Slipping Through the Cracks: A Kenyan Case Example of Refugeeism, International Norms, and Gender-Based Violence

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This thesis titled
Slipping Through the Cracks: A Kenyan Case Example of Refugeeism, International
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ABSTRACT

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Slipping Through the Cracks: A Kenyan Case Example of Refugeeism, International Norms, and Gender-Based Violence

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This thesis will examine the East African nation of Kenya and how its policy regarding the northern refugee camps of Dadaab and Kakuma relates to the policies of international organizations such as the United Nations and African Union. In doing so, this thesis will focus specifically on the effects that international norms such as repatriation have on refugees in these camps who face gender-based violence. In this analysis, questions of the role and limitations of civil society within Kenya in addressing the issue of gender based violence are addressed. From this research it can be concluded that refugees facing gender-based violence in Dadaab and Kakuma will benefit from a shift in Kenyan policy away from its current application of international norms, the implementation of the more human rights conscious policies of the African Union, and Kenya’s reconsideration of its responsibility as a host country.
DEDICATION

To my loving husband and family who have supported me through all of my endeavors both in academia and in life. I would not be where I am today without you.
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INTRODUCTION

In 2004 the United States Court of Appeals denied the application of native Somali, Jawahir B. Aden. As is shown in court records, Aden entered the United States illegally after spending years living in the Kenyan refugee camps, which reside along the country’s two borders. Aden’s court recorded background information states that the mother of three fled Somalia after facing sexual assault within her home country, an event that took place during the raiding of her home and murder of her brother. Applying for asylum under Article 3 of the Convention Against Torture (“396 F. 3d 966 - Aden v. Ashcroft”), Aden was denied asylum due to her inability to prove herself as having a “well-founded fear of persecution” based on one of the five categories for doing so (“race, religion, nationality, membership of a particular social group or political opinion”, United Nations High Commissioner for Refugees, 2002). This denial highlights a significant gap within the definition of a refugee and issues facing women seeking refuge from “gender” related claims.

In addition to directly impacting the lives of refugees seeking asylum in Western host-countries, this adoption of restricted policy by the West has directly affected the lives of those residing in refugee camps in the global south. As this thesis will demonstrate, while refugee agencies such as the United Nations Commissioner for the Status of Refugees (UNHCR) have mirrored their policies for assisting refugees in the global south on the statutes outlined in the 1951 Convention, the same ambiguous language regarding the protection of women under the status of “membership in a particular social group” and responding to these crises is applied at the local level.
In addition to recognizing the lack of response to gender-based violence in refugee camps, it is important to note how the similar application of internationally recognized policies such as repatriation influence the behavior of refugee hosting countries like Kenya to avoid the responsibility of assisting with refugee resettlement within their own borders. Moral obligations to assist these refugees aside, this passing of responsibility is vital to the discussion of resettlement, because transnational legislation constructed by the African Union which has been formally accepted by the Kenyan government regarding the resettlement of refugees is very clear in dictating the role of the state in supporting refugees within their borders, and bridges the gap between gender-based violence and refugeeism.

**Explaining Kenyan Refugee Policy**

The key focus of this thesis is to explain the existence of two phenomenon: (A) the gap between the human-rights oriented, refugee resettlement legislation of the African Union and its application in the case of refugees facing gender-based violence within the Kenyan refugee camps of Dadaab and Kakuma, and (B) the choice and ability of the Kenyan state to succumb to internationally recognized norms that inhibit the human rights of refugees facing gender-based violence. Before studying the Kenyan case example, one must first conceptualize the theoretical debate regarding the implementation of this law so as to better understand the significance of the choices made by the Kenyan government as they apply to gender-based violence refugees in Dadaab and Kakuma. From the available literature two key themes emerge: governmental
behavior in ratifying and implementing human rights initiatives, and the influence of non-
governmental organizations in supporting these initiatives.

Explaining Compliance with International Standards

Understanding state behavior and the adoption internationally recognized human 
rights initiatives is necessary in order to conceptualizing their application on the local 
level. In doing this, one must look at the incentives and consequences for a state 
government when they either ratify, implement or ignore a human rights initiative. 

According to authors such as John Mearsheimer, the ability of institutions to do so is 
limited by the inherent nature of the state (1995, pg. 11). Authors Emilie M. Hafner-
Burton, Kiyoteru Tsutsui, and John Meyer explain that a state’s willingness to ratify 
human rights initiatives is based on whether or not doing so is in the states interest (2008, 
121). However Hafner-Burton, Tsutsui and Meyers are skeptical of the actual 
implementation of these initiatives after their ratification (2008, 121). In addition to this 
these authors highlight the lack of accountability and enforcement on the part of 
international actors after their ratification by a state (2008, 116).

In her article “Justice Lost! The Failure of the International Human Rights Law to 
Matter Where Needed Most”, Hafner-Burton highlights the potential reasons as to why a 
state may ratify an international human rights policy, but not choose to implement it.

Reforms are usually deliberate and costly, often requiring leaders in power to give 
up certain authorities and privileges they have become accustomed to enjoying. 
Improvements in protection of human rights do not, as a result, happen tacitly or 
through simple processes of mimicry without some convincing motivation. 
Repressive leaders can certainly reform, but they are unlikely by any stretch of the 
imagination to give up repression simply because their neighbors have. (2007, pg. 
414)
Oona Hathaway supports this line of thinking within her article “Why Do Countries Commit to Human Rights Treaties?”. In this article, Hathaway makes the claim that a state’s ability to implement a policy it is being pushed to ratify will decrease the likelihood that the state will adopt the policy (2007, pg. 612-613). In contrast, Hathaway explains that a state without the infrastructural mechanisms to implement policy will be more likely to ratify a human rights treaty (2007, pg. 612-613).

