International Human Rights in Land As a Tool to Empower Women in Post-Conflict Countries

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Summary

Post-cold war geopolitical transformations have affected the ways armed conflicts manifest and develop. Although overall more men than women continue to die as a result of conflict, the nature of warfare is changing in ways that increasingly endanger women and girls. Besides suffering from the general brutality inflicted by violent conflict, women also suffer particular attacks whose form is defined by distinct notions of female sexuality.

For that reason, it is unequivocal the need to draw attention to violence against women and girls in the context of the diverse armed conflicts. However, the ironic fact must be recognized that the upheaval of a conflict can break down social barriers and traditional patriarchal patterns, providing opportunities to integrate international legislation against gender discrimination into the domestic system. Such legislation, if implemented, will serve as a basis for the reconstruction of a more just and equitable society in the post-conflict phase.

Land is more than often identified as the basis of wealth, social status and power. It is the primary source for shelter, food and economic activities. Right to housing cannot be fulfilled if there is no access to land. Consequently, equal rights to access land are fundamentally important to the potential of building balanced gender relations in post-conflict societies and to integrate women to their new reality.

At the international level, land rights are contained in numerous international treaties and declarations. Broadly speaking, these human rights instruments do not directly articulate the right to access land and related rights, but create the obligation of non-discrimination and equal enjoyment of all rights for all people regardless of sex. UN instruments and documents interact and combine to constitute a legal and political base for the protection and enforcement of women’s land rights and must be considered holistic.
## Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>CEDAW</td>
<td>Convention on the Elimination of All Forms of Discrimination against Women</td>
</tr>
<tr>
<td>CERD</td>
<td>Convention on the Elimination of All Forms of Racial Discrimination</td>
</tr>
<tr>
<td>CESCR</td>
<td>Committee on Economic, Social and Cultural Rights</td>
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<tr>
<td>ECmHR</td>
<td>European Commission on Human Rights</td>
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<tr>
<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>FAO</td>
<td>Food and Agriculture Organization</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<tr>
<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<tr>
<td>ICERD</td>
<td>International Convention on the Elimination of All Forms of Racial Discrimination</td>
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<td>ICJ</td>
<td>International Court of Justice</td>
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<td>ICRC</td>
<td>International Committee of the Red Cross</td>
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<td>ICTR</td>
<td>International Criminal Tribunal on Rwanda</td>
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<td>IHL</td>
<td>International Humanitarian Law</td>
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<td>LTTE</td>
<td>Liberation Tigers of Tamil Eelan</td>
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<td>NGO</td>
<td>Non Governmental Organization</td>
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<td>PICJ</td>
<td>Permanent Court of International Justice</td>
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<td>Acronym</td>
<td>Full Form</td>
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<tr>
<td>PFA</td>
<td>Beijing Platform for Action</td>
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<td>SC</td>
<td>United Nations Security Council</td>
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<td>SCR</td>
<td>Security Council Resolution</td>
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<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNFPA</td>
<td>United Nations Population Fund</td>
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<td>UNIFEM</td>
<td>United Nations Development Fund for Women</td>
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<td>UNHCR</td>
<td>United Nations High Commission for Refugees</td>
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<td>UNRISID</td>
<td>United Nations Research Institute for Social Development</td>
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1 Introduction

This paper will focus on the study of International Human Rights Law as a way to maintain the gains achieved by women during external or internal armed conflicts.

While women and girl children affected by contemporary wars are the most assailable group considering their exposure to specific forms of gender-based violence and exploitation, the terms ‘vulnerable’ and ‘victim’ are not synonymous with ‘women’. Women, in wartime, show tremendous courage and resilience as survivors and in the multiple new roles they assume.

Many women participate as members of the regular armed forces or armed groups and in their supporting services. Some of them take part in acts of torture and genocide and are responsible for serious crimes under humanitarian law.

As members of the civilian population, women have important, and often crucial, social and household economic roles and skills, which enable them to deal with the increased stresses and burdens placed on them in wartime. For example, women have initiated small enterprises and income-generating projects with meager resources within their devastated communities and within camps for the displaced. Others start performing activities -- like mechanics and civil construction -- that were traditionally carried out by men and often even forbidden to be executed by women before the conflict.

Paradoxically, wars also open windows of opportunities for the society to undermine gender oppressive restrictions and rules. Alongside with psychosocial traumas, social, political, economic, religious and cultural norms that oppress women in times of peace are challenged in times of war. For instance: during armed conflict women tend to step outside the household context. Going to the labor market broadens their abilities and also increases the interest and opportunities to associate and take advantage of working collective, as a class. In addition, the movement of populations,
the scattering of families headed by women create situations where they have either to participate in decision making or to strengthen solidarity among themselves, raising their political awareness and building strength as a class.

Obviously, the achievements in times of conflict are often difficult to grasp and may often be ambivalent. As it can be noticed along this study, the processes of desirable structural transformation shall be critically analyzed, as gain and losses can be different sides of the same coin and there is no clear cut between them.

However, the necessity to acknowledge women’s active roles and contribution is as crucial as the one to draw attention to violence against women and girls in the context of the diverse armed conflicts. The fact that gains were achieved through much pain shall be not used as an excuse or a reason to ignore them. The balance between good and bad achievements is on the background of this thesis.

1.2 Scope and Justification:
Human Rights Law is a rather broad topic that pertains several instruments of international law; furthermore, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) brings a comprehensive bill of women’s rights. It addresses certain rights, such as the right to work, the right to education and the right to political participation, that are of great importance to integrate women in the post-conflict context. However, this study will be discriminatory, placing its focus on the right to land.

Right to land was chosen for its ability of protecting and empowering: a piece of land is a potential means of shelter, of bringing income and social recognition. And it also plays a significant role in food security, one big issue during times of reconstruction.

The focus is the right to land under international law. That being said, it is important to draw attention to the fact that national law continues to apply during armed conflict and offers significant rights. In particular, at administrative level, it is national law rather than international
law which provides and ensures the more substantial rights and structures, for example with regard to entitlement to documents, regulation of inheritance, etc. Situations also exist in which international law lays down broad obligations but leaves practical and detailed implementation to national law. However, national law falls out of the scope of this study.

Examples presented in the study are meant to be illustrative rather than comprehensive.

1.3 Research Questions and Methodology

The main research question to be discussed in this paper is whether international rights in land can be used as a tool to integrate women in post-conflict countries. This will be done through the identification of applicable laws. In order to answer such research question a series of secondary questions will be answered in the development of this study: What are the impact of armed conflicts on women’s lives? What is access to land? What is the status of women when it comes to access to land? Is there a legal definition of access to land? Where (in which legal instruments) can the international right to land be found? What are sources of international law? Do international human rights instruments protect women’s right to land? How do they do that?

Based on these research questions, the original hypothesis is that international rights to land can work as an effective web to protect women’s interests and assure more equitable gender relations in post-conflict societies thus playing one of the main roles in sustaining peace.

This work uses a descriptive method of research in order to answer the research questions and to verify the validity of the original hypothesis. This is done through the identification of applicable laws. At the same time, an empirical study is conducted in order to provide some concrete examples of global and domestic implementation. For the theoretical framework of this study, the method used was the analysis of hard and soft-law documents, together with some jurisprudence. However, the empirical part of the research is based on previous studies that were found in books and also electronic sources available on the internet.
Consequently, the analysis of international instruments provided a legal framework, which was used to offer a foundation to the empirical data.

1.4 Structure
This thesis is composed of six chapters. Chapter one is a general introduction to the topics that will be discussed in the paper. Chapter two deals with the impact on and the active role of women in armed conflicts. Chapter 3 defines access to land. Furthermore, in order to create a link with the next chapter, Chapter 3 displays an overview of women’s rights in land in times of peace and during conflict. For a full understanding of how/if international law can be used as a tool to empower women in post-conflict societies Chapter 4 studies the main law-making tools through which contemporary international law is made. What follows in Chapter 5 is a review of the international human rights instruments, resolutions and documents within which women's rights to land are stated. Finally, the findings of this investigation and some recommendations will be presented in Chapter six.

1.5 Note on terminology
Some definitions are necessary to clarify the content of this research. First, social science usually makes a distinction between sex and gender. “The term ‘sex’ refers to the congenital and universal biological differences between men and women; 'gender' relates to the socio-cultural and historical characteristics that determine how men and women interact and apportion their roles”. ¹ In the 1990s, social science and development programs moved away from an approach focusing on women and on ensuring the full participation of women producers in the development process ("Women in Development"); toward an approach looking at "gender", i.e. at the broader issues concerning the socially determined roles of and relations between

men and women (what is usually referred to as the "Gender and Development" approach).\(^2\)

As for law, most legal instruments, including the Convention for the Elimination of All Forms of Discrimination against Women (CEDAW), refer to sex, rather than gender, as prohibited ground of discrimination. It probably does so because of the date of its adoption on 18\(^{th}\) of December 1979, when the distinction between sex and gender were still not fully formulated. On the other hand, some more recent instruments refer to gender or to both gender and sex, reflecting the changes that have taken place in social science thinking (e.g. the 1996 Constitution of South Africa).

As this study analyses international legislation and case law, the differences between sex and gender are not emphasized, and the two terms are mostly used in conjunction (e.g. "sex/gender"). Moreover, from a legal point of view, the gender dimension of access to land related legislation is mainly determined by norms concerning the legal status of women and/or discriminating against women. Therefore the studies will be focused on these norms.

\(^2\) Ibid, p. 3.
2 Impacts of Armed Conflict on Women

2.1 Women, Girls and Sex as a Weapon of War

The costs to human society and the anguish experienced by all living beings that inhabit an armed conflict environment are inestimable. However, with no intention to negate the particular needs of men and men’s suffering in wartime or to infer that women hors de combat suffer more than their male counterparts, the women’s experience, challenges and needs during and after armed conflict will be the focus of this first chapter.

Post-cold war geopolitical transformations have affected the ways armed conflicts manifest and develop and, although overall more men than women continue to die as a result of conflict, a study carried in 2006 by the United Nations Population Fund (UNFPA) concluded: “[t]he nature of warfare is changing, in ways that increasingly endanger women and girls”.

Besides bearing comparable harm as experienced by civilian men and boys, women and girls suffer myriad debilitating consequences of war due to their exposition to specific forms of gender-based violence and exploitation. According to Ms. Radhika Coomaraswamy, under-secretary-general of the United Nations (UN):

“The forms of violence used and the ways in which perpetrators carry out violent acts – genocide, torture, rape, mass rape, sexual slavery, enforced prostitution, enforced sterilization, enforced abortion, custodial violence, forced displacement, attacks on civilian populations, mutilations, and so on – all correspond to gender: the gender and sex of the victim, the gender of the perpetrator and gender relations in the society and

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3 A. Raven-Roberts et al (eds.), Gender, Conflict and peacekeeping, p. 2.
Women and girls are often viewed as bearers of cultural identity and for that reason become prime targets. Violence against women is repeatedly used to break and humiliate women, men and communities in conflict areas around the world. According to Tina Sideris, “women suffer the general brutality inflicted by violent conflict, yet they also suffer particular attacks whose form is defined by distinct notions of female sexuality”.

The use of sex as a weapon of war has become a common phenomenon. Rape is carried out by the armed forces with the objective of destabilizing populations, quelling resistance, spreading HIV infection, advancing the goal of ethnic cleansing and genocide etc. Unfortunately, the practice is not limited to combatants; access to guns enhances young men's capacity to take sexual partners forcibly. Moreover, “[m]en from the local community may exploit the chaos of conflict to commit sexual violence against women without fear of punishment”. Although men can also be victims of such crimes, women and girls are far more exposed to sexual violence.

As aforementioned, while rape is the most widespread form of gender-based violence against women, it is not the only form. Systems of pre-war gender inequality, war economies, criminal syndicate and the destruction and destabilization of livelihoods combine to place women and girls at high risk of trafficking. Moreover, the trauma, stigma and social ostracism endured by survivors of sexual violence lead to family and

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8 Ibid, p. 46.
10 Marsh, supra note 4, p. 3.
12 Raven-Roberts supra note 3, p.7.
community breakdown, weakening the social fabric and creating long-term obstacles to peace-building.

