

¹²⁵ *Gaurav Jain V. Union of India,* (1997) 8 SCC 114 at P.119.

¹²⁶ Now known as Juvenile Justice (Care and Protection of Children) Act, 2000.

imprisonment for a period of 7 years or for life or for a term that may extend to 10 years.

A very confused relation between trafficking and prostitution, there is no proper understanding of the seriousness of trafficking. It would be appropriate here to list out the wrongs, violations, harms and crimes that are committed by various persons on a trafficked victim. These violations can be realized only during a careful interview of a trafficked person. Once the victim is allowed, facilitated and promoted to speak, the unheard story will reveal a long list of violating acts perpetrated on her. As a typical example, under the (IPC) **Indian Penal Code**, a trafficked girl child has been subjected to a multitude of violations. She has been:

- Displaced from her community, which tantamount to kidnapping/ abduction (Sections 361, 362, 365, 366 IPC may apply).
- Procured illegally (S.366 A IPC).
- Sold by somebody (S.372 IPC).
- Bought by somebody (S.373 IPC).
- Imported from a foreign country (if she hails from a foreign country, or even from J & K State, and is under 21 years of age – S.366 B IPC).
- Wrongfully restrained (S.339 IPC).
- Wrongfully confined (S 340 IPC).
- Physically tortured/injured (S.327, 329 IPC).
- Subjected to criminal force (S. 350 IPC).
- Mentally tortured/harassed/assaulted (S. 351 IPC).
- Criminally intimidated (S.506 IPC).
- Outraged of her modesty (S 354 IPC).
- Raped/gang raped/repeatedly raped (S 375 IPC).
- Subjected to perverse sexual exploitation ('unnatural offences') (S.377 IPC).
- Defamed (S 499 IPC).
- Subjected to unlawful compulsory labor (S.374 IPC).
- Victim of criminal conspiracy (S 120 B IPC).

This list is only illustrative and not exhaustive. Undoubtedly, in every case, the trafficked person is a victim of at least one or more of the violations listed above. Oftentimes victims become pregnant as they are subjected to non-protective sex. If the victim are subjected to miscarriage then the liability of the offender falls under Sections 312 to 318 IPC. In some cases, the process of exploitation has proven fatal wherein the victim succumbs to the direct effects of the harm or to the consequential problems arising thereof. This means that the offence of homicide/murder is also attracted.

The ITPA(Immoral Traffic (Prevention) Act, 1956) is not a self-sufficient piece of legislation. It depends upon the Indian Penal Code to address some of the most crucial and serious offences that constitute commercial sexual exploitation and trafficking. ITPA is also take initiative to the international dimensions of the crime and makes no provisions to tackle the international crime. Thus it is crystal clear that the Act maintained a silence on the issue of second generation trafficking i.e. induction of the children of victims for commercial sexual exploitation and trafficking into the flesh trade in absence of any positive social intervention.

Under the J.J.Act, Section 22-A provides for setting up of special courts for speedy trials of offences. Though the implementation was left to the discretion of the state government as a result no such court was established. The Act did not fix any responsibility on the part of the intervening state agencies like the enforcement, the Juvenile Welfare Board, the Heads of the various State Agencies giving shelter to the actual and potential victims of commercial sexual exploitation and tourism to conduct medical examination of the juveniles particularly to ascertain any incidence of sexual exploitation, and in the event of such an incidence to file an FIR against an identified or unidentified offenders a result the children and minors are rescued from brothels or re in the captivity of the traffickers, who have been sexually exploited is rarely medically examined and in the case of any incidence of sexual exploitation no criminal proceedings are initiated at any police stations.

The Juvenile Justice (Care and Protection of Children) Act, 2000 (JJ Act 2000) also has penal provisions. Anybody in control of a child who assaults,

abandons, exposes or willfully neglects the child or procures him to be assaulted, abandoned or exposed causing the child unnecessary mental or physical suffering, is liable under S. 23 JJ Act.

There are so many Human Rights violations that take place on trafficked person. The list includes the following:

- Deprivation of the right to life (slave-like conditions).
- Deprivation of the right to security.
- Deprivation of dignity.
- Deprivation of the right to access to justice and redressal of grievances.
- Denial of access to health services.
- Denial of right to self determination (e.g. when the victim is re-trafficked).
- Denial of right to return to own community.
- Double jeopardy (e.g., a person trafficked across a border is sometimes convicted for non-possession of passport/visa, etc. and is simultaneously punished for ‘soliciting’).
- Denial of right to representation.
- Denial of right to be heard before decision making.