While the above discussion provides some understanding as to why states like Kenya may not implement the policies outlined by international organizations such as the African Union, it falls short in explaining Kenya’s relationship with large-scale international organizations like the United Nations. Authors Michael Barnett and Martha Finnemore would answer this concern with their explanation of how international organizations like the United Nations are capable of influencing government actors to concede to international norms. As Barnett and Finnemore explain, international organizations like the United Nations are capable of influencing states to implement policies through the use of incentives (2004, pg. 7). The question that this thesis seeks to examine is how, and why, some international organizations like the United Nations have the ability to influence policy in Kenya, as opposed to others like the African Union.

Value of NGOs

These issues of policy ratification and states open the discussion towards potential solutions for implementing human rights policy into local communities. A primary solution in this discussion arises with the utilization of non-governmental actors in promoting these initiatives. In the introduction to his book, *Meeting Needs: NGO*
Coordination and Practice, Jon Bennet explains the limitations of the state and the need for non-governmental actors.

At best, the state can provide a conducive political, social and economic environment in which development takes place through a mixture of private and public endeavors. Where freedom of association, participation and empowerment are valued, it is civil society that creates the necessary normative framework. (1995, pg. xx)

While Bennet’s argument refers to the importance of NGOs as they support human rights on a local level, it does not account for how this process is applicable to international human rights initiatives as they may be implemented by domestic governments. Xinyuan Dai addresses this issue explaining what he refers to as the “compliance gap” between international human rights policy and its adoption into practice by the state (Risse et. al. 2013). In this argument, Dai explains that in order to effectively bridge the gap between international human rights actors and the state, there must be the existence of “domestic non-state stakeholders” that will push the policy on a domestic level (Risse et. al., 2013, pg. 96).

It should be noted that the argument promoting the utilization of NGOs in implementing human rights initiatives is not without critique. Authors such as Alexander Cooley and James Ron argue that an increase of international organizations and international non-governmental organizations in implementing human-right initiatives may lead to issues of “uncertainty, competition and insecurity” (2002, pg. 6). However this argument falls short of the Kenyan case example as it does not account for the effects of extreme limitations being imposed upon civil society. As will be seen in later
discussion regarding NGOs within the Kenyan state restrictions being placed upon these organizations have drastic consequences for human rights initiatives on the local level.

**Main Argument**

This thesis will draw from Barnett and Finnemore’s theories regarding the adoption of international norms by state actors, as well as Hafner-Burton, Tsutsui and Meyers arguments pertaining to state interest and implementation of ratified policies. As will be seen throughout this thesis, the Kenyan government’s ratification of the refugee and gender-based violence policies from the African Union runs contradictory to its application of human-rights violating international norms from the United Nations High Commissioner for Refugees (UNHCR).

In addition to uncovering this tension, this thesis will examine the role of human-rights NGOs present in Kenya in dealing with refugeeism and gender-based violence. While issues of coordination as they are raised by Cooley and Ron should not be discounted in understanding limits to the effectiveness of NGOs, it does not make up the whole picture of NGOs application in Kenya. This argument by Cooley and Ron may be a valid concern in coordinating Kenya’s NGO efforts in the distant future; however the current control over NGOs in the country is too extreme to allow for any benefits to reach refugees in Dadaab and Kakuma.
Methodology

In his book, “Qualitative Research and Evaluation Methods”, Michael Quinn Patton stresses the importance of partaking in three data collection methods in completing qualitative research: observations, interviews, and documentation (2002, 306). According to Patton, these three methods support one another and create a “complete picture” of the issue being evaluated (307). While this argument is logical as it applies to studying socio-political issues like refugeeism and gender-based violence, it is not applicable to the available parameters of this study.

While future research will yield observations of and interviews from female refugees within the camps of Dadaab and Kakuma, this thesis will utilize document analysis in order to explain issues of international policy application on the local level. These documents include international legal statutes from the United Nations and African Union, legislation from Western host countries and the Kenyan state, international human rights doctrines, and gender-related protocols from both international actors and host countries. In analyzing these legal and governmental documents, I analyzed the diction used in determining the referenced policies, and evaluated any clauses that may affect or negate the policies implementation.

While this thesis does include reports from NGOs and transnational agencies that have evaluated the experience of women and marginalized individuals living in Dadaab and Kakuma, they are used primarily to gauge the living conditions of these women, and the struggles they undergo as victims of gender-based violence. These reports, while invaluable to the discussion, are not intended to fully evaluate the day to day social and
cultural practices that occur within these camps. Such an evaluation of social interaction would require interviews and observations with gender-based violence refugees- outside of the scope of this thesis.

It is important to note that this research has been conducted to apply what Corrine Glesne refers to as the “critical theory paradigm” as well as “critical feminism” (2011, 9-12). The former applies to this thesis, as it will challenge the status quo of Western-established refugee law and international norms relating to the treatment of refugee populations in the global south. The latter, “critical feminism”, is addressed in this thesis’s analysis of gender-based violence as it is recognized by international and domestic actors- specifically in the case of refugees. Overall, these two themes create the context by which the entire thesis is constructed.

**Chapter Outline**

It is the goal of this thesis to examine how international restrictions on the definition of gender-based violence, accepted norms such as repatriation, and the policy of the Kenyan government have come together to affect refugees who have previously, or are currently experiencing gender-based violence within the context of Kenya’s two northern refugee camps, Dadaab and Kakuma. In making this claim it should be noted that while both gender-based violence and repatriation policy are the product of international pressures, and both the central focus of debate within the international human rights movement, they are separate issues in that they stand alone as issues within the context of understanding refugeeism. As this thesis will explain, it is when these two
policies are adopted within the Kenyan context that refugees undergoing gender-based violence suffer from the neglect of the international community.