In remote rural areas some women are abandoned by their husbands, preyed upon soldiers and rebels or cut off from the intelligence and food markets. Women who ran away to escape fighting and became internally displaced persons may have been sexually assaulted or abducted by rebels. Displaced women who are forced to live in refugee camps face a situation where privacy is non-existent and levels of generalized violence, alcoholism and domestic violence are high. The situation of the internally displaced persons can be even worse as they do not have the benefit of refugee status given to those who cross international boarders and come under the jurisdiction of the United Nations High Commission for Refugees (UNHCR).

An estimated 40 percent of child soldiers are girls, the majority of them are forcibly or coercively conscripted; there is an increscent of commercial sex trade (including child prostitution) around military bases and army camps. Women and girls are also very often abducted for the purposes of supplying combatants with sexual services. According to the United Nations (UN) study Women, Peace and Security, “international presence which follows armed conflict has been linked to an increasing demand for prostitution and trafficking of women and girls”. For example, an investigation of refugee camps in Guinea, Liberia and Sierra Leone revealed the sexual exploitation of women, girls and boys by humanitarian workers and peacekeepers in exchange for basic provisions.

13 Meintjes supra note 7, p.6.
16 The full title of the study is Women, Peace and Security: Study of the United Nations Secretary-General as Pursuant Security Council Resolution 1325. This study was conducted – as its title indicates – after the adoption of United Nations Security Council Resolution 1325 which expressly asked the secretary general to prepare a study and report on the impact of armed conflict on women and girls, the role of women in peace building and the gender dimensions of peace processes and conflict resolution.
Women whose husbands have disappeared, or are missing, experience many of the same problems as widows, but without official recognition of their status, and this again creates specific problems. They have to suffer the psychological effects and insecurity that stem from not knowing their husband's fate and not being able to bury their loved ones and mourn properly, and the long-term consequences of raising children without a father and not being able to remarry.¹⁸

Much of the harm resulting from a conflict cannot be neither described nor depicted. The examples mentioned hitherto and the ones that will follow are not at all comprehensive. Of course, the duration of a war, the level of weapons technology employed and the status women have in a certain society are relevant factors that condition women’s experience of a conflict and its aftermath. Women are not a homogenous group and may have contradictory interests and priorities. The socio-economic and political conditions also vary from conflict to conflict and it is crucial to respond considering the different realities.¹⁹

2.2 Poor Enforcement and the Devaluation of Women and Girls As Victims

There is an unequivocal need to draw attention to violence against women and girls in the context of the diverse armed conflicts. It is beyond necessary to implement the protection that women and girls are entitled to under international law and to end impunity by prosecuting those responsible for sexual and gender-based violence in armed conflicts. Above all, the failure to prosecute crimes of sexual violence sends a message to perpetrators that they can act with impunity, making a mockery of efforts to re-assert the rule of law.²⁰

Notwithstanding, the restricted traditional perception of women in conflict and post-conflict situations as only passive agents and

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¹⁸ Lindsey, supra note 11, p. 1.
¹⁹ United Nations, supra note 17, para. 49.
abject victims needs to be challenged. The image of women as only victims has serious consequences for a true awareness of the different impacts of conflicts on women and men and impedes the recognition of endogenous solutions and the adoption of suitable legislation.

Although the media has repeatedly provided information that describes the tough conditions women endure to survive, particularly in refugee camps and on the roads of exile, they constantly ignore the actions women take as engaged agents. Women also tend to be categorized as only ‘vulnerable’, yet they are not necessarily vulnerable and even display remarkable strength. This is evidenced by their role as combatants or agents for peace, or by the roles they assume in wartime to protect and support themselves and their families. Women are also politicians, leaders of non-governmental organizations, social and political groups, and active participants in peace campaigns.

Women and girls assume greater roles in contemporary armed conflict: acting as spies, messengers, porters, “wives” – women who are taken to soldiers camps in order to provide them with sex or/and to cook and clean. Others became famous for smuggling on a small scale, including contraband of arms and precious stones. For example, in Sierra Leone, women supporting the rebel forces smuggled weapons through checkpoints in baskets of fish, under their clothing and via their children. They also infiltrated governmental and peacekeeping forces using social contacts. In Rwanda, women were accomplices to and participants in horrific acts committed in the genocide.

Also, while most armies are still composed entirely of men soldiers, survival strategies often challenge the traditional gender stereotypes and roles, with women making up significant numbers of combatants in various conflicts. Over the last decade, women and girls

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21 Meintjes, supra note 7, p.19.
22 Ibid.
23 Lindsey, supra note 11, p. 11.
24 Raven-Roberts, supra note 3, p.7.
25 Meintjes, supra note 7, p. 25.
26 United Nations supra note 17, para. 47.
27 Lindsey, supra note 11, p.8.
28 UNDP, supra note 15, p. 5.
have fought in armed conflicts in Afghanistan, Bosnia and Herzegovina, Eritrea, Guatemala, Iraq, Lebanon, Mozambique, Namibia, Nepal, Palestine, South Africa, Sierra Leone, Sudan, Uganda and elsewhere.²⁹

Far from the battlefield, but also under the influence of the social chaos produced by the war, many women become involved in the struggle and mobilize politically. Obviously, women’s political activities may be limited in countries where women do not have full and equal rights or are considered the property of their husbands and fathers. Although these restrictions are usually tightened during armed conflict, women and adolescent girls continue to organize for change.³⁰ They visit jailed militants and collect money to bail them out. Frequently they even run blood banks. Several receive training for the use of guns, but few make use of it, as it happened in Kashmir, during the first popular phase of the Kashmiri struggle (1989-90).³¹ Ordinary women bear new and additional responsibilities in ingenious ways to ensure survival.

Just as women have taken up arms, women have also been at the forefront of activities for peace, demonstrating against the fact that their husbands, sons, fathers and brothers must take part in war. They demonstrate publicly against excesses by the security forces, protest against types of weapons, agitate outside security bunkers in order to secure release of boy soldiers. The Women in Black³² and women protesting against nuclear weapons at Greenham Common in England are examples of such acts.³³

Therefore, the active roles female adopt in conflict -- free from judgment if it has been ‘good’ or ‘bad’ -- must be recognized. This must be done with the objective of advancing the implementation of international legislation regarding women’s human rights. It must also be undertaken as

²⁹ Raven-Roberts, supra note 3, p.2.
³⁰ United Nations, supra note 17, para. 48.
³¹ Meintjes, supra note 7, pp. 104-105.
³² Women in Black is a form of protest by women against war. Women in Black groups have sprung up in many countries around the world but there is no organizational link between them. Women dress in black and stand silently in public places in peaceful protest against war. For further reading on women and peace see COCKBURN, C., The Space Between Us: Negotiating Gender and National Identities in Conflict, Zed Books, London and New York, 1998.
³³ Lindsey, supra note 11, p.11.
a fundamental step towards the achievement of lasting peace.

2.3 The Change in Women’s Roles

Ironically, the upheaval of a conflict can also undermine cultural controls that otherwise restrict women. It is a paradox, but a war can offer opportunities for women to transform their lives concerning their image of themselves, their behavior towards men and towards their elders and their ability to live independently. For Manchanda “conflict opens up intended and unintended spaces for empowering women, effecting structural social transformations and producing new social, economic and political realities that redefine gender and caste hierarchies”. 34

Moreover, wars have certain economic systems which, coupled with the changes in the countries’ demography, demand a shift on the traditional gender roles. In order to fulfill such demand, the gender division of labor in workplaces generally changes. With men mobilized for combat, women have often taken over traditionally male occupations and responsibilities, emerging in sectors previously dominated by men. This contributes to mitigating the prejudices preventing women’s advancement in economic and social spheres. In this regard, we have the example of changes in European countries during the Second World War, where women replaced men in factories and on farms, keeping their countries going by virtue of their productive work. 35

Such phenomena also occurred in the United States, where Rosie the Riveter is a cultural icon, representing the American women who worked in factories during World War II, many of whom in the manufacturing plants that produced munitions and war supplies. These women sometimes took entirely new jobs replacing the male workers who were in the military. 36

The traditional division of labor within a family may also be under pressure during wartime. Women may become single heads of

34 Meintjes, supra note 7, p. 7.
households, supporting children, parents or extended families. For example, due to war in Angola, women now head one-third of all households. Women step outside the private/domestic sphere pushed there by the necessity to provide for the everyday needs of their family and/or increased number of dependents, combined with the market’s need of work force.

Peasant women with no formal education very often develop new skills when forced to assume family headship and take care of children and the elderly. Whereas they had previously only received training in traditional tasks, like sewing, cooking or healthcare, they learn mechanics, carpentry, tinwork, farming and administration. They become able to assume management positions. In pastoral communities in Eritrea, North-east Kenya and the Sudan, women have expanded their traditional trade in milk products to include other items, such as handicrafts, beer, incense and other products traditionally sold by men.

On the other hand, the changing demographic structure of communities affected by war creates additional burdens on women and girls when male family members are killed, disabled, driven into militia forces or forced to flee. During wartime, the destruction of schools and hospitals shift the responsibility for these public goods back into the private sphere and onto women, who have to play the role of providers and caregivers. Women find their workloads increase as the availability of natural resources and access to public, household and environmental goods shrink. Additionally, women and girls may pursue multiple jobs or engage in risky economic endeavors such as prostitution, smuggling and begging because they must raise money enough to feed, clothe and shelter their families and themselves.

When it comes to joining the army or struggling within an army or armed group, according to Machanda “[the] woman militant is a black hole in feminist discourse on the possibility of empowerment in

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38 United Nations, supra note 17, para. 92.
39 Ibid, para. 88.
40 Raven-Roberts, supra note 3, p.7.
conflict because she adopts the role of perpetrator of violence”.

Women become militants based on political and economic motivations, but also due to ideological propaganda, abduction, intimidation and forced recruitment. Many times they become combatants due to the material conditions of declining manpower resources.

Under-secretary-general of the UN, Radhika Coosmaraswamy, when working as special rapporteur on violence against women (1994-2003), expressed the following opinion:

“I do not believe inducting women into fighting force is a step towards empowerment and equality; (it) signals the militarization of civil society – a militarization which in itself is inimical to anyone who believes in human rights”.

However, reality shows that belonging to an armed group can also have positive side effects. It radically transforms women’s self-image and affects positively their freedom of movement. After women-combatants break down the prejudices, transformations are experienced not only by them, but also by other women from the community. This was the case of women in northern Sri Lanka. At first, only Liberation Tigers of Tamil Eelan (LTTE) women fighters rode bicycles and wore jeans, while all other Tamil women had to dress long skirts and saris. Within a short period of time, all the community’s women were free to change their dress code.

Also in the refugee camps, where, together with children, they account for 80 per cent of refugees in most camps, women show resilience and strength. The UNHCR and nongovernmental organizations (NGOs) can provide some food, shelter and counseling services to help people deal with their losses. But resources are constantly in short supply and refugees often begin to develop new productive enterprises that include producing food. Women take on new additional responsibilities in the camps, creating networks of survival and drawing on inner, untapped resources to carve out new arenas of independence. Despite the psychosocial traumas entailed, many women also experience the camp as an opportunity to live free from

41 Meintjes, supra note 7, p. 114.
42 Raven-Roberts, supra note 3, p.2.
43 Meintjes, supra note 7, p. 114.
44 Ibid, p. 115.
subservient traditions. This freedom can lead to transformation. As a consequence, some women emerge with a new sense of their own capabilities and strength.

The increase in political awareness and political participation of ordinary women arises from their everyday reality during wartime. Women’s daily activities are naturally politicized by their collective struggle to manage survival. When the war is finished, while some women (former combatants, former refugees or not) return to traditional functions, others may seek expanded roles. They become organized and actively participating in the national political debates of the post-conflict socio-economic reconstruction. They operate through women’s organizations that existed prior to the conflict or were formed in exile, or through avenues opened since the cessation of hostilities such as peace accord implementation and monitoring mechanisms or national legislative processes.46

However, women are largely absent at the peace tables and levels of decision-making within foreign affairs, defense or international relation bodies. This effectively disregards all of the transformation women go through during wartime, despite their leadership, restlessness and the fact that armed conflict and post-conflict reconstruction processes strongly affect them. In general, changes in gender roles at micro level have not been accompanied by corresponding changes in political or organizational influence: women have taken on responsibility but have not received their share of power. At the judicial level, de facto gains are usually not translated into de jure changes in women's status, rendering both the sustainability of any gain and the adaptation to the new societal reality almost impossible.47

This trend is demonstrated by the United Nations Development Fund for Women (UNIFEM) research, which showed that women average fewer than 10 percent of members of official negotiating teams at peace talks.48 Besides, the gender dimensions of the conflict and post-conflict periods are usually not present when dialogue and peace negotiations take place. Given their lack of participation and access in pre-

46 Meintjes supra note 7, p. 105.
47 El-Bushra supra note 9, p. 5.
48 United Nations, supra note 17, para. 88.
conflict decision-making organizations and institutions women are almost always excluded from formal discussions.⁴⁹

Despite a multitude of challenges, women usually take advantage of all possible opportunities to participate in new ways at the local and -- less frequently -- national levels. They take up key -- but generally not visible -- roles in relief and political organizations.