The list of rights violations is long and several such violations can be listed out depending on the provisions of the Constitution/Protocols/Conventions etc.

It is apparent that issue of prostituted children in the name of tradition by their own families is still not addresses by Indian Laws and in those cases when the law has indeed been used to protect victims or punish the abusers the process has been subjective, based mostly on the legal powers of the lawyers or the sensitivity of the judge. There is Setting of a national database/web portal under the aegis of National Crime Records Bureau. The main purpose of this kind of a mechanism is to create a help desk in providing information on missing persons including women and children, alert notice on suspected traffickers, anti-trafficking networks, do’s and don’ts to be followed while dealing with victims of trafficking, etc.¹²⁷

¹²⁷ Integrated Plan of Action To Prevent And Combat Human trafficking With Special Focus On Children and Women, nhrc.nic.in/PLANOFACTION.doc, visited on 27.02.15.

Appointing trained social workers and counsellors at police stations, courts and homes/institutions of different kinds meant for accommodating victims of trafficking. NGOs provide the appropriate linkage between police and civil society as well as between the victim and civil society. A few examples of rehabilitation by NGO's are-

- *Prayas Bharti*, an NGO based at Patna, was instrumental in rehabilitation of a trafficked girl of 16 years, who was lodged in jail for two years on the charge of 'soliciting'. The villagers refused to accept her back, 'branding' her as prostitute. *Prayas Bharti* spent one full day with the entire villagers, speaking to them, coaxing them, and finally convincing them that the girl is a 'victim of trafficking' and a 'child in need of care and protection'. The commendable initiative by this NGO helped proper rehabilitation of the girl.
- *STOP*, based at Delhi, took initiative to assist the rescued young women locate partners and facilitated their public marriage. The empowerment programmes by *STOP*, coupled with marriage to a suitable partner, could ensure that these young women were rehabilitated and that there would be no re-trafficking.
- *Prajwala*, Hyderabad and *Prayas*, Delhi worked with the corporate sector and rehabilitated several young women, who were victims of trafficking and sexual assaults for a long period. They tied-up with AMUL cooperative, to help train these young women in the sale processes and, thereafter, the corporate sector utilized their services for sale and marketing of their products. This is a landmark initiative in involving the corporate sector in the rehabilitation and empowerment of trafficked girls. This has been recognized to be a 'good practice' in permanent rehabilitation.
- *SANLAAP*, based at Kolkata, networks with police and BSF and ensures that the women and children trafficked from Bangladesh are not 'pushed back' (as is the usual case with illegal immigrants) but are properly transferred to responsible NGO's across the border. The networking of *SANLAAP* with the NGO's and government agencies across the borders have ensured not

only proper rehab but also prevented re-trafficking and further violations of the trafficked persons.

It is rarely any survivors of trafficking get full family support after she is rescued. These women and children have undergone long term exposure to isolation sexual abuse, rape, physical torture, fear cheating and hence when she is returned to her social space it is difficult for her to feel that she will be accepted. Thus these make them failure to negotiate with the emotional challenges and sometimes the family fails to give that support.

F. A Sum Up

After the long discussion on violence against the internally displaced women and children it is found that, CEDAW General Recommendation No. 19, and the other human rights instruments, promote non-discrimination against women and girls are operational, at all times and under all circumstances, even during armed conflict. Further the researcher had found a review of humanitarian law, human rights law and international criminal law reveal a growing tendency to define forms of sexual violence, including rape, and use their investigation and prosecution to redress impunity for gender-based violence. These areas of law appear to be developing the precept that reduces or eliminates the legal relevance, and thus requirement of a victim's lack of consent to acts of sexual exploitation, especially rape as a prerequisite for prosecution. Jurisprudence of rape is more likely to qualify its examination based upon the context of the coercive physical or mental circumstances, abuse of power, or the status of the victim/survivor. Coupled with judicial acknowledgment of a victim's inherent sexual integrity, sexual autonomy, sexual equality and right to human dignity, judicial pronouncements have broadened their understanding of gender-based violence. Human rights protection now augurs for more refined and responsive right to equal access to justice under the humanitarian norms and international criminal law for women and girls.

These rights must encompass procedural and substantive aspects of access to justice, which are not mired in gender-weighted myths about sexual violence nor legal inaction nor inappropriate actions, especially when dealing with the crime of

rape. If the “impact” of the lack of consent element in rape, is sanctioned and raised more frequently with female victim/survivors, even when rape is prosecuted under another crime, like persecution or torture, or sexual slavery, a disproportionate gendered chilling effect will descend on the females’ exercise of their rights to access humanitarian norms.