The first chapter of this thesis will define and describe the basis by which a variety of actors determine the status of a refugee in regards to their acceptance or denial of claims of gender-based violence. Recognizing the United Nations, dominant Western host-countries, the African Union, and the Kenyan state, this foundation highlights the differences between the major actors in assistance of refugees in Dadaab and Kakuma.

The latter half of the first chapter describes the academic and theoretical debate surrounding the addition or exclusion of gender-based violence in the United Nations definition of a refugee. Discussing both the arguments of those opposed to the change (e.g. difficulty in implementation) and those promoting the idea of a gender-related claim in the refugee definition, this chapter will provide the reader with a well-rounded understanding of the debate from a theoretical perspective.

The second chapter of this thesis moves past this discussion of definitions and theory to examining the influence of the international human-rights movement on the policies associated with refugee resettlement. In doing so this chapter highlights key United Nations human rights conventions and how documents produced from these conferences have spurred the debate regarding the expansion of refugee law. Following this train of thought, the thesis briefly highlights the active “hand” in promoting these shifts in policy—non-governmental organizations (NGOs). At this point, the reader should have a general understanding of the contributions of the human-rights movements in
affecting international policy. This sets the stage for the last section of this thesis, discussing the issue of repatriation and refugeeism.

While all discussion prior to this point directs the reader to understanding the lacking of a gender-based violence forum in the refugee definition and shifts being made to potentially improve the refugee system, this last section explains how international norms such as repatriation violate human rights initiatives and in turn, has a negative impact on refugees living in the global south. This section explains the potential reasons why such a policy has been adopted on the international level. Overall, this chapter is designed to evaluate the behavior of those affecting policy, as well as that of those implementing it, so as to begin the reader’s formulation of understanding how this behavior will affect refugees on a local level.

The third and final chapter of this thesis contextualizes arguments made in the previous chapters as they apply to the Kenyan refugee camps of Dadaab (located along the north-eastern border) and Kakuma (along the north-western border). While hosting marginally different population dynamics (both host refugees from Somalia, Sudan, Ethiopia, and Uganda; however the population dispersal differs) (Crisp, 2000), they are both impacted similarly by the normalized gender-based violence and repatriation policies. This thesis recognizes that the reason for this cross-camp impact inherently lies with the role of the Kenyan state. The third chapter of this thesis examines how these two factors were institutionalized in the Kenyan refugee system through the government’s development of policy.
While in the case of Jawahir B. Aden, the United States court of appeals argued that it was lack of corroborating evidence and clarification that led to her exclusion, this case highlights key issues within the asylum-determining process. It can be argued that Aden’s denial for asylum was caused by a lack of “gender-specific” policies that would set specific standards for determining the validity of individual’s applications. Instead, Aden did not meet the qualifications of being a “member of a particular social group”, which under international policy and that of the domestic government, allowed the courts to not only ignore her claim of human-rights violations, but, as will be seen in later chapters, indirectly cause them by not creating any sense of accountability from those residing in internationally run refugee camps. As the third chapter of this thesis will show, women in the Kenyan refugee context are not only facing an uphill battle with the recognition of their right against situations such as gender-based violence because of policy implications, but also the potential for direct violations of these rights by their ‘protectors’.

Overall, this thesis is intended to call into question the international and Kenyan norms for dealing with the refugee crisis in the Kenyan state. In doing so, this thesis highlights a key marginalized group- women- whose, as this thesis will illustrate, plight is systematically ignored by both parties.
CHAPTER ONE: LEGAL FRAMEWORK AND THEORY OF GENDER-BASED VIOLENCE IN REGARDS TO REFUGEEISM

Since the end of World War II, the issue of refugee resettlement has become a source for debate among international actors. One of the most prominent documents resulting from this debate is the standard for defining the world’s refugees during the United Nations 1951 Convention Relating to the Status of Refugees- a standard that, as this chapter will show, is arguably both limited in scope and exclusive in application. In making this claim, this chapter will highlight one specific category within refugeeism, gender-based violence, that has been left out of the international standard for the recognition of refugees. In doing so, this thesis will provide arguments supporting greater awareness of the issue of gender-based-violence across the globe as well as describe the academic movement to promote the addition of the term “gender” to the current platforms for seeking asylum.

In order to fully comprehend the steps necessary to developing a more productive refugee definition through the legal process, the legal history of the United Nations, major host countries (e.g. United States, United Kingdom, and Canada), the African Union and the Kenyan state, must be evaluated and compared. In completing this evaluation, the definition of gender-based-violence and its application to refugees seeking asylum must be deconstructed and conceptualized, so as to allow for a better understanding of the existing void between international legislation and rights of refugees seeking asylum on the grounds of gender-based violence. This chapter will also recognize
arguments surrounding the potential for and implementation of gender-based violence as a basis for receiving refugee status.

Overall, this chapter will work to provide a well-rounded understanding of the legal basis of and controversy surrounding the gender-asylum issue.

**Legal Background**

*The United Nations*

The international standard for identifying refugees was dictated by the 1951 Convention and Protocol Relating to the Status of Refugees, held in Geneva Switzerland. This convention, states that:

The term “refugee” shall apply to any person who: As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. (United Nations High Commissioner for Refugees, 2002)

While the 1967 Protocol regarding this convention eliminated the applicability of the phrase “as a result of events occurring before 1 January 1951” and “as a result of such events”, the standard for defining a refugee under the five causes of persecution remained (United Nations High Commissioner for Refugees, 2010). This definition has been mirrored by many nation states, including the United States of America in determining the definition of a refugee (Musalo, K., et. al, pg. 3).