Women have demonstrated their ability to play an influential role via their work in grassroots organizations working for peace and reconciliation. From within these organizations, women constantly challenge the authorities and other members of society with demands for peace, non-discrimination, accountability, recognition of human rights, etc. While always positioned on the margins, these organizations show their ability to mobilize large numbers of women and to translate individual grievances into legitimate social concerns. Moreover, many of them play a significant role in building a new culture of peace at the local level by organizing peace education and community-based reconciliation and social reconstruction activities.⁵⁰

At national levels, women have developed survival strategies and reconstruction plans for communities destroyed by wars. They have engaged in lobbying belligerents to lay down their arms and they organize consciousness-raising campaigns to help other women become more fully integrated into the decision-making structures of the peace process in which they invest more and more energy.

In fact, the Rwandan example shows that the impact of the transformations achieved at the societal level tends to be deep and lasting. Since the genocide’s culmination, in 1994, there have been tremendous gains for women on the political front. Before the 2008 parliamentary elections, 49 per cent of legislators were women. After the elections, the figure rose to 56 per cent, unprecedented -- at least in modern history -- anywhere else in the world. Skeptical perspectives attribute this success in

⁴⁹ UNDP, supra note 15, para. 70.
large part to a lower male population as a result of the 1994 genocide. Even if this were the case initially, it would not be sufficient to explain the increase in female legislators from the first post-genocide elections to the most recent.\textsuperscript{51}

The structural implications of ordinary women’s ‘domestic activism’ in effecting desirable changes in gender relations must be seriously regarded if it is to reinforce the possibility of securing the ambivalent gains of conflict. Affirmative action for administrative and legislative governance positions is now part of Rwanda’s legal culture and women were key in advocacy in the immediate post-genocide period to ensure that women’s representation was a central goal in rebuilding the country.\textsuperscript{52}

On the international arena, in the face of painful victimization, women have learned to unite and organize in order to bring about collective attention to their rights by appealing to international authorities. Many have learned how to use the media and the internet to make their problems widely known and to exert pressure on governments or regional and international institutions. They have learned how to organize important campaigns at the regional and international levels, to make demands for such goals as: an end to the use of land mines, the enforcement of treaties, an end to sexual violence and recognition of specific acts of gender violence. The later initiative was a key element to the recognition of women’s right to bodily integrity and the groundbreaking decision by the International Criminal Tribunal on Rwanda (ICTR) recognizing rape as an instrument of genocide.\textsuperscript{53}

The Rwandan genocide is known for the widespread rape that women endured during the period. In coming to terms with their experiences, women survivors have worked to ensure that local and


\textsuperscript{52} Ibid.

international justice mechanisms would address sexual violence as a manifestation of war that is often downplayed. Their experiences helped shape international criminal jurisprudence. They successfully petitioned the ICTR to accept additional charges and evidences of rape, which resulted on the conviction of Jean-Paul Akayesu of rape as a crime against humanity and an instrument of the genocide in Rwanda. In addition, the tribunal convicted Akayesu for inhumane acts for several instances of forced nudity. Rwandan women’s rights organizations, in conjunction with international allies, were instrumental in achieving this milestone.\textsuperscript{54}

To engage in such actions tends to broaden women’s self-perception, their self-esteem, their interest to associate, their interest to engage in political debate and their capability to influence the society.

\section*{2.4 Addressing and Tackling the Challenges}

The important contributions made by women at the grassroots and informal levels to reconstruction and peace processes have been repeatedly noted, including by the former United Nations secretary-general Kofi Anan. Anan also highlighted the near absence of women at the formal level.\textsuperscript{55} Moreover, research into women’s peace-building work in conflict and post-conflict situations finds that:

“Women, although less visible than men, have long been integrally involved in seeking solutions to issues intrinsic to building peace, including ecological balance, demobilization and reintegration of former child soldiers, demilitarization and disarmament and sustainable economic, environmental and political development. Furthermore, women are resource managers, advocates for other women in emergency and crisis situations, leaders in political processes and community influential (…) Women often develop informal or formal groups and processes that contribute to peacebuilding and the construction of democratic societies.”\textsuperscript{56}


\textsuperscript{55} United Nations, \textit{supra note 17}, p. ix.

\textsuperscript{56} Raven-Roberts, \textit{supra note 3}, p. 3.
Accordingly, the transitional recovery phase can prove to be a particularly critical period to combat power imbalance. This challenge can be tackled through positive transformation of gender relations, providing opportunities to the effective adoption and enforcing of international legislation aimed at the protection of women’s rights, their overall empowerment and promotion of gender equality.

Crises can break down social barriers and traditional patriarchal patterns, providing windows of opportunity to integrate international legislation against gender discrimination into the domestic system. Such legislation, if implemented, will serve as a basis for the reconstruction of a more just and equitable society.

Further, if power balance between genders is not considered and tackled by appropriate laws, the reconstruction phase will miss the opportunity of enabling real and sustainable change, imbedded on the international system for the protection of women. Instead, it can perpetuate the gender gap by denying women one of the most powerful instruments on the fight for their rights: the legal framework.

Women’s points of view, experiences and needs must be taken into account by legislation reform and its implementation. More than that, legislation has to absorb the social changes that occurred during and because of the war in order to integrate women’s new roles. The societal upheaval caused by a conflict and the experience of loss project women into non-traditional functions in public space. However, society must recognize and value women’s activism; otherwise after the conflict, marginalization will follow. Rwanda and its affirmative action to include women into formal politics is only one of the examples showing that laws can take the lead in changing societal attitudes.\(^{57}\)

In many instances, the risk to women and girls of falling prey to exploitation is exacerbated by reconstruction programs, which fail to target their specific needs when designing new laws. After the genocide in Rwanda, for instance, inheritance laws barred surviving women and girls from accessing the property of their dead male family members unless they

\(^{57}\) Meintjes, *supra* note 7, p. 105.
had been explicitly named as beneficiaries. As a result, thousands were left with no legal claim to their homes and land. Such impoverished women, returning to their communities without family or resources, are more likely to be caught up in the sex trade.\(^{58}\)

In this regard, equal rights to access land are fundamentally important to the potential of building more equitable gender relations in post-conflict societies and to integrate women to their new reality. It is also a primary way for them to regain faith in the future after having been torn apart from their loved ones, lost their livelihoods, their home and their entire way of life.

Assuring women their rights in land is mandatory if it is to ensure security of livelihoods, food security, access to economic activities and an increase in female leadership on a day-to-day basis. However, it is even more important when women are trying to rebuild families and communities, which is the case in post-conflict period. During such periods, women take over more farms and more of the tasks traditionally carried out by men — such as land preparation — in addition to their more traditional tasks of planting, weeding and harvesting.\(^{59}\)

Nevertheless, for women the effects of socio-economic injustice are compounded by gender discrimination embedded in customary law and cultural practices, making it far harder for them to gain access to land then men. This is despite producing up to 80 per cent of food in Africa, women own only one per cent of the land in that continent, receive only seven per cent of extension services and one per cent of all agricultural credit.\(^{60}\)

Secure rights in land empower women by granting them shelter and providing income and security. Without resources such as land, women have limited say in household decision-making.\(^{61}\) Not having secure

\(^{58}\) J. Marsh, supra note 4.
\(^{60}\) Ibid, p.15.
tenure of land is part of the reason why women are not perceived as farmers, even when they do much of the farm work. In most of the cases, to grant an agricultural loan, banks require proof of land ownership. This is discriminatory if the legislation itself discriminates against women. Government tends to reject peasant women and usually does not even mention women rights or gender balance when designing agrarian policies. The marginalization of women can delay or undermine the achievement of sustainable peace, security and reconciliation. 62

Without secure livelihood opportunities, recourse to prostitution and vulnerability to human traffic becomes more common. As a consequence there generally is an increase in the risk of contracting HIV/AIDS. Therefore, rights in land play a significant role in raising the ability of women and girls to cope under difficult circumstances and to ensure their sense of dignity and self-esteem in the post-conflict.

The following chapters will examine how international women’s human rights legislation deals with the integration of women in post-conflict societies by compiling and examining the relevance of norms regarding access to land and their application in post-conflict situations.

62 Curtis, supra 59.
3 Access to Land

3.1 Introduction

Since the early years of human kind history, land has been identified as the basis of wealth, social status and power. It is the primary source for shelter, food, and economic activities; it is the most significant provider of employment opportunities in rural areas and an increasingly scarce resource in urban areas.

Access to water and other resources, as well as to basic services such as sanitation and electricity, is often conditioned by access to rights in land. The reverse way is also true: assuring someone access to land is not complete if there is no assurance of the means to adapt the land in order to make it commercial or a place to live. For convenience, ‘access to land’ will be used here to include access to other natural resources such as water and trees.

Land possession is also highly significant in the cultural, religious, and legal spheres. In a large number of societies, there is a close connection between the decision-making powers that a person enjoys and the quantity and quality of land rights held by that person. In rural areas, social inclusion, or exclusion, often depend almost entirely on a person’s land holding status. Even in urban areas, the right to participate in municipal planning, in community decision and sometimes elections, can depend on the status of an individual as a resident or landowner. This is not a new phenomenon. For many centuries only ‘land owners’ could participate in elections in most western democracies. Consequently, access to land is an important aspect of household, community and national decision-making powers.

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Moreover, the interest and capacity to make long-term investments in arable land and the chances of being granted credit to do so are societal protection for the landowners. Thus, considerations about sustainable development must take both tenure in land and the security of land rights into account.67

3.2 Important Definitions

‘Access to land’, means that a person can use the land – e.g.: for cultivation, property or housing – but s/he does not necessarily have legal rights to do so. Access can be acquired through informal concessions granted by individuals to kin or friends. In some instances access to land can be bequeathed and inherited.68

‘Land tenure’ is the relationship, whether legally or customarily defined, among people, as individuals or groups, with respect to land. Rules of tenure define how property rights in land are distributed within societies, along with associated responsibilities and restraints.69 In simple terms, land tenure systems determine who can use what resources, for how long and under what conditions.70

Land tenure includes the right to own, inherit, rent, lease, mortgage. It also encompasses one’s right to remain on his/her land and the protection from arbitrary or involuntary removal.71 Tenure is considered secure only if protected as a right in law, as opposed to reliance on mere custom, tradition, or the whims of governmental authorities.72 Legal rights to land broadly refer to security of tenure in land and property and the right not to be forcibly evicted.73

‘Control over land’ can have multiple meanings including the authority to decide how land resources are used and disposed of, and

67 Ibid, para.3.4.
68 Agarwal, supra, note 63, p. 19.
70 Ibid, para. 2.3.
72 Ibid.
73 Agarwal, supra, note 63, p. 19.
whether it can be leased out, mortgaged, bequeathed, sold etc. Legal ownership does not necessarily carry with it the right of control. For example, there are regions – like Zambia or some parts of Mozambique -- where a married woman requires her husband’s consent to alienate land that she legally owns.74

3.3 Land Rights As Housing Rights

Secure land rights are a firm springboard for economic, productive activity. They facilitate household income gains and improve food security. More equitable land distribution across society reduces social inequality. Land ownership can be a vital source of capital, which opens personal credit markets, leads to investments in the land, provides a social safety net and transfers wealth to the next generation.75

However, before the potential for a higher income, secure land rights are fundamental to shelter. “[s]ecure access to land provides a valuable safety net as a source of shelter, food and income in times of hardship, and a family's land can be the last available resort in the instance of disaster.”76

In both urban and rural areas, individuals rely on the availability of adequate plots of land for shelter and the availability of resources. In rural areas in particular, the realization of the right to food is intimately tied to the availability of land on which to grow crops.