Women and girls are securing the right to equal access to the judicial process as a means to redress discrimination, including gender-based violence. Exercising these rights and further securing them necessitates an analysis of the procedural and substantive aspects of investigation, prosecution and adjudication of IHL norms and international criminal law. Sexual violence, in particular rape, serves as a beachhead and a yard stick to dissect and discern the female community’s real ability to exercise its access to justice during war or times of national emergencies or in their immediate aftermath. The hard law gains of the specialized international courts and tribunals still require a vigilant, even handed application of the appropriate sex-based crimes, and their attendant liability forms. Due diligence, on the part of judges to resistance any sexist interpretations of the laws, elements, procedural rules and the evidence, remains critical to the endeavour of constructing a non-discriminatory international justice system. Gains must be constantly safeguarded, questioned and then further developed, especially at the ICC. Regional human rights courts and appropriate national *fora* must also ensure that females retain comprehensive, dynamic protection and full enjoyment of the human rights.

The researcher must confront sex crimes and find ways to understand and prevent them. It is also to emphasize deconstructing the harmful stereotypes and practices that have resulted in the endemic marginalization of women and a systemic indifference to the crimes committed against them. Only when we accept that victims of sexual violence should not bear the shame and stigma that society traditionally imposes on them, and when we acknowledge that rape is a crime of serious sexual, mental, and physical violence that deserves redress will we truly be able to tackle the underlying causes of sex crimes. When reverse the stigmas and the stereotypes associated with sex crimes, we take away much of the power held by the perpetrators of these crimes. Further when we place the shame on the perpetrators

of sex crimes instead of on the victims, recognize perpetrators as weak and cowardly, typically men with weapons preying on civilians in far more vulnerable positions, and formulate rape as a despicable crime that brings dishonor to all men, then we can also take away at least some of its potency and thus its use as a weapon.

The gender jurisprudence of the ICTY and ICTR will help in the struggle to ensure that gender crimes in other places, such as Afghanistan, Burma, Bangladesh, Guatemala, Congo, Chechnya, and Cambodia, are prosecuted and punished. The Serious Crimes Unit in East Timor, the Special Court in Sierra Leone, and the International Criminal Court join other international, regional, mixed, and local accountability initiatives to resoundingly demonstrate that justice has turned a corner and impunity is no longer the norm. It was evidence of gender-related crimes before the ICTY and ICTR, indefatigable efforts by individuals and organizations working alongside or under the auspices of the Women's Caucus for Gender Justice in the ICC, and the participation of gender-sensitive delegates that secured the inclusion of rape, enforced prostitution, sexual slavery, forced pregnancy, enforced sterilization, sex trafficking, and other crimes of sexual violence within the war crimes and crimes against humanity provisions of the ICC Statute. The unequivocal inclusion of a broad range of sex crimes within the jurisdiction of the ICC, which have largely been reproduced in the statutes for the Sierra Leone and East Timor courts, indicates a new global awareness of the dangers of continuing impunity for gender and sex crimes.¹²⁸

The explosive development of gender-related crimes in international law within the last ten years reflects the international community's denouncement of the crimes and the commitment to redress them. The inclusion and enumeration of several forms of sexual violence in the ICC Statute acknowledges that these are crimes of the gravest concern to the international community as a whole, and their inclusion in the ICTY/R Statutes situates them amongst the crimes regarded as constituting a threat to international peace and security. Further, the large and ever increasing number of human rights treaties, declarations or reports, conference or

¹²⁸ Kelly D. Askin, "Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles", Volume 21, Issue 2 Article 4, Berkeley Journal of International Law, Pg. 60-61.

committee documents, U.N. resolutions and decisions by human rights bodies promulgated since the 1990s that condemn, protect against, prohibit, or outright criminalize gender-related violence reflects the commitment of the international community to afford accountability for these crimes, irrespective of the presence of an armed conflict.¹²⁹