For example, in case of Jawahir B. Aden, the adoption of this definition by the United States inhibited Aden’s ability to receive asylum, as she was not able to establish
that her fear of persecution was classified by her “membership of a particular social
group”. As was discussed before, Aden’s case was also impacted by her inability to
produce solid evidence supporting her claim for asylum (Jawahir B. Aden v. John
Ashcroft, 2005). The second half of this chapter will examine the complexity of these
issues and provide arguments promoting and defaming the addition of a gender-category.

The United Nations has recognized the issues of female refugees, as in their 1990
Executive Committee Conclusion NO. 64 (XL), Refugee Women and International
Protection. However, while this document explains potential improvements and
considerations that must be taken when handling female-related issues, it does not
directly address gender-based claims in their entirety. Nor does it address the issues of
creating a sixth platform for ‘gender’ in defining a refugee. (Musalo, et. al., pg. 342-343)
These advancements had not been made by the United Nations 1993 Executive
Committee Conclusion NO. 73 (XLIV) Refugee Protection and Sexual Violence (Musalo
et. al., pg. 358-360).

Similarly, in their review of the 1951 Convention and 1967 Protocol, The United
Nations High Commissioner for Refugees (UNHCR) Executive Committee recognized
the complexity of gender-based violence. In this report, the UNHCR executive committee
defined gender-based violence as acts such as having:

…typically encompassed, although are by no means limited to, acts of sexual
violence, family/domestic violence, coerced family planning, female genital
mutilation, punishment for transgression of social mores, and discrimination
against homosexuals. (United Nations High Commissioner for Refugees 2002, pg. 2)
However, while the UNHCR has recognized the vast nature of the gender-based violence issue, the goal of this report is to promote a better interpretation of the gender-based violence issue so it can better fit into the confines of the five established sources of fear. While this UNHCR report does show a positive shift in the transnational recognition of the plight of individuals undergoing gender-based violence, it does not promote the addition of the term “gender” to the reasons for fear defining a refugee.

It is important to note that the movement against gender-based violence developed separately from the context of refugee law. According to authors such as Keck and Sikkink, international recognition of gender-based violence emerged separately and significantly later, from that of women’s rights in general, not taking its place in international discourse until the 1980s (Keck and Sikkink, pg. 166).

It can be argued that the exclusion of gender-based claims in the United Nations recognized definition of a refugee is part of a larger pattern of ambiguity on the part of the state applying the definition. For example in his chapter, “The Philosopher and the Policy Maker”, Joseph H. Carens, explains how this ambiguity transcends to a multitude of groups that may not distinctly fall into a category outlined by the definition (Hailbronner, et. al., pg. 10-11). For Carens, this ambiguity is related to the issue of morality and the role that the state plays in either defending or limiting the rights of those who may have a moral claim for asylum (Hailbronner, 10). Similarly in his work, Peter Nyers explains how the defining principles of a refugee as they are stated by the 1951 Convention, limit specific groups of people.
These criteria have been subjected to a number of critiques, as they a priori exclude “victims of general insecurity and oppression or systemic economic deprivation, and people who have not crossed national frontiers to seek refuge”… This system of law is identified as being rooted in the liberal political tradition of rights-based individualism and so reproduces core liberal distinctions, such as the public-private divide. (2006, pg. 48)

While these claims do not directly relate to gender-based violence, they do show significant gaps in the development and application of the refugee definition as stated in the 1951 Convention and 1967 Protocol. Although the gaps relating to the role of the public and private sector will be addressed in this chapter regarding criticisms of the definition, the human-rights implications of this policy for defining refugees will be addressed in the next chapter.

*Dominant Host Countries*

In addition to adopting the United Nations definition of a refugee, the United States has also adopted a “female-sensitive” approach to their asylum agenda. However like the UNHCR they have not adopted the term “gender” as a recognizable ground for persecution. In a report in which Special Assistant, Phyllis Coven of the Office of International Affairs, cites international guidance” from the UNHCR, the Convention on the Elimination of All forms of Discrimination Against Women, and the UN’s 1993 Declaration on the Elimination of Violence Against Women, asylum officers of the United States were encouraged to implement a “customer-friendly asylum interview environment” for their female applicants claiming gender-based violence (United States Immigration and Naturalization Services, pg. 4). This report goes on to explain that while courts in the United States have recognized gender as a contributing factor to the persecution of women, it has yet to acknowledge it as the sole cause of persecution.
The United Kingdom produced a similar document that was issued in 2011 to their Boarder Agency, explaining the issue of gender-identity and violence and its relationship to the acceptance of applicants for asylum as refugees. Like the UNHCR and the United States, this document stresses the need for applicants to “establish that he or she has a well-founded fear” that applies with one of the five accepted grounds by the 1951 Convention and 1967 Protocol, in order to receive refugee status. (United Kingdom Boarder Agency, pg. 10)

While these documents have demonstrated a shift in recognizing the presence of gender-based claims of refugees, none have gone so far as legislation produced in Canada with their 2003 Compendium of Decisions: Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution. This legislation, passed by the Canadian Immigration and Refugee Board, not only addressed the influence of gender on refugee status as it relates to the five approved causes by the UN, but goes a step further to identify grounds for asylum based on one’s affiliation with a “gender-based social group” (Center for Gender and Refugee Studies, pg. 2-4). This legislation removes the conditionality of other legislations as it recognizes gender as a sole cause of refugeeism, as opposed to a contributing factor to fear of persecution.

The African Union

In 1979 the Organization for African Unity (OAU) held the Conference on the African Refugee Problem in Arusha, Tanzania. This conference preceded a similar conference, the Convention Governing the Specific Aspects of Refugee Problems in Africa, which was hosted by the OAU a decade before in 1969. These conferences were
conducted so as to effectively respond to the pan-African issue of growing rates of refugeeism.