Right to housing cannot be fulfilled if there is no access to land. Indeed, “[l]and is often a necessary and sufficient condition on which the right to adequate housing is absolutely contingent for many individuals and even entire communities”77

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74 Ibid.
Therefore, right to land can mean at the same as right to housing, considering that the place where one plants and works and from where one extracts his/her livelihood can be the place where s/he lives. This is generally the rule in rural areas of developing and post-conflict countries.

3.4 Women’s right to land: an overview

For both women and men, “ownership and control over property signifies command over productive resources, which enables individuals to make choices regarding livelihoods, provides security against poverty and promotes autonomy”. 78

In developing countries, men are increasingly migrating to urban areas in search of employment or to join military forces, leaving women to undertake agricultural activities for subsistence and to generate an income off the land, where possible. Women's reliance on land, for economic security and survival is only deepening as the number of woman headed households expands. 79

Women’s access to and control over land is a determining factor in women's overall living conditions, specially in developing countries. It is essential to women's everyday survival, economic security and physical safety and, some would argue, it is the most critical factor in women's struggle for equality in gender relations and empowerment. 80

However, in many countries around the world, women’s property rights are limited by social norms and customs and at times by legislation, which hampers their economic status and opportunities to overcome poverty. Even in countries where women constitute the majority of small farmers and do more than 75 percent of the agricultural work, they

80 Agarwal, supra note 63, p.2.
are routinely denied the right to own the land they cultivate and on which they are dependent to raise their families.81

This is largely a result of economic and social discrimination against women supported by gender biased laws, policies and traditions which prevent women from renting, leasing, owning, and inheriting land, housing and property independently or at all. This renders women's access to and control over land, housing and property dependent on their link to a man.

Therefore, women’s rights to land must be independent rights, that is, “rights that are formally untied to male ownership or control, in other words, excluding joint titles with men”.82

Independent legal rights in land empower women and provide income and security. Rights in, access to and control over land have direct and indirect bearings on poverty. The direct advantages stem from shelter and production possibilities. The indirect advantages include facilitating access to credit from institutional and private sources and serving as assets that can be sold.83 Ownership of land and housing can increase women’s status within their community and increase their bargaining power within her household.

On the other hand, even where female access to land is weakly supported by legislation, women have no recourse to the assets during crises. They have limited say in household and community decision-making, even though these decisions invariably affect them and their living conditions. Many times, loss of tenure in land means not only loss of housing, but also loss of livelihood, which often relates to other vulnerabilities such as domestic violence and HIV and AIDS.84

Secure tenure leads to better living conditions, access to livelihood and access to education. As a result, women and girls are often better able to mitigate the negative personal and financial impact of

82 Agarwal, supra note 63, p. 17.
83 Ibid, p. 31-33.
84 UNIFEM, supra note 81.
HIV/AIDS. Critically, for women, the realization of housing and land rights may actually prevent HIV/AIDS transmission in certain cases by reducing economic dependency on men and enhancing personal autonomy. On the other hand, repressive norms and traditional practices, gender-based bias and inability to access property generate and sustain circumstances leading to women’s susceptibility to HIV/AIDS infection. Economic dependency can make women defenseless to unsafe sexual relations, while absence of shelter contribute to engagement in prostitution and vulnerability to human traffic.\textsuperscript{85}

Moreover, research has clearly shown that when women’s land rights are respected and protected -- including when women and girls are able to inherit and control housing, land and property -- women and girls are better able to cope with the detrimental effects of HIV/AIDS.\textsuperscript{86}

In addition to HIV/AIDS, domestic violence is a problem that is exacerbated by land insecurity. Lack of secure tenure also plays an important role in sustaining domestic violence. Women tend to remain on abusive relationships due to economic dependency. There is also a strong tendency for women to fall back into violent relationships as they cannot find another place to live or shelter.\textsuperscript{87} At the same time, a lack of security of tenure means that women can be forcibly evicted from their homes and lands on the whim of an angry spouse or male relative.\textsuperscript{88}

**3.5 Access to Land in Post-Conflict Situations**

There is a myriad of cultures that maintain systems where only men can register land and assets. Under such circumstances, women must rely on the male figures in their lives for housing security and to access land and property. In the end, this relationship of dependence and subjugation makes women far more susceptible to landlessness and abject poverty.\textsuperscript{89}

\textsuperscript{85} COHRE (2008), supra note 71, p. 16.
\textsuperscript{87} COHRE (2008), supra note 71, p. 33-35.
\textsuperscript{88} Agarwal, supra, note 63, p. 5.
\textsuperscript{89} COHRE (2008), supra note 71, p. 13.
If this situation is, let’s say, dreadful in times of peace, in regions of conflict, the impact of unequal land rights has particularly serious consequences for women -- often the only survivors. In conflict and post-conflict situations, the number of women-headed households often increases sharply as many men have either been killed or are absent.

Without their husbands, brothers or fathers — in whose name land and property titles are traditionally held — women find themselves denied access to their homes and fields by family members, former in-laws or neighbors. Without the security of a home or income, women and their families fall into poverty traps and struggle for livelihoods, education, sanitation, health care and other basic rights.90

There is little doubt that both during and following conflict women experience extreme trauma and hardship. At the same time, however, armed conflict and reconstruction provide women with new opportunities and roles in relation to land, housing and property. This can serve as the germinating seed for structural change and the realization of women's rights to land, housing and property.

Guatemalan women are one example. In 1987 refugees from the Guatemalan civil war began the struggle to return to their country. A key issue, which emerged from this struggle, was the right to own a house, and to own, live and work on land. After the peace agreements were signed, in 1992, the refugee women’s organizations analyzed the agreements and discovered that married women or those in common law unions were not being granted independent title to land and housing. This revelation led the women’s organizations to commence a campaign for co-ownership of land and housing upon their return to Guatemala. Such campaign was only possible because, during their time in refugee camps, women worked together with international organizations to struggle illiteracy and to learn about their rights, learning the power of their union and building strong networks.91

90 UNIFEM, supra note 81.
91 UNCHS (1999), supra note 75, p. 35.
Notwithstanding, in some countries, many refugee and internally displaced women who want to return to their lands and homes are prohibited of doing so if their husbands or fathers have died during the war or are missing. Under many customary law systems women cannot inherit or own land. There are also cases where, when the armed conflict subsides, men return to their own lands and houses but then claim neighboring lands and houses as their own. This is particularly the case when the neighboring lands/houses are occupied by women alone.\textsuperscript{92}

Land ownership should be an appropriate method of multiplication of wealth, placed in order to contribute to the development and social peace. But, on the contrary, during reconstruction and rehabilitation, the restitution of land and property usually marginalizes women, leading to social and political instability in the country. Without land, housing and property rights for women, there can be no sustainable peace.\textsuperscript{93}

As previously explored in the last chapter, during times of conflict women -- though excluded from decision making -- are the main responsible for re-building their countries. They emerge as head of households -- if they were not already -- and are responsible for doing all that is necessary to ensure their own well-being and that of their families. This includes child rearing and education, accessing food, water and other basic amenities and services, generating an income and protecting their families from exposure to physical violence. Added to this are the difficulties they face running family farms without men's labor and during times of looting. If, on one hand, this burden cannot be underestimated, on the other, the armed conflict provides women with an opportunity to make decisions regarding the running of the household and the cultivation of lands.

Women’s agricultural and market activities sustain food security as well as large numbers of family members. Providing them credit and protecting their property rights will have a significant multiplier effect.

\textsuperscript{92} Ibid.
\textsuperscript{93} Ibid, p. iii.
on peacebuilding.\textsuperscript{94} Securing women’s land and property rights must be a major focus of recovery efforts and should be addressed in peace negotiations.

Secure land rights are an extremely important feature in assuring social inclusion to both genders in almost all societies. Assuring women secure tenure at post-conflict times, though, is fundamental to fostering the rebuilding process, specially if there is an intention that the country being reconstructed emerges as a more equal and favorable to lasting peace.

With the purpose of better understanding the way international law can be used to integrate women in post-conflict societies, the next chapter will be dedicated to studying the sources of international law.

\textsuperscript{94} UNIFEM, Women, Peace and Security. \\
4 Sources of International Law

4.1 Introduction

One should notice that the ideal approach to the topic of access to land in post-conflict countries should be a holistic one, due to the huge importance of the national law and customary systems in the realization of the rights. However, States, which are parties to international human rights treaties and conventions, bear the ultimate responsibility for enforcement of rights and implementation of corresponding obligations. Moreover, the ability of the international society to influence and pressure States for desirable changes is widely known. Therefore, the focus of this thesis, as aforementioned, will be the right to access land under international law.

In order to fully understand how/if international law can be used as a tool to empower women in post-conflict societies, firstly it is necessary to define and study the sources of international law. Therefore, this chapter will study the principal law-making tools through which contemporary international law is produced. It does not seek to give an account of the traditional - and untraditional - sources and theories of international law. Rather, this chapter will briefly assess the concept of sources of international law, aiming at determining and identifying international legal instruments that might contain rights and obligations that shall be applied to the specific situation which is under analyses on this thesis: women’s right to access land in post-conflict countries.

Accordingly, this chapter will examine some of the mechanisms and procedures whereby new rules of law are created or old rules are amended or abrogated. It will focus on the UN, diplomatic conferences, codification bodies and courts.

4.2 Definition of Sources:
The term ‘source’ is a starting point (archai) for legal science.95 According to Black’s Law Dictionary, a source of law “provides authority for legislation and for judicial procedure”.96 Every society perceives the need to differentiate between its legal norms and other norms controlling social, economic, moral and political behavior. However, unlike domestic legal systems where this distinction is typically determined by constitutional provisions, the decentralized nature of the international legal system makes this a complex and contested issue.97

In international law, sources can be defined as “those legal procedures and methods for the creation of rules of general application which are legally binding on the addressees.”98 It can also be defined as “the criteria under which a rule is accepted as valid in the given legal system at issue”;99 or simply “the process whereby rules of international law emerge”.100

Kolb identifies two different and interrelated perspectives of sources: “actively speaking, a source determines the means of creating the law; passively speaking, it indicates the place where to find the law.”101 Kolb notes, however, that some rules might not have been created by legislation; they may simply exist like the rule aspect of general principles of law.102

Additionally, it must be taken into account that contemporary international law is often the product of a subtle and evolving interplay of law-making instruments, both binding and non-binding, customary law and general principles.103

In a broader and more complete sense, the term ‘source’ may

96 B. A. GARNER, Black’s Law Dictionary for iPhone/iPad/iPod touch, (West law, 2010), p. 1523.
101 Kolb, supra note 95, pp.3-4.
102 Ibid, p.4, footnote 8.
103 Boyle, supra note 97.
well design all elements that concur to the development of the law, i.e. all aspects that involve some element of legal creativity. Thus, the term would not remain confined to the formal avenues of legislation; it would open up to that whole field of quasi-legislation, which is linked to the law-application. This creativity is particularly striking in the case of very general norms and principles, especially of constitutional type, e.g., in the field of human rights or in the field of the Charter of the United Nations. Only in this broader context can the significance of so-called 'soft law' and multilateral treaties be fully appreciated. 104

4.3 Codified Recognized Sources
International law is based on measurable parameters. There are sources from which to extract rules that can be analyzed, interpreted and applied. Doctrinal writing on sources of international law generally start by reference to Article 38 of the Statute of the International Court of Justice (ICJ). According to which:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

   b. international custom, as evidence of a general practice accepted as law;

   c. the general principles of law recognized by civilized nations;

   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as

104 Kolb, supra note 95, p.5.
subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

Paragraphs (a) and (c) are of greatest interest to the present study. The next section will discuss the meaning and place of each of the recognized sources of law under international law.

### 4.3.1 Treaties

Treaties are among the primary sources of international law. Despite the fact that article 38 1(a) of the ICJ uses the term ‘convention’, international practice registers free use of several synonyms for the word ‘treaty’ - convention, agreement, protocol, etc. Under a strict legal perspective, such names matter little and are not applied consistently.\(^{105}\)

An international treaty is an agreement resulting from the convergence of the wills of two or more actors in international law,\(^ {106}\) formalized in a written text,\(^ {107}\) with the goal of producing legal effects at the international level.\(^ {108}\) In other words, a treaty permits subjects of international law -- especially the national states and international organizations -- to stipulate rights and obligations among themselves.