As noted above, genocide, slavery, torture, war crimes, and crimes against humanity are violations of jus cogens, subject to universal jurisdiction. Many forms of sexual violence constitute forms or instruments of genocide, slavery, torture, war crimes, and crimes against humanity, making them subject to universal jurisdiction when they meet the constituent elements of these crimes. However, there is now a strong indication that rape crimes may be subject to universal jurisdiction in its own right. The landmark jurisprudence of the Yugoslav and Rwanda Tribunals recognizing sexual violence as war crimes, crimes against humanity, and instruments of genocide, the inclusion of various forms of sexual violence in the ICC Statute (including crimes that had never before been formally articulated in an international instrument), the increasing attention given to gender violence in international treaties, U.N. documents, and statements by the Secretary-General, the new efforts to redress sexual violence in internationalized/hybrid courts and by truth and reconciliation commissions, the recent recognition of gender crimes by regional human rights bodies, and the increasingly successful claims brought in domestic court to adjudicate gender crimes all provide compelling evidence that crimes of sexual violence are now considered amongst the most serious international crimes. This in turn supports an assertion that sexual violence, at the very least rape and sexual slavery, has risen to the level of a jus cogens norm. Such an attribution provides increased means of protecting women and girls, bolsters efforts in enforcing violations of the laws, and challenges traditional stereotypes of gender crimes being less grave or important. It has taken over twenty-one centuries to acknowledge sex crimes as one of the most serious types of crimes committable, but it appears that this recognition has finally dawned.¹³⁰

¹²⁹ *Ibid*, Pg. 61.

¹³⁰ *Ibid*, Pg. 62.

Thus from the above noted presentation of the issues where women and children have to face, it is clear that lots of work needs to be done to improve the situation. The studies we used concur on a number of recommendations on steps to be made to achieve this objective. According to these, States and societies should:

On violence

- Criminalise all forms of violence against women (custodial, domestic, sexual violence and trafficking) under national laws with strong punitive measures;
- Exclude crimes of sexual violence from amnesty accords;
- Sensitize law enforcement officials, including judges, police and armed forces, about crimes against women;
- Emphasize the prohibition of sexual violence in military codes and training manuals of police officers, military and paramilitary groups and peacekeeping forces;
- Carry out fast and effective investigations of rape, prosecute all security personnel in civilian courts and give punishments not lower than under civilian law;
- Protect medical workers examining victims of sexual and custodial violence;
- Regarding custodial violence in India, always apply rules established by the Supreme Court concerning arrest and detention of women suspects;

On health

- Provide victims of violence with rapid and appropriate health care, trauma counseling and rehabilitation programmes including reintegration into the community, while giving special emphasis to the needs of women;
- Make available a sufficient number of trained female medical personnel;
- Always provide basic reproductive health services accessible to women;

On work, land and property rights

- Provide training and agricultural and work assistance programmes to women, especially those who are displaced or have become single heads of households;

On displacement

- Engage women in the process of planning of displacement camps, take into account their needs and adopt practical measures for their safety (for example: *“involving female security officers in the patrolling of camps; appropriate fencing and lighting to deter night raids; appropriate location of sanitary facilities limiting women’s exposure to abuse; provision of food which needs limited cooking; and types of heating and cooking stoves which reduce the need to collect firewood outside the camps, so reducing the risk of injury or attack”*77);
- Train and sensitize personnel in displacement camps to special women needs;
- Incorporate the UN Guiding Principles on Internal Displacement into national laws;

On access to justice

- Train and make available special, preferably female, police staff for approaching women victims of violence;
- Organize Commissions in the nature of truth and reconciliation commissions to enable victims of violence to speak up and gather evidence of crimes committed against them;
- Ensure that witnesses are protected and prevent re-victimization of women by insensitive practices of law-enforcement officials;
- Provide reparation programmes to victims of violence including compensation and re-integration into their communities;

In general

- Spread awareness among women about their rights, provide them with literacy programmes, legal and support services;
- Spread awareness of the rights of women in the society – for example through radio and theatre;
- Support women groups as means for dissemination of knowledge on women rights and an important part of rehabilitation programmes for victims of violence;
- Involve men in programming activities to secure their support, promote community based programmes;
- Ratify important international human rights treaties, such as the Convention against Torture, the Refugee Convention, Additional Protocols to the Geneva Conventions and Protocols to the International Covenant on Civil and Political Rights and the Convention on the Elimination of all forms of Discrimination against Women, as well as the Rome Statute of the International Criminal Court.

As the problems faced by internally displaced women and children in different situations are very closely intertwined with their position in times of peace, it is essential that the latter is addressed simultaneously. The social status of women must be uplifted not only in law but mainly in daily life. Efforts must be made to bring more attention to the heinous crimes committed against them and to the available remedies. Most importantly, awareness must be raised among them as well as in the society about their rights and their needs.

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