While these conferences produced internationally recognized procedures and regulations concerning the African refugee, perhaps the most significant element to these proceedings was the resulting definition of a refugee. As with the United Nations, the definition of a refugee included the five political statutes for claiming asylum. However, unlike the UN’s 1951 Conventional definition, the authors of the OAU’s convention constructed a more expansive definition that included not only political refugees, but those who fear “external aggression, occupation, foreign domination or events seriously disturbing to public order in either part or the whole of his country of origin or nationality.” (Blavo, 1999)

This clause is imperative to the recognition of gender as a claim for refugeeism, as it does not limit the definition of a refugee to those who fear persecution solely on the basis of politics. In their analysis of the Conference, editors Lars-Gunnar Eriksson, Göran Melander and Peter Nobel emphasize that the UNHCR needed to accept these terms and agree to assist all refugees under the convention, not only those recognized by the international community under the 1951 and 1967 United Nations definition (1982, 21).

In addition to the expanded definition of a refugee, the proceeding African body, the African Union, had a deep impact on recognizing gender-based refugees in the African context with the passing of the 2003 Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa. According to Otiocha Eleazar,
this protocol was a grand step for women’s rights on the African continent, as it was inclusive in recognizing the African woman’s ‘political, social, economic, and social rights’ (2011, 172). In discussing this protocol, Marina Sharpe explains its significance to refugee women. Sharpe cites several clauses within the document; however her primary focus is on article 11 of the protocol which states:

State parties undertake to protect asylum seeking women, refugees, returnees, and internally displaced persons, against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction. (2013, 89)

This clause is significant because it provides a framework outlining the Organization for African Unity responsibility not only to protecting African women from violence, but refugee women. The clause does not provide a reason for denying this right to any African woman based on nationality. As will be seen in the third chapter of this thesis, this clause is significantly ignored by the Kenyan government in their implementation, or rather deference, of refugee policy in the country.

Kenyan Policy

While the history of Kenya’s refugee system will be discussed in the third chapter of this thesis, it is important to note the Kenyan legislation concerning gender-based violence within its own country and in its refugee legislation. The former, which is encompassed under the country’s 2006 Sexual Offenses Act, provides a holistic approach to understanding the various types of sexual offenses and situations that produce such occurrences. It is important to note that this document does not highlight the refugee population inside Kenya anywhere in the document, and does not acknowledge the
refugee facing sexual offenses in their definition of a “vulnerable person” (The Sexual Offenses Act).

While the Refugee Act of 2006 does recognize women and children as a distinct group within the Kenyan refugee context, this document does not cite any responsibility for protecting such refugees from these types of offenses, only making mention to the Commissioner’s role in ensuring “safety”- a very general term in both definition and application (Refugee Act of 2006).

The gap between the Kenyan state’s legislation regarding gender-based violence and refugee protection is not random. As the following chapters will illustrate, this separation can be attributed to the Kenyan state’s dissociation from taking responsibility for their refugee populations, thus deferring to transnational organizations such as the UNHCR.

Despite advancements made by countries such as Canada and transnational organizations such as the African Union, there is no doubt that the majority of Western legislation (and that of the Kenyan state) has not evolved in adequately responding to gender-related issues of violence and refugeeism over the last three decades. However, in recognizing this, one must understand why these limitations exist in determining the definition of a refugee in these areas. The following section will address these issues as they are discussed by various sources in order to fully understand what obstacles still stand between present day efforts by international governments and the ultimate goal of representing those in need to the greatest extent possible.
Difficulties in Implementation

In their “Guidelines on International Protection: Gender-related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees”, the UNHCR states:

No documentary proof as such is required in order for authorities to recognize a refugee claim; however, information on practices in the country of origin may support a particular case. It is important to recognize that in relation to gender-related claims, the usual types of evidence used in other refugee claims may not be as readily available. Statistical data or reports on the incidence of sexual violence may not be available, due to under-reporting of cases, or lack of prosecution. Alternative forms of information might assist, such as the testimonies of other women similarly situated in similar reports or oral testimony, of non-governmental or international organizations or other independent research. (United Nations High Commissioner for Refugees 2002, pg. 10)

This statement by the UNHCR notes the difficulty in producing concrete evidence to support claims and stresses that the asylum officer look into other resources in order to corroborate testimony. This statement also demonstrates how the use of oral or written self-reporting in terms of gender-based violence offenses, has replaced ‘concrete’ data collection, and has become a key element to determining the status of an applicant. As will be seen in the following paragraphs, it is the use of these oral testimonies that has led to scrutiny by the international and academic community in granting asylum to those claims based in the gender-based violence realm.

In their “Considerations for Asylum Officers Adjudicating Asylum Claims from Women”, the United States Immigration and Naturalization Service suggests that asylum officers obtaining testimony from individuals claiming gender-based violence “should move to issues such as sexual abuse and violence only when well into the interview.” The document goes on to stress the importance of “cross-cultural sensitivity” in regards to
dealing with individuals who may have experienced gender-based violence (United States Immigration and Naturalization Services, pg. 6). The UNHCR echoes these warnings as they identify “procedural issues” regarding individuals who may not wish to disclose all of the events that transpired throughout the duration of their claim, due to potential “shame they feel over what happened to them” (United Nations High Commissioner for Refugees 2002 pg. 8).