Treaties are among the oldest forms of international law. For example, a treaty existed between the Hittites and Egyptians around 1280 BC. It is only relatively recently that they, and the rules under which they are formed, have become increasingly codified. After drafting efforts in the early 20th century by various bodies such as the League of Nations, the International Law Commission of the United Nations drafted the Vienna Convention on the Law of Treaties (1969), which came into force in 1980.

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\(^{106}\) Ibid, p.7.
\(^{107}\) Ibid, p.9.
\(^{108}\) Ibid, p.7.
The Vienna Convention is known as the law of treaties, due its comprehensive coverage of the subject.109

With the development of the international society and the intensification of relations between nations, treaties have become the main source of international law. These documents now assume a function similar to the one performed by the laws and contracts in municipal legal systems by legally regulating relations between the countries and/or the countries and international organizations on the various fields of human interaction.110

Treaties are based on well-established principles, amongst which the logical and legal principle of *pacta sunt servanda* (what had been agreed must be respected) and the principle of good faith should be highlighted. They are both present in the Article 26 of Vienna Convention.111

If properly concluded and ratified, a treaty creates rights and obligations for the contracting parties at the international level. “Thus a treaty is one of the most evident ways in which rules binding on two or more States may come into existence, and thus an evident formal source of law.”112 It is therefore axiomatic that a State, which is not a party to a treaty, is under no such obligation.113 As a general rule, a treaty, may not apply as *treaty law*, to states that are not part of it – it may apply as *customary law*, if there is a settled custom on the same subject the treaty deals with.114 The principle: *res inter alios acta nec nocent nec prodest* (a transaction between other effects neither disadvantage nor benefit) is also adopted by the Vienna Convention under Article 34.115

The principles of *pacta sunt servanda* and *res inter alios acta nec nocent nec prodest* convert to the same meaning: States parties accept a

112 H. Thirlway, ”The Sources of International Law”, in Evans, p. 119.
113 *Ibid*, p. 120.
115 *Article 34 - General rule regarding third States*: A treaty does not create either obligations or rights for a third State without its consent.
commitment to certain behavior that would not be legally required of them in the absence of the treaty. They may vary or set aside the rules that general international law imposes on all States by treaty, though such variation or exclusion is only effective between the parties; this power is subject to the limits imposed by *jus cogens*.\(^{116}\)

According to the Vienna Convention, a treaty is null and void if it violates a peremptory norm.\(^{117}\) These norms, unlike other principles of customary law, are recognized as permitting no violations and thus cannot be altered through treaty obligations. These are limited to such universally accepted prohibitions as those against genocide, slavery and torture\(^{118}\) meaning that no state can legally assume an obligation to commit or permit such acts.

Another element regarding the theory of treaties of relevance for this master thesis is the *reservation*. The reservation is a unilateral declaration of a party, expressed at the time of the consent, in order to exclude or modify the legal effect of one or more provisions of the treaty in respect of that contracting party.\(^{119}\) In other words, the party, when signing or ratifying a treaty, may inform the other parties that it does not consider itself bound by one or more provisions, and/or considers that certain provisions shall be applied in a specific way, explained at the time of the reserve.

\(^{116}\) Thirlway, *supra* note 112, p. 120.
\(^{117}\) Article 53 - *Treaties conflicting with a peremptory norm of general international law* (*“jus cogens”*): A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

\(^{118}\) Tomuschat, *supra* note 124, pp. 35-36.

\(^{119}\) Vienna Convention on the Law of Treaties, art. 2 Sec 1(d) “reservation” means a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.
The reservation is a consequence of small disagreements over the text of the treaty that shall not threaten its core. In general, the reservation is applicable in multilateral treaties, not bilateral.

Further on this study (Chapter 4) the following treaties and others will be analyzed as relevant to the subject matter: International Covenant on Civil and Political Rights (ICCPR) and its protocols, International Convention on Economic, Social and Cultural Rights (ICESCR), Convention on the Elimination of All Kinds of Discrimination against Women (CEDAW).

4.3.2 Custom

It is a universal characteristic of human societies that many practices, which have grown up to regulate day-to-day relationships imperceptibly, acquire a status of inexorability: the way things have always been done becomes the way things must be done. Custom may be conceived as a repeated and constant way the actors of international law proceed in their relations with one another; such behavior is justified by a sense of legal obligation.

Custom has a material element, that is, repetition and constancy, and a subjective element, namely the belief that this proceeds are legally mandatory. The subjective element corresponds to *opinio juris*: the conviction of the legal obligation of an action. Thus, the mere fact that a custom is widely followed does not make it a rule of international law. States also must view it as obligatory to follow the custom, and they must not believe that they are free to depart from it whenever they choose, or to observe it only as a matter of courtesy or moral obligation. Consequently, custom is evidenced by widespread and consistent state practice and *opinio juris*.

Under international law, a custom, unlike a treaty, is mandatory for all subjects of law not only for the contracting parties. However, international law contemplates the possibility of regional customs. Customs are more flexible than treaties because they adapt easily to the constant

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120 Thirlway, *supra* note 112, p. 121.
changing nature of the international relations. On the other hand, customs are more insecure than written agreements, due to two main obstacles: the constant changes and the difficulties in pointing out the date of their validity. In international law there is no hierarchy between treaty and custom.ⁱ²²

The classical doctrine of customary law, as it is reflected in the North Sea Continental Shelf judgment of the ICJ,¹²³ does not easily lend itself to identifying rules in the field of human rights. Whereas relations between states can be observed by empirical means, the way in which states behave in their dealings with individual citizens escapes such methods.¹²⁴

Therefore, emphasis must be placed on official acts and statements. In particular, in order to get hold of the relevant practice and opinio juris, the observer, following in that regard the methodology relied upon by the ICJ in its Nicaragua judgment, must closely verify to what extent states present their practices as fully corresponding to the international rule of law or whether they simply deny charges brought against them:

“Even massive abuses do not militate against assuming a customary rule as long as the responsible author state seeks to hide and conceal its objectionable conduct instead of justifying it by invoking legal reasons. According to this method, there exists today broad agreement to the effect that many of the rules enunciated in the UDHR have crystallized as customary law.”¹²⁵

Over the years, the circle of custom-based rights may increase mainly through discourse in the relevant bodies, much less through real deeds supported by opinio juris. As pointed out above, this is an area where the orthodox rules on the formation of customary rules cannot be resorted to usefully.¹²⁶

⁴.³.³. General Principles of Law

¹²² Rezek, supra note 105, p.62.
¹²³ Thirlway, supra note 112, pp. 121-127.
¹²⁵ Ibid, p. 35.
¹²⁶ Ibid.
The meaning of general principles of law has often been the object of widely differing interpretations. At the time of the drafting of the Statute of the Permanent Court of International Justice\textsuperscript{127} there were -- and still today there are -- differing perceptions of what general principles of law meant. For some jurists, the general principles of law recognized by civilized nations was a new source of international law which had not existed before; for others, it was not at all a novelty in international law but a restatement of how previous courts had applied international law.

While some believe they are only a subsidiary source in the scheme of article 38, others consider that they have the same hierarchy as the other sources. For some publicists, general principles are only binding insofar they are part of customary international law; for others, they constitute either a separate source in themselves or even the very foundations of international law.

Alfred von Verdross, who was a member of the Permanent Court of Justice, persuasively argues through a textual interpretation of article 38 that general principles were in themselves sources of international law. The *chapeau*, which was included in the statute of the ICJ, affirms: “[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply”. This sentence would have given an ‘authentic interpretation’ according to which all sources listed in the article would be sources of international law. However, paragraph $d$, as the text itself would clarify, judicial decisions and doctrine are only subsidiary means of determination of rules of laws. Therefore, article 38 establishes conventions, customary international law and general principles of law as direct sources of international law.\textsuperscript{128}

The professor also adds that such interpretation would be in conformity with the textual interpretation of the Charter of the United Nations. The Charter’s third perambulatory clause reads “to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained”. The fact

\textsuperscript{127} The outcome of which was substantially preserved in the Statute of its successor, the International Court of Justice.

\textsuperscript{128} Verdross, supra note 128, p. 523.
that ‘other sources’ (autres sources, otras fuentes) is mentioned in the plural would logically entail the affirmation of the existence of more than one other source. These other sources would be, hence, customary international law and general principles of law. It is important to highlight that at the time of the adoption of the Charter there were not yet discussions on other formal sources such as unilateral acts and decisions of international organizations.129

Another related debate is the question of whether general principles of law recognized by civilized nations refer to general principles in foro domestico, to general principles of international law itself, or even whether such difference is actually artificial. According to Thirlway, “[t]he term ‘civilized’ is now out of place, but at that time it was apparently included in Article 38 inasmuch as some legal systems were then regarded as insufficiently developed to serve as a standard of comparison”.130

While the Commission of Jurists may have had primarily in view the legal principles shared by municipal legal orders, the principles to be applied by the Court also include general principles applicable to general legal relations. Many of these find expression in customary law, e.g. pacta sunt servanda. Some are applied unquestioningly as self-evident: for example the principles for successive treaties: that the special prevails over the general and the later prevails over the earlier.131

Notwithstanding, it is undeniable that a clear separation of legal conceptions in domestic law and those in international law is not easy. This is because the domestic juridical consciences and the international juridical conscience are intertwined and to a large extent they develop in parallel.

This is specially true for the international human rights system. International human rights must be considered an offspring of human rights that were originally codified at the national level. The substance of what was first guaranteed by procedures and mechanisms within a national

130 Thirlway, supra note 112, p. 128.
131 Ibid, p. 128.
framework was later strengthened by a complementary international set of rules.\textsuperscript{132}

On the other hand, the reverse way is also correct: in an age of information society, internet, nullification of distances, and growing mutual economic interdependence, general principles of law reverberate in the same way in the domestic and international systems. It becomes increasingly unacceptable for domestic legal orders to detach from what is accepted and required internationally. This is even more flagrant with the recognition of principles of \textit{jus cogens},\textsuperscript{133} the majority of which are based basic considerations of humanity dignity.

\textbf{4.3.3.1 General Principles of Law as the Foundation of International law}

Fundamental legal principles are present in every legal system, inspiring, conforming and informing their norms.\textsuperscript{134} It is from the principles that the law begins and emanates (principium), as first causes, sources or origins of the norms and rules. The principles confer to the norms and rules their cohesion, coherence and legitimacy.\textsuperscript{135}

Principles are in perpetual movement, allowing law to evolve in dynamicity according to the needs and values in place at a given time. International law is a normative system. It can only be considered as a system due to the role performed by basic general principles of international law, since legal norms and rules alone are incapable of evolving into a legal system.\textsuperscript{136}

Each and every domain or branch of law emerge and consolidate themselves through general principles of law, which may or may not be specific for each of them. Indeed, this is so with civil law, civil procedure, criminal law or administrative law. This is also the case for...

\textsuperscript{132} Tomuschat, \textit{supra} note 124, p. 25.

\textsuperscript{133} Vienna Convention on the Law of Treaties, Vienna on 23 May 1969. Entered into force on 27 January 1980, United Nations, Treaty Series, vol. 1155, p. 331, art.53. If treaties conflicting with principles and rules of \textit{jus cogens} are void, it is only logical that the same can be said about rules of domestic law conflicting with \textit{jus cogens} norms.


\textsuperscript{135} I\textit{bid}, p.87.

\textsuperscript{136} I\textit{bid}, p.88.
public international law and its different branches such as international humanitarian law, human rights law, international refugee law, international environmental law, law of the seas, international labor law, etc.

Some of these basic principles permeate all areas, with higher or lower weight. They enlighten the path of legality and legitimacy. A true legal system should operate on the basis of its fundamental principles. As Professor Abi-Saab have stated in referring to the UN Charter legal regime, “there is a normative system, which must be capable of fulfilling its task, or there is no system at all”,\textsuperscript{137} and to achieve its task the regime must be oriented by the aims set by its basic fundamental principles.

The fundamental principles not only inform the tasks and aims of the legal system but also the law-making process itself of international law, as they reflect the \textit{opinio juris} understood not only from its State centered traditional conception, but mainly from a broader sense encompassing the \textit{status conscientiae} of humanity which frames the validity of international law as a whole.\textsuperscript{138}

The principles that guide international human rights law, specifically the principle of equality, are of special importance for this study and will be examined in Chapter 4.

4.4 Subsidiary Sources: Judicial Decisions and Teachings

Paragraph 1(d) of Article 38 makes a clear distinction between the sources mentioned in the preceding paragraphs and judicial decisions and teachings. It refers to the latter as being merely “subsidiary means for the determination of rules of law”. According to Thirlway:

\textquotedblleft [t]he reason for this is evident: if a rule of international law is stated in a judicial decision, or in a textbook, it will be stated as a rule deriving either from treaty, custom or general principles of law. The judge, or the author of the textbook, will not assert that the rule stated is law because he has stated it; he will state it because he considers that it derives from one of the three principle sources indicated in paragraphs (a) to (c) of Article 38.\textquotedblright \textsuperscript{139}

\textsuperscript{138} Trindade, \textit{supra} note 134, p.90.
\textsuperscript{139} Thirlway, \textit{supra} note 112, p. 129.
The first three sources of Article 38 are formal sources; those in paragraph (d) are material rather than formal sources, but material sources having a special degree of authority.

The scope of Article 38 (1)(d) is not limited to the decisions of international courts and tribunals and also includes arbitral decisions and the decisions of municipal courts. It is difficult to determine what influences these materials have on the development of the law. Pleadings in cases before the ICJ are often replete with references to case law and to legal literature.

This entire thesis is permeated with the teachings of enlightened publicists and some cases have been used so far.

4.5 Security Council Resolutions
United Nations Security Council Resolutions adopted under Chapter 7 of the Charter are binding. In other words, the SC resolutions related to threats to the peace, breaches of the peace, and acts of aggression create legal obligations for all states members of the United Nations. Article 25 of the document, states: “[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter”.

Therefore, SCR 1325 and 1889, which deal with women, peace and security not only are a source of international law, but they are also a biding source. And due to their importance to the topic of women’s land rights in post-conflict countries they will be analyzed in detail on the following chapter.

E. Non-codified recognized sources
In addition to the sources codified in Article 38 of the ICJ statute and UN Security Council resolutions, soft law instruments are also sources of international law.

Soft law are international norms, principles and procedures that located outside of the formal source systems or that lack the requisite normative content to create enforceable rights and obligations. Nevertheless,
soft laws are capable of producing certain legal effects. Although not legally binding, these instruments may reflect existing principles of customary international law (e.g. several provisions of the Rio Declaration); in any cases they represent the trends prevailing in the international community.\textsuperscript{140}

Even where resources do not provide legal basis \textit{per se}, they can provide guidance in interpretation, information on resources for successful advocacy, documentation of violations and information on trends and developments in analysis, particularly on crosscutting issues.\textsuperscript{141}

Thus, both treaties and soft law instruments can become vehicles for focusing consensus on rules and principles, and mobilizing a consistent, general response on the part of States. According to Professor Alan Boyle, “[w]idespread acceptance of soft law instruments will tend to legitimize conduct, and make legality of opposing positions harder to sustain”. They may additionally constitute subsequent agreement between the parties on how to interpret a treaty and/or apply its provisions.\textsuperscript{142}

In this sense, United Nations General Assembly Resolutions, although not binding on States in the same manner as the conventions, recognize a range of rights and goals that can guide the interpretation of binding norms.

Also, \textit{Reports and recommendations published by international human rights bodies} can provide the basis for the interpretation of and guidance on the application of international human rights norms such as non-discrimination, substantive equality and State obligations. They can also provide guidance on the evolution of substantive issues, particularly developments integrating rights and interpretations of human rights norms. General recommendations and also reports of the CEDAW committee have found to be particularly relevant on finding the status of women’s land rights and also on how right to housing should be understood were particularly useful for this study.

\textsuperscript{141} COHRE (2008), \textit{supra} note 71, p. 74.
\textsuperscript{142} A.Boyle, ‘Soft Law in International Law-Making’, in Evans, p. 142
Finally, *Documents that emerge from World Conferences (Declarations, Plans of Action)* documents adopted in international conferences contain provisions on how the international community accept and plan to achieve rights, implementing them on reality. The Beijing Platform for Action and the Habitat Agenda are examples of such instruments that will be studied in the next chapter.
5 Key Provisions Under the Sources of International Law

1. Introduction

Previous chapters analyzed the definition and importance of access to land (chapter 2) and sources of international law (chapter 3). Now the sources of international law in connections with women’s land rights will be examined. What follows is a review of the international human rights instruments, resolutions and documents within which women's rights to land are stated.

This will be discussed from a broader to a narrower perspective, in the sense that firstly it will be examined the general principles of international human rights law and, subsequently, treaties and more specific legislation, rules and documents.

5.2 Principle of Equality and non-discrimination:

The role of the general principles of law as one of the formal sources of international law has already been detailed in the previous chapter. As a general principle, equality and non-discrimination provide a legal standard, which is intimately related to the very concept of human rights. If human rights are intrinsic to every human being, without any additional requirements, discrimination and exclusion cannot be tolerated.143

All aspects of women’s land rights touch on the themes of a woman’s rights to non-discrimination and equality. Indeed, the very idea of non-discrimination and equality are cornerstone human right principles, which have enjoyed rich development. International human rights law has repeatedly set forth the overarching right to nondiscrimination, a principle which applies to all aspects of housing, land and property.144

5.2.1 Gender equality

Gender equality is the key principle underlying the protection of women’s

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143 Tomuschat, supra note 124, p. 61.
144 COHRE (2008), supra note 71, p. 12.
rights. The principle of gender equality encompasses the prohibition of discrimination and the adoption of special measures for the advancement of women. Sex/gender discrimination is defined in the Convention for the Elimination of All Kinds of Discrimination Against Women (CEDAW) as "any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field" (art. 1). However, according to the Human Rights Committee: "not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under [human rights law]." 145

Discrimination may take different forms. It is direct when norms or practices explicitly differentiate, with no reason or objective, treatment on the basis of sex/gender; it is indirect when although norms or practices do not make explicit reference to sex/gender, they include requirements that advantage persons of one sex. Discrimination is *de jure* when law envisages it, *de facto* when although the law is non-discriminatory, discrimination exists in practice. 146

In order to secure women’s land rights, it is critical to understand that sex/gender neutral laws are often simply not enough to make a real change in the lives of women. Too often, the application of such laws continues to disadvantage women by failing to address entrenched systems of male dominance and male privilege. 147 Therefore, legal instruments may contain an "affirmative action" clause, i.e. a clause allowing (or requiring) the state to adopt special measures conferring temporary advantages on women, with the long-term aim to achieve *de facto* gender equality. 148 The Rwandan example – studied on chapter 2 – where affirmative action was adopted in order to assure women’s political

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145 Human Rights Committee, 1989, Non-discrimination, General Comment 18, para.11.
146 FAO, *supra* note 1, p. 5.
participation is an example of a way law can operate to bring about social change.

For the purpose of this study, 'gender neutral' refers to legislation that does not discriminate on the basis of sex/gender, whether directly or indirectly, *de jure* or *de facto*.

The principle of non-discrimination on the basis of sex is also affirmed in the Universal Declaration of Human Rights (UDHR) (arts. 2 and 7), in the International Covenant on Economic, Social and Cultural Rights (ICESCR) (arts. 2(2) and 3), and in the International Covenant on Civil and Political Right (ICCPR) (arts. 2(1), 3 and 26), as well as in regional human rights treaties such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (art. 14), the American Convention on Human Rights (ACHR) (art. 1), and the African Charter on Human and Peoples’ Rights (ACHPR) (art. 2).

International law affects women’s legal status by providing guidance in the interpretation of domestic law. Non-discrimination as a principle of law therefore must inform domestic legal frameworks by advancing the recognition of women’s equal rights, including the right to own, inherit, purchase, lease, rent or bequeath property. 149

5.3 The Universal Declaration of Human Rights (UDHR):

Adopted unanimously in 1948 by the United Nations General Assembly, the Universal Declaration of Human Rights (UDHR) constitutes an important source of general principles of international human rights law, providing a useful legal framework for women's rights to land. Although it is not considered legally binding on States, the UDHR has time and again been recalled in resolutions of international conferences and in resolutions of the General Assembly. This demonstrates that it has entered the body of common legal principles, which are no longer challenged because of their origins. And, as discussed on the previous chapter, general principles of law are one of the formal sources of international law. 150

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150 Tomuschat, *supra* note 124, pp. 63-64.
Article 1 of the UDHR proclaims the unity of the human race, the equality and dignity of all its members by stating: “All human beings are born free and equal in dignity and rights”. It again expresses the principle of equality and non-discrimination on the grounds of sex in Art. 2151 and equality before the law in Art. 7.152

Article 17 (1) and (2) clearly establish the right to property for all people regardless of sex, stipulating that "[e]veryone has the right to own property alone as well as in association with others" and that "[n]o one shall be arbitrarily deprived of his property."153

Article 25 establishes the right to an adequate standard of living including housing and to security in the event of a lack of livelihood for everyone. Women’s rights to land, housing and property are included in Article 25 as they are essential to an adequate standard of living for women and to women's security when widowed, unemployed or lacking livelihood. This is the case of the majority of the women in post-conflict.154

Further support for women's rights to land can be found in Article 16 of the UDHR, which states that men and women are "entitled to equal rights as to marriage, during marriage and at its dissolution". Given the central role that land, housing and property play within marriages and upon their dissolution, this article suggests that women have the right to be free from discrimination with respect to rights in, access to and control over

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151 Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

152 Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination

153 Article 17:
(1)Everyone has the right to own property alone as well as in association with others.
(2)No one shall be arbitrarily deprived of his property.

154 Article 25:
(1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.
(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection
land both during marriage and upon its dissolution.\textsuperscript{155}

If indeed Articles 17, 25 and 16 are read as implying the right to land, housing and property, Article 2 of the UDHR underscores these rights for women by stipulating that women have the right to be free from discrimination with respect to all of the rights found in the UDHR.

Legal instruments such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination Against Women codify many of the provisions found in the UDHR which are relevant to women's rights to land. As treaties -- governed by the principle of \textit{pacta sunt servanda}, which is codified in Article 26 of the Vienna Convention on the Laws of Treaties -- these instruments are accorded more legal weight than the UDHR as they are legally binding on those States, which have ratified them. They will be studied in the following sections.\textsuperscript{156}

\subsection*{5.4 International Covenant on Economic, Social and Cultural Rights}

The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted in 1966 and is viewed as the most authoritative pronouncement on economic, social and cultural rights and housing rights in particular.\textsuperscript{157}

The ICESCR provides a framework that allows women to claim equality rights as well as specific rights to housing and land. That is, the ICESCR protects women’s right to be free from discrimination and to equality with respect to housing while also protecting more specific rights to housing and access to land. Under Article 3 women are guaranteed equal

\footnotesize{\textsuperscript{155} Article 16.

(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State

\footnotesuperscript{156} COHRE (2008), \textit{supra} note 71, p. 78.

\footnotesuperscript{157} Committee on Economic Social and Cultural Rights, 1991, The Right to Adequate Housing (Art. 11 (1)), General Comment 4, para. 8.}
rights to the enjoyment of all economic, social and cultural rights set forth in the ICESCR and Article 11(1) codifies the right to adequate housing.

The contextual reading of Art.2, Art. 3 and Art.11 leads to the conclusion that women are guaranteed the right to own, use or otherwise control housing, land and property on an equal basis with men.

In its legal interpretation of the right to adequate housing, the Committee on Economic, Social and Cultural Rights, has explicitly included the right to land as an element of the right to housing. In General Comment No. 4, the CESCR defines accessibility – one of the seven elements required for adequate housing – as follows:

“Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources (…) Within many States parties increasing access to land by landless or impoverished segments of the society should constitute a central goal. Discernible governmental

158 Article 3: The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

159 Article 2:

(1) Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

(2) The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

(3) Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

160 Article 11:

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need

161 COHRE (2008), supra note 71, p. 77.
obligations need to be developed aiming to substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement.”

In other words the ESCR Committee, recognizes the right to land as one of the manifestations of right to housing.

5.5 International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) was adopted in 1966. The ICCPR, though intended to address traditional civil and political rights, contains reference to economic, social and cultural rights and provides important safeguards for the rights of women.

Although it does not explicitly codify the right to land, it addresses rights to be free from discrimination with respect to land, housing and property. It affirms the principle of non-discrimination in the basis of sex on Art. 2(1), Art. 3 and Art. 14.