While these considerations are positive in their sensitivity towards the plight of these individuals, authors Hellen Baillot, Sharon Cowan and Vanessa Munro go into great detail to explain how the issue of credibility is fluid in its interpretation when relating to gender-based violence asylum seeker, and explain how factors such as ‘late disclosure’, ‘omissions/inconsistencies’, ‘calm and “proper” demeanour’, can affect the opinion of the asylum officer, potentially discredit any testimony, and ultimately affect the fate of the asylum seeker (Baillot, Cowan & Munro, pg. 214-217).

However, while some may argue that these issues may lie with the perceived actions of the asylum seeker, author Connie Oxford emphasizes that issues with establishing authenticity of a testimony may lie with the asylum officer. In her article, “Protectors and Victims in the Gender Regime of Asylum”, Oxford states:

Male asylum officers often respond to women’s essentialist notions of experience by intervening on behalf of female asylum seekers. Protectionism takes on a gendered characteristic demonstrated in men’s protectionism of female asylum seekers and women’s protectionism of their own position of power and authority. (Oxford, pg. 35)

While some may be skeptical of Oxfords assumptions that female asylum seekers relay their stories so as to gain sympathy from the assigned male asylum officer, the issue of
protectionism is one that should be addressed in the protocols of asylum agencies. These
officers are forced to question the line between “cross-cultural sensitivity” and effective
interviewing and questioning.

Some authors such as Monica Boyd have claimed that even in areas such as
Canada, where the gender-based violence issue is addressed by the asylum guidelines,
women are still not receiving the acceptance rates that they should as refugees. In her
article “Gender, Refugee Status and Permanent Settlement”, Boyd argues that the
historical social trend of accepting males based on their lack of social and family
obligations will carry over into future statistics as well as the early pregnancies and
marriages of the female asylum seeker. (Boyd, pg. 22-23)

While these issues with the implementation of asylum procedure are concerning,
they are not irrevocable and should not ultimately influence the dismissal of the gender-
based asylum seekers claims. The following section will address theoretical academic
arguments that support such a move towards the incorporation of gender as it should be
incorporated as a free-standing basis for asylum.

**Theoretical Arguments Promoting Gender at Basis for Asylum**

Over the last two decades there has been a large shift in academia that has worked
to promote the expansion within the international recognition for gender-based claims for
asylum. However, while there is continuity throughout academia for the adoption of more
gender-related policies, authors differ in their approach to the subject. Primary
approaches regarding this issue include, but are not limited to, the idea that belonging to a
“particular social group” is non-inclusive and that the creation of a ‘nexus’ for gender-related legislation will ultimately benefit the overall functionality of the refugee system.

In addition to this there is a trend in academic pressure towards the adoption of a more gender-sensitive refugee policy by international actors, which criticizes the foundation on which international law has been constructed and applied. There is also the distinct debate in academia regarding the rate to which current refugee law is effective. Some authors have argued that the issue of refugeeism and the representation of gender are not based on the adoption of a new gender-sensitive platform in the refugee definition, but a reevaluation of the already existing refugee guidelines. These critiques include ambiguity and the use of male-dominated discourse in international legislation, the reevaluation of social issues that divide men and women along “public and private spheres”, as well as a need to take a closer look into the term “persecution”.

Addition of Gender Platform for Asylum

Perhaps the most common argument for improvement within the gender-based violence refugee context is the argument that the term “gender” should be the sixth standard for fear of persecution under international refugee law. A main argument supporting this claim states that the classification of a refugee under the category of belonging to a “particular social group” is not seen as sufficient by governmental actors in most cases of asylum seekers.

In her article, “Gender and the ‘Membership in a Particular Social Group’ Category of the 1951 Refugee Convention”, author Andrea Binder explains the
complexity of gender-related issues and qualifying for refugee status under the “particular social group” category.

…the creation of a particular social group comprised of women with shared experiences of gender-based harm runs counter to the U.S. and the British court practice. Refugee groups (that is, refugees sharing a common experience) are not necessarily considered “particular social groups” by the courts. Courts have responded negatively to this approach and have even said, “that the actual persecution cannot be the defining characters of the group; those traits must be discrete. (Andrea Binder, pg. 192-193)

This argument by Binder supports the idea that being classified under a “particular social group” in order to receive asylum for gender-based violence is extremely subjective to the opinion of the courts, as there is no solid guidelines for gender under the “particular social group” category. This statement also recognizes the common thought that gender-based claims are not sufficient in themselves in claiming a need for asylum.

Other supporting arguments for this adoption of the term “gender” is based on limitations produced by the current refugee definition as it has been adopted by various international and national actors (United Nations, United States, United Kingdom). Author Lisa Chan also argues for the effectiveness that these changes and the ultimate adoption of the “gender” platform for claiming “well-founded fear” will have on the refugee system overall.

In her article “Everything in Moderation: Why Any Gender Nexus Under U.S. Asylum Law Must Be Strictly Limited in Scope”, Chan argues that the adoption of a “gender nexus” in defining a refugee will provide better processes for outlining and limiting of gender-based violence asylum seeker. This argument as it is made by Chan, works to discount the potential issues of using the case of a “particular social group”
nexus, gender segregation, or establishing credibility that surround the adoption of gender-based refugee policy as it is addressed in the previous section.

A gender nexus allows courts to identify claims properly within the context of gender instead of employing an ill-fitted PSG (Participation in a Social Group) or political opinion nexus. The term “gender” also markedly includes both men and women, such that everyone-and not only women-could benefit from the new ground for asylum. Finally, gender as a free-standing nexus resolves issues with the burden of proof that asylum-seekers asserting gender-based claims currently have trouble satisfying. (Lisa Chan, pg. 185)

In this statement, Chan not only addresses the argument of bias in applicability of a new gender-nexus between men and women, but explains how the current system of determining gender-based claims leads to the issue of credibility as was described in the previous section.