Article 23 (4) brings that “[s]tates Parties to the present

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163 COHRE (2008), supra note 71, p. 78.
164 Article 2:
1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
3. Each State Party to the present Covenant undertakes:
(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
(c) To ensure that the competent authorities shall enforce such remedies when granted.
165 Article 3:
The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

167 Article 23:
1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution”, providing for equality of rights and responsibilities in marriage, including equal inheritance rights for women and men. Women should enjoy equal rights in all matters, including running of the household and administration of assets.\(^{168}\)

Article 26\(^ {169}\) is a broad, anti-discrimination provision, which indicates that any law – regardless of its subject matter – which discriminates on the basis of sex is in breach of the ICCPR.\(^ {170}\)

Therefore, laws that discriminates against women with respect to, \textit{inter alia}, using, renting, owning or inheriting land, constitute a violation of women's human rights under the ICCPR. This means that any State party to the ICCPR found to have such law is in violation of its legal obligations under the ICCPR.

5.6 International Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) was adopted in 1965 and entered into force in 1989. It recognizes on its preface the principle of gender discrimination and human dignity, according to what the entire convention shall be interpreted.

Although it explicitly include the right to land, CERD does recognize and protects housing rights of persons, including women

\(^{168}\) COHRE (2008), \textit{supra} note 71, p. 79.
\(^{169}\) Article 26: All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
belonging to marginalized, racial and ethnic groups, by stating in Art. 5 (...) States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, color, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:...(e) Economic, social and cultural rights, in particular… (iii) The right to housing.

Such provision is of much relevance in post-conflict situations, considering many of the conflicts have their origins in ethnical and racial segregation and women belonging to minority groups are more vulnerable due to their exposure to a double ground of discrimination.

5.7 The Convention on the Elimination of All Forms of Discrimination against Women

The Convention on the Elimination of Discrimination against Women (CEDAW) has been described as the international bill of rights for women. The Convention addresses the various aspects of discrimination faced by women and provides measures aimed at ensuring the de facto and de jure equality of women and men and the overall protection of women against discrimination. CEDAW is a fundamental tool in the advancement of women’s rights to housing, land and property.\(^{171}\)

Like Article 26 of the ICCPR, the CEDAW’s relevant provisions focus on the right to be free from discrimination, but differ from the ICCPR in that it contains a number of provisions which explicitly protect women from discrimination with respect to matters relating to land, housing and property. For example, Article 13\(^{172}\) instructs States parties to take all appropriate measures to eliminate discrimination against women in areas of economic and social life to ensure women’s equal right to bank loans, mortgages and other forms of financial credit. Article 14.2 (h) ensures rural

\(^{171}\) COHRE (2008), supra note 71, p. 80.

\(^{172}\) Article 13: States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women, the same rights, in particular:
(a) The right to family benefits;
(b) The right to bank loans, mortgages and other forms of financial credit;
(c) The right to participate in recreational activities, sports and all aspects of cultural life
women the right to enjoy "adequate living conditions in relation to housing, sanitation, electricity and water supply …". 173 And Articles 15 and 16 provide explicit protections from discrimination with respect to land, housing and property. Under Article 15, States Parties are obliged to accord to women “equality with men before the law”; “a legal capacity identical to that of men” including “equal rights to conclude contracts and to administer property”. It also states that “all contracts and all other private instruments of any kind with legal effect which is directed at restricting the legal capacity of women shall be deemed null and void”. Article 16 stipulates:

“States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

…

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property whether free of charge or for a valuable consideration.”

The Committee on the Elimination of Discrimination Against Women has complemented these provisions in General Recommendation No.21, Equality in marriage and family relations, commenting on Article 15 the Committee states:

“When a woman cannot enter into a contract at all, or have access to financial credit, or can do so only with her husband's or a male relative's concurrence or guarantee, she is denied legal autonomy. Any such restriction prevents her from holding property as the sole owner …

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173 Article 14:
1. States Parties shall take into account the particular problems faced by rural women and the significant roles which rural women play in the economic survival of their families, including their work in the non-monetized sectors of the economy, and shall take all appropriate measures to ensure the application of the provisions of the present Convention to women in rural areas.
2. States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right:
   (…) (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.
Such restrictions seriously limit the woman's ability to provide for herself and her dependents.”

Then, linking Article 16(1)(h) with Article 15(2), the Committee notes that the right to own, manage, enjoy and dispose of property is central to a woman's right to enjoy financial independence and, in many countries, is critical to her ability to earn a livelihood and to provide adequate housing and nutrition for herself and her family. The Committee also suggests that countries undergoing agrarian reform or redistribution of land, should carefully observe the right of women - regardless of marital status - to share such redistributed land.

Further the Committee states:

“…any law or custom that grants men a right to a greater share of property at the end of a marriage or de facto relationship, or on the death of a relative, is discriminatory and will have a serious impact on a woman's practical ability to divorce her husband, to support herself or her family and to live in dignity as an independent person.”

After describing the various ways in which women are commonly discriminated against with respect to the division of property during marriage and upon its dissolution as well as the discrimination women suffer under inheritance laws and customs, the Committee calls for the revocation and abolition of laws and practice which support or entrench these types of discrimination against women.

5.8. Security Council Resolutions 1325 and 1889:

UN Security Council Resolutions correspond to a non-codified source of international law, as it was discussed in the previous chapter. Resolution 1325 was unanimously adopted during the Namibian presidency of the UN Security Council in October 2000. It is a legal landmark and political

174 Committee on the Elimination of All Kinds of Discriminations Against Women, 1994, Equality in marriage and family relations, General Recommendation No. 21, para. 7.
176 Ibid, para. 27.
177 Ibid, para. 28.
178 Ibid, para. 30-35.
framework that acknowledges the importance of the participation of women and the inclusion of gender perspectives in peace negotiations, humanitarian planning, peace-keeping operations, post-conflict peace-building and governance.

It does not bring any specifications about women's land rights. However, it calls on all actors involved in conflict when negotiating and implementing peace agreements, to adopt a gender perspective. This includes, *inter alia*, taking measures that ensure the protection of and respect for human rights of women and girls and taking into consideration the special needs of women and girls during repatriation and resettlement and for rehabilitation, reintegration and post-conflict reconstruction.

Security Council Resolution 1889, adopted in 5 October 2009, is another document that should be considered when studying the issue of women's land rights in post-conflict countries. In it, the Security Council expresses concern that women’s capacity to engage in public decision-making and economic recovery often does not receive adequate recognition or financing in post-conflict situations. It further underlies that funding for women’s early recovery needs is vital to increase women’s empowerment, contributing to effective post-conflict peace-building. It also reaffirms the key role women can play in re-establishing the fabric of recovering society, stressing the need for their involvement in the development and implementation of post-conflict strategies in order to take into account their perspectives and needs.

Moreover, it encourages the Peacebuilding Commission and Peacebuilding Support Office to continue to ensure systematic attention to and mobilization of resources for advancing gender equality and women’s empowerment as an integral part of post-conflict peace-building, and to encourage the full participation of women in this process. Further, it reiterates its call for all parties in armed conflicts to respect fully

179 UN Security Council Resolution 1325, para. 8(c)
180 *Ibid.*, para. 8(a)
international law applicable to the rights and protection of women and girls.\textsuperscript{181}

The main relevance of these resolutions is in building the culture of taking the opportunities that emerge during the post-conflict reconstruction to tackle women’s needs by applying the suitable legislation. And, considering the key-role of land rights for the empowerment of women, the resolutions shall be interpreted as urging for the implementation of such rights in reality.

5.9 Other United Nations Documents

In addition to international treaties, documents that emerge from World Conferences (Declarations, Plans of Action) carry moral persuasion and contain provisions on women’s land-related rights. More importantly, these instruments may reflect existing principles of customary international law. In any case they display the trends prevailing in the international community and represent one of the sources of international law (see chapter 3).\textsuperscript{182}

5.9.1 Beijing Platform for Action

The Beijing Platform for Action (PFA), which emerged from the Fourth World Conference on Women, explicitly recognizes the importance of land, housing and property to women's livelihood. It draws the important link between women's poverty and their homelessness, inadequate housing, and lack of access to economic resources such as credit, land ownership and inheritance.\textsuperscript{183}

The Platform for Action commits governments to: enable women to obtain affordable housing and access to land by removing all obstacles to access;\textsuperscript{184} undertake legislative and administrative reforms to give women full and equal access to economic resources, including the right to inheritance and to ownership of land and other property;\textsuperscript{185} eliminate the injustice and obstacles in relation to inheritance faced by the girl child by

\textsuperscript{181} UN Security Council Resolution 1889 para. 14.
\textsuperscript{182} FAO, supra note 1, p. 9.
\textsuperscript{183} Beijing Platform for Action, paras. 41, 51, 156.
\textsuperscript{184} Ibid, para. 185.
\textsuperscript{185} Ibid, para. 256 (k), 61(b).
enacting and enforcing legislation that guarantees equal right to succession and ensures equal right to inherit;\textsuperscript{186} and enhancing at the national and local levels, rural women's income generating potential by facilitating their equal access to and control over productive resources, land, credit, capital, and property rights.\textsuperscript{187}

Despite these important observations and commitments for action, it should be noted that the PFA predominantly calls for women’s ‘equal access to’ but not ‘equal rights to’ housing, land, property and inheritance. The sole paragraph in the PFA which calls for “equal rights” to succession and inheritance (in the context of the girl child), is subject to reservations from the following countries: Egypt, the Islamic Republic of Iran, Iraq, Libyan Arab Jamahiriya, Mauritania, and Tunisia all of which stipulated that this paragraph would have to be interpreted in the context of respect for the laws of inheritance in the Islamic Shariah.\textsuperscript{188}

5.9.2 Habitat Agenda

The Habitat Agenda is the main document that came out of the Habitat II conference in Istanbul, Turkey 3 to 14 June 1996. Adopted by 171 countries, it contains over 100 commitments and 600 recommendations on human settlements issues.\textsuperscript{189}

At the outset, the Habitat Agenda correctly identifies the factors which have prevented women from obtaining adequate shelter such as the persistent and increasing burden of poverty on women and discrimination against women.\textsuperscript{190} In turn, women's equal access to land, housing and property is one of the overall guiding principles of the Habitat Agenda. This is reflected in Chapter II, which sets out the Goals and Principles regarding human settlements. It also stipulates that equitable human settlements are those in which all people, without discrimination, have equal access to housing, and which provide equal access to the right to

\begin{itemize}
\item \textsuperscript{186} \textit{Ibid}, 274(d).
\item \textsuperscript{187} \textit{Ibid}, para. 274 (c).
\item \textsuperscript{188} FAO, \textit{supra} note 1, p. 10.
\item \textsuperscript{189} The habitat agenda, < ww2.unhabitat.org/declarations/habitat_agenda.asp>, accessed on 17 December 2010.
\item \textsuperscript{190} UN-HABITAT, \textit{supra} note 75, para.15.
\end{itemize}
inheritance, the ownership of land and other property and credit. The Agenda further notes that the empowerment of women is fundamental to sustainable human settlements development.

Chapter III of the Habitat Agenda is particularly articulate on women's rights to land, housing and property, with paragraph 40(b) committing governments to:

“Providing legal security of tenure and equal access to land to all people, including women and those living in poverty; and undertaking legislative and administrative reforms to give women full and equal access to economic resources, including the right to inheritance and to ownership of land and other property, credit, natural resources and appropriate technology.”

This is reinforced by the commitments undertaken by States to ensure gender equality in all aspects of human settlements, such as: the integration of gender perspectives in human settlements related legislation, policies, programs and projects; developing conceptual and practical methodologies for incorporating gender perspective in human settlements planning, development and evaluation; and formulating and strengthening policies and practices to promote the full and equal participation of women in human settlements planning and decision-making.

Later, the document complements these objectives and commitments with corresponding strategies for implementation, recommending the eradication of legal and social barriers to women's equal and equitable access to land. More specifically, the document calls for States to, *inter alia*: promote awareness campaigns and education regarding women's legal rights with respect to tenure, land ownership and inheritance; support community projects that aim to remove all barriers to women's access to affordable housing, land, housing and property ownership, economic resources, infrastructure and social services and ensure the full

191 *Ibid*, para. 27.
193 *Ibid* para. 46 (a)-(e).
participation of women in all decision making processes; undertake legislative and administrative reforms to give women full and equal access to economic resources, including the right to inheritance and the ownership of land and other property, credit, natural resources and appropriate technologies.\textsuperscript{194}

The Habitat Agenda is useful in the struggle to promote and protect women’s rights to land, as it reaffirms the crucial link highlighted in the Beijing PFA between women’s economic and social disadvantage and women’s lack of \textit{access} to land. It provides a number of concrete actions Government’s and others can take to ensure women’s \textit{equal access} to land, housing and property. Like the Beijing PFA, however, the Habitat Agenda does not go far enough, as it fails to recognize and call upon Government’s to ensure women’s \textit{equal rights} to land, housing and property and to stress the importance of doing so in the post-conflict reconstruction time.\textsuperscript{195}

\section*{5.10 Regional Systems}

None of the regional instruments include specific reference to land rights. They do, however, provide an indirect means of supporting and claiming these rights for women through either anti-discrimination provisions and/or provisions which protect private family life and the home.

\subsection*{5.10.1. The European System:}

The European Convention for the Protection of Human Rights and Fundamental Freedoms came into force on 3 September 1953 (and amended in 1 November 1998). It contains provisions that can be interpreted and applied in a manner which affords women rights to land. Article 8,\textsuperscript{196} like Article 17 of the ICCPR, provides the right to respect for

\begin{footnotesize}
\begin{enumerate}
\item \textit{Ibid}, para. 78 (a) – (g), 79 (a) – (f).
\item \textit{Ibid}, para. 75.
\item Article 8 – Right to respect for private and family life
\begin{enumerate}
\item Everyone has the right to respect for his private and family life, his home and his correspondence.
\item There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for
\end{enumerate}
\end{enumerate}
\end{footnotesize}
private and family life and the home. Article 1 of Protocol No. 1 underscores this by stipulating that “[n]o one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law”. 

Despite the male-centric language of these rights, the protections undoubtedly extend to women as indicated by Article 14 which stipulates that the enjoyment of the rights and freedoms set forth in the ECHR “shall be secured without discrimination on any ground”, including sex. From a gender perspective, these provisions may not be useful for women who cannot prove title to her home or who do not have possessions that she can claim as her own. 

5.10.2 The American System

The American Convention on Human Rights (ACHR) came into force on 18 July 1978. Like other human rights legislation, it includes a non-discrimination clause with respect to the rights contained the Convention (Art. 1).

The ACHR also states the right of everyone to the use and enjoyment of property, without discrimination on the basis of sex (Art. 21 combined with Art.1), and the principle of equality of rights and "adequate balancing of responsibilities of the spouses within marriage and in the event of its dissolution". (Art. 17(4)).
Moreover, it contains similar provisions to the ICCPR and the ECHR, that could be applied to women’s land claims, stipulating at Article 11(2) that “No one may be the object of arbitrary or abusive interference with his private life, his family, his home….” and that everyone has the right to the protection of the law against such interference or attacks (Article 11(3)). However, like the ECHR, these provisions may not adequately protect women. 201

5.10.3 The African System

The African Charter of Human and People’s Rights 1981 (the so-called Banjul Charter), was adopted 1981 and came into force in 1986. It does not codify a specific right of women to land, housing and property. However, it does contain a number of provisions which - in their totality - can be interpreted as affording women the right to be free from discrimination with respect to land, housing and property. 202 States parties are bound to recognize the right to freedom from discrimination with respect to the rights included in the Charter and shall undertake to adopt legislative or other measures to give effect to it.

The ACHPR guarantees, without discrimination, the right to property (arts. 2 and 14) 203, and mandates states to eliminate all discrimination against women and to protect women’s rights. Article 18 (3) ensures the “elimination of every discrimination against women” and the protection of the rights of the woman “as stipulated in international declarations and conventions”. Article 22 provides that all peoples have the right to their “economic, social and cultural development” and Article 25

201 COHRE (2008), supra note 71, pp. 89-90.
203 Article 2 Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status. Article 14 The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.
obliges States to: "protect and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood”.

These articles of the African Charter which protect women from discrimination and which refer to international human rights law could be used to challenge laws and judicial decisions which restrict or deny women’s rights in, access to and control over land. The African Charter also provides an opportunity to include private (non-State) actors in the protection and promotion of women's rights to land, housing and property and to be free from discrimination, by making both States and individuals within the State responsible for eliminating discrimination against women.204

On the other hand, different from other international human rights instruments, the ACHPR does not explicitly state the equality of spouses during and after marriage. Instead, it places particular emphasis on the promotion and protection of African "traditional values" recognized by the community (arts. 17(3) and 18(2)).205

The Protocol on the Rights of Women in Africa provides for the integration of a gender perspective in national legislation (art. 2(1)(c)),206 for equality of rights of the spouses within marriage, including in relation to property (art. 7),207 for the right of married women to acquire

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204 Butegwa, supra note 202, p. 502.
205 Article 17(…)3. The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.
Article 18 (...2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.
206 Article 2 Elimination of Discrimination Against Women
1. States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures. In this regard they shall: (...c) integrate a gender perspective in their policy decisions, legislation, development plans, programmes and activities and in all other spheres of life;
207 Article 7 Separation, Divorce and Annulment of Marriage
States Parties shall enact appropriate legislation to ensure that women and men enjoy the same rights in case of separation, divorce or annulment of marriage. In this regard, they shall ensure that:
. separation, divorce or annulment of a marriage shall be effected by judicial order;
. women and men shall have the same rights to seek separation, divorce or annulment of a marriage;
and freely administer separate property (art. 7), for equality of property-related rights upon divorce or annulment of marriage (art. 7(c)), for equality in inheritance rights (art. 21)\textsuperscript{208}, and for women’s access to land (art. 15(a)).\textsuperscript{209} While the Protocol entered into force in November 2005, it has been ratified by a relatively small number of states (fifteen at the time of writing).\textsuperscript{210}

\begin{itemize}
\item in case of separation, divorce or annulment of marriage, women and men shall have reciprocal rights and responsibilities towards their children. In any case, the interests of the children shall be given paramount importance;
\item in case of separation, divorce or annulment of marriage, women and men shall have the right to an equitable sharing of the joint property deriving from the marriage.
\end{itemize}

\textsuperscript{208} Article 21

Right to Inheritance

1. A widow shall have the right to an equitable share in the inheritance of the property of her husband. A widow shall have the right to continue to live in the matrimonial house. In case of remarriage, she shall retain this right if the house belongs to her or she has inherited it.

2. Women and men shall have the right to inherit, in equitable shares, their parents' properties.

\textsuperscript{209} Article 15 Right to Food Security

a) provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food;

\textsuperscript{210} FAO, \textit{supra} note 1, p. 32.
Conclusions

Most often women are depicted as poor victims when images of wars are shown and stories are told. There is a general tendency of focusing on rape, enforced pregnancy, human trafficking and other forms of sexual violence inflicted on women and girls on the context of armed conflicts. Although that is a rough and desperation reality, it is just a part of the whole picture.

Women show great strength becoming head of households, learning new skills, fleeing with remaining family members. More frequent than most believe, they also take part in conflicts as agents engaged in violence, and, time and again, commit acts of torture and participate in acts of genocide.

Women’s over-victimization leads to their equivocate treatment as persons incapable of running their own lives, depending on men to be protected and to fully exercise their rights. Over-victimization also blurs the fact that more then only victims, women play an active role in armed-conflict and have particular needs and interests, which, almost often are ignored.

Fortunately, the specific problems experienced by women in situations of armed conflict have received increased attention of the international community in recent years. The concern to address the problems faced by women more effectively became official approximately 10 years ago, when the UN Security Council adopted Resolution 1325. Through that resolution the Security Council recognized that women -- although being impacted in different and specific ways -- are, as much as men, deeply affected by wars. Steps have been taken towards guaranteeing their full participation and integration in all the phases of a conflict (pre-conflict decision making, combat, peace agreements, post-conflict reconstruction).

In this regard, the examples collected along this thesis have shown that, for its very special characteristics of being a time when gender stereotypes have been challenged and women represents the majority of the
population, the post-conflict reconstruction period has proved to be an ideal opportunity for advancing the implementation of international legislation regarding women’s human rights aiming at combating power imbalance through the promotion of gender equality.

Turning to the question of whether the right to land under international law can be used as a tool to integrate women in situations of post armed-conflict, the review carried out in the present study shows that, on the whole, international law does adequately cover the needs of women. But this is true only if one considers all the bodies of international human rights law simultaneously, in particular through the lenses of the principle of gender equality.

At the international level, land rights are not displayed as an independent right in treaties and declarations. Broadly speaking, these human rights instruments create the obligation of non-discrimination and equal enjoyment of all human rights for all people regardless of sex.

However, numerous international treaties and declarations explicitly address related rights such as the right to property, the right to an adequate standard of living, equal rights within marriage and its dissolution, right to succession and inheritance and the right to housing. Such rights interact and combine to constitute a legal base for the protection and enforcement of land rights for women and must be considered holistically.

Among all the rights that inbase land rights, right to housing is of special importance for its dependency on the right to land to be fulfilled. Additionally, considering that the place where one plants and works and from where one extracts his/her livelihood can be also the place where s/he lives -- which is often the case in rural areas of developing and post-conflict countries-- right to land merges with the right to housing as the land and home are also integrated.

The fact that the rules regarding land rights are spread in different bodies of law is not negative per se. It would not be appropriate for a single set of rules to attempt to regulate all the various aspects of human interaction. Different bodies of law have different purposes. Notwithstanding, all the sources of international law must be systematically
examined, playing the UN documents related to women and war a crucial role as to give the instruments of international law an updated interpretation, conditioned to the current demands of the society. And, nowadays, a crucial demand of the contemporary society is the recognition of women’s role in conflicts and their aftermath and the regulation of post-conflict times in a way that will better suit and integrate.

It is also important to draw attention to the fact that, despite the well-known power of the international society to influence and pressure States for desirable changes, national law continues to apply during armed conflict and its aftermath, offering significant rights. In particular, at administrative level, it is national law rather than international law which provides and ensures the more substantial rights and structures, for example with regard to entitlement to property, regulation of inheritance, etc. Situations also exist in which international law lays down broad obligations but leaves practical and detailed implementation to national law.

And, again, legislation prohibiting discrimination based on the ground of sex is vital for women's equality in land rights. These provisions can be a possible solution to overcoming at least some of the obstacles to women's rights to land and may go some distance in ensuring that community leaders, the judiciary and others involved in the allocation of land do not discriminate against women.

At the same time, however, anti-discrimination laws do not provide complete protection for women's interests as in many countries patriarchal social structures, patriarchal customary norms generally do not assure women proper protection, discriminating against them. In order to secure women’s land rights, it is critical to understand that sex/gender neutral laws are often simply not enough to make a real change in the lives of women. Too often, the application of such laws continues to disadvantage women by failing to address entrenched systems of male dominance and male privilege.

In summery, amongst many of the rights that may be particularly important for fostering the rebuilding process in a more equitable way, right to land is central. For its elementary abilities to serve as
shelter and generate an income, the right to land is very suitable for the purpose of empowering women and a potential tool for translating *de facto* achievements in equality obtained during conflict into *de jure* gains, capable to last and also sustain peace in the long run. Thus, land rights can be a powerful feature in conforming the new societal reality: stimulating development and the overcoming of the disasters brought by the conflict. However, while at the normative level the needs of women can be regarded as adequately addressed, the challenge lies in ensuring respect for and implementation of the existing rules.

**Recommendations**

1. Governments as well as NGOs must ensure that women and women’s organizations are included in the negotiation of peace agreements and in the reconstruction process from the outset and not as an afterthought. “The effective participation of the stakeholders in the implementation of land regularization programs is vital not only to fit the expectations of the population but also for the occupants of these lands to exercise their citizenship”. 211

2. Donors and relief funds must invest in women’s organizations committed with access to land and women’s organizations must lobby for gender inclusive agrarian reform.

3. Legal instruments may contain an "affirmative action" clause.

4. Governments must concentrate on the creation of accessible and independent enforcement mechanisms.

5. All sectors of society must receive human rights education with a focus on women's rights and on economic, social and cultural rights including

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women's rights to land, housing and property. Where appropriate, human rights education should also focus on local, national, regional and international legal and other mechanisms to enforce these rights.

6. Women's rights to land, housing and property must be more firmly established as human rights. To this end, human rights lawyers and activists should work together to delineate holistically the legal framework to support the claim that women's rights to land, housing and property are human rights.

7. More research should be carried out on the relationship between the right to housing and land and property rights, with a view to better determine how the right to housing (one of the most developed economic and social rights at the international level) might be used to support women’s right to land.
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