Perhaps what is most interesting is Chan’s later argument that the development of new legislation incorporating gender as a basis for well-founded fear, is her citation of the Canadian example to “debunk the myth” of massive refugee movements that have been feared to overcrowd asylum agencies (189).

This reassurance that adopting a refugee policy that includes gender as basis for asylum will not threaten the integrity and effectiveness of asylum agencies is groundbreaking in the academic world and should be regarded by all international agencies.

Ambiguity and Male-Dominated Discourse

While many authors argue that the adoption of gender-based issues and refugees will result in a better understanding of the current international legislation, some authors have held to the opinion that reactionary efforts are not enough.
In his article, “The International Protection of Women Refugees: A Summary of Principal Problems and Issues”, Anders Johnsson explains that the primary issue with the internationally recognized refugee definition is the historical context in which it was written. Arguing that this legislation is not fully applicable to women, Johnsson explains that this gap in applicability is based on the masculine discourse within the text. Johnson states: “International instruments relevant to the protection of refugees make no distinction between male and female refugees. To the extent that gender is revealed in these legal texts, it is nevertheless clear that the male refugee was in the mind of the drafter.” (Anders Johnsson, pg. 222)

According to Johnsson, the initial foundation for refugee law was not established to include women. Citing the lack of gender-neutral language in international legislation, Johnsson emphasizes a gap in gender-sensitive consciousness in the international sector prior to the 1990s. In addition to this, when discussing the discrimination that women seeking asylum encounter, Johnsson theorizes that it is the ambiguous wording of the UNHCR stance upon how international actors should address the said issue (Anders Johnsson, pg. 229). In her discussion of international involvement in addressing violence against women, Deborah Anker agrees with Johnsson to question the basis for the internationally recognized refugee legislation and continues the argument that this interpretation creates what she calls a “mainstreaming” effect that limits the rights women undergoing gender-based violence (Deborah Anker, pg. 139).

In evaluating the works of Johnsson and Anker it has become clear that the issue of male dominated language during the construction of the current refugee legislation is
not sufficient in addressing the needs of women in today’s refugee society. However, as the following section will show, it is not only the male-dominated language that limits the effectiveness of current refugee legislation, but the interpretation of these statutes and their application to the public that must also be evaluated.

*Reevaluation of the term “Persecution”, as well as “Public and Private Spheres”*

As with critiques of the male-dominated discourse and ambiguity of current international legislation regarding the qualifications of a refugee, authors have also criticized the defining principles of the legislation—particularly the use of the term “persecution” and lack of recognition of social differences that categorize women into different “spheres” than men. These authors argue that the refugee system cannot be advanced to include gender-based refugees, because its foundation is not being interpreted so as to be inclusive to the needs of gender-based asylum seekers.

In her article “Gender and Persecution: Protecting Women Under International Refugee Law”, Linda Cipriani states her concerns regarding the use of the term “persecution” as it relates to defining a refugee. In presenting her case for the adoption of gender as grounds for asylum, Cipriani stresses how the UNHCR’s *Handbook on Procedures and Criteria for Determining Refugee Status* is not a sufficient in its current interpretation of “persecution” in regards to defining a refugee. Cipriani makes this argument apparent in her claims that, “the drafters of the original definition contemplated further expansion to include further concerns; and the international community already condemns persecution of women” (Linda Cipriani, pg. 538)
Cipriani goes on to argue that persecution as it is defined by the United Nations High Commissioner for Refugees is indeed applicable to the plight of gender-based violence asylum seeker and should be interpreted as such.

The treatment of women outlined herein could be considered “persecution” under the *Handbook*. The examples given in Part II indicate that women are deprived of the right to work, to attain education or training, and to enter into marriages freely, are deprived of control over their own persons, and are considered in the eyes of the law as inferior to men. These laws and practices clearly fall into the categories of persecution given in the *Handbook*. (Linda Cipriani, pg. 540)

This understanding that the issue of persecution must be reevaluated prior to advancement in the refugee field has also evolved to include a reevaluation of the manner in which gender based issues are interpreted to include how women are perceived in their own respective societies.

While some may argue that the recent moves by the United Kingdom and the United States towards accepting the plight of women through their interpretation of the five existing grounds for asylum, some authors believe that this does not go far enough to address the social differences between men and women, that in turn affect how women are viewed by international courts.

For example, in her article “The Gender Difference: Feminist Critiques of Refugee Discourse”, Jacqueline Greatbatch argues that men and women’s issues are inherently separated into “public and private spheres”. According to Greatbatch the latter, as it applies to women, is not recognized by the international community and is neglected in their current interpretations of how gender-based violence fits into one of the five existing categories of a refugee. Greatbatch argues that a shift must first be made in
recognizing the plight of women in the private sector, before they can fully be recognized under new legislation.

It is in respect of claims to persecution of an economic or social nature that the absence of gender as an enumerated ground most significantly harms women, although the difficulty in establishing such claims ultimately lies in the nature of the rights violated. Economic and social rights, as formulated in the 1966 Covenant, are generally viewed as future rights, which States should strive to provide in an unspecified time frame. Moreover, despite the humanitarian rhetoric of resettlement States… both issues factor into the domestically regulated determination process. (Jacqueline Greatbatch, pg. 526)

This statement by Greatbatch emphasizes the difference in understanding within refugee law as it applies to female refugees. In referencing the 1966 International Covenant on Economic, Social and Cultural Rights, Greatbatch emphasizes how the case-specific issues of the female refugee are not being coupled legally within existing refugee law, but in another area of international legislation. In referencing Deborah Anker, author Lisa Chan also defends the notion of recognizing the separation of the gender-based refugee struggle and the arena for which it is addressed.

Female asylum-seekers usually present a different kind of asylum claim. Their claims generally revolve around what has previously been termed the “private” or domestic sphere and include harms such as sexual abuse and domestic violence. U.S. Asylum law presently fails to address adequately this kind of gender-based persecution that female asylum-seekers overwhelmingly face. (Lisa Chan, pg. 177)

Both Greatbatch and Chan recognize that the mindset under which the international community recognizes gender-based violence needs to be challenged before any structural changes to these refugee defining documents can be applicable. In providing recognition to the socially established regulations of women in the private sector, the
asylum officers will be more productive and effective in understanding the plight of female applicants.

**Not Going Far Enough**

This chapter has examined the key debates regarding the recognition of gender as a category for asylum under the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, and the policies of the African Union which expand upon the currently established Western definition. While the debate surrounding the United Nation’s policies, has become imperative to expanding the rights of refugees seeking refuge in the global north (a topic that will be discussed in the following chapter), it is only a piece to the puzzle of refugee rights and gender-based violence. Instead, the literature should move forward to understand how different international and transnational policies are implemented by governmental actors who host refugees. For example, why does the Kenyan government not follow the policies of the African Union (which were recognized by the Kenyan state) regarding refugees? How do the United Nations and transnational actors play a role in the country’s disregard for gender-based violence policies? While there is little research asking these questions in today’s available literature, the following chapter will work to examine how some of these actors and international norms ultimately affect the choices being made by the Kenyan government.

**Conclusions**

The issue of gender-based violence and the defining principles of a refugee are both complex and vital in the context of human rights in the modern world. With a
historical precedence being established with the 1951 Geneva Convention and 1967 Protocol, the ever-changing nature of human society, particularly in regards to the recognition of gender-based issues, has led to a shift in the debate. This shift analyses not only the possible addition of the term “gender” to the defining grounds of a refugee, but also analyses the outdated interpretations of the original refugee definition.

While there have been many advancements in the practices of conducting interviews and overall sensitivity to individuals claiming gender-based violence, many countries such as the United States and the United Kingdom have yet to develop a concrete set of policies dictating gender as a platform for refugeeism. While many have argued that to develop this legislation will drastically increase refugee migration and create issues with creditability, others have expressed the opposite view. These authors have argued that implementing a gender-based platform will ultimately limit these issues by establishing a more concrete set of standards that will eradicate the vague nature of today’s interpretation towards gender-based violence.

Gender-based violence and refugeeism is an issue that has only come to light within the international community over the last few decades. While there is much debate over the addition of gender to the statutes defining a refugee, this debate can be interpreted as awareness, and ultimately, a positive step in the direction for the protection of these individuals along international lines. One avenue by which this issue is being addressed is through the work of non-governmental and transnational human-rights actors.

The following chapter will examine the shifting trends within the non-governmental and transnational communities that have ultimately led to debate among
the international community regarding refugee policy. Highlighting the issues as they are raised among these groups and the trends will set the foundation for understanding the subsequent policy within the Kenyan context, and the resulting effects on gender-based violence victims in Kenya’s refugee camps of Dadaab and Kakuma, which will be addressed in the third chapter of this thesis.
CHAPTER TWO: CHANGING GLOBAL NORMS IN ADDRESSING REFUGEES

The previous chapter has outlined the existing legislation and theoretical shifts in addressing gender-based violence and refugeeism on the international level, and while this discussion is paramount to understanding the continuation of gender-based violence on a local level, it is not sufficient in itself to fully understand the behavior and policies implemented by the Kenyan government when discussing the refugees housed in Dadaab and Kakuma. The second piece to this puzzle, which will be discussed in this chapter, is the coalition of three major trends that have embedded themselves in the refugee process. These three factors- the human rights initiative, the influence of transnational and non-governmental actors in promoting these human rights, and the adoption of repatriation as a solution to the refugee crisis in the global south- are all vital in the contextualization of the issue of gender-based violence and refugeeism in Kenya.

The purpose of this chapter is to examine the relationship between international, humanitarian, and transnational actors in regards to their focus on human rights when processing the needs of refugees. Beginning with an overview of the international human rights initiative this chapter will move on to discuss the divide between refugee law and the norms adopted by transnational human rights groups in regards to gender-based violence. In addition to the relationship between human rights and refugee law, the role of non-governmental actors in promoting these human rights will be evaluated. Following this, the discussion will shift to evaluating the role and position of the United Nations High Commissioner for Refugees (UNHCR) in dealing with refugees from the global south. As will be seen in Chapter Three, it is the UNHCR’s adoption of
repatriation as a norm that is the key link between the humanitarian community, NGOs and the Kenyan government’s response to gender-based violence refugees within the Dadaab and Kakuma communities.

**Human Rights Historical Context**


While the 1951 Convention Relating to the Status for Refugees and 1967 Protocol set the standard for the legislative policies and handling of refugees by international governments, the above documents state the United Nations position related to the overall rights of the human being as reflected in the opening sentence to the Preamble for the 1948 *Universal Declaration of Human Rights*: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the
foundation of freedom, justice and peace in the world…” (The Universal Declaration of Human Rights). The seven human rights based doctrines that followed reflected these principles into their respective contexts.

In addition to protecting the rights of all human beings, it can be argued that the 1948 Convention was intended to influence national laws as it claimed, “whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.” However, as has been demonstrated in the previous discussion on gender-based violence and refugeeism, and as will be seen in the later arguments relating to repatriation, when applied to laws of refugeeism, the human rights doctrines of the United Nations are not always implemented into law.

**Refugee Law vs. Human Rights Efforts**

It is important to note that the debate concerning the expansion of refugee policy to include gender has reached beyond the bounds of state-based legislative policies. Popular discourse has developed over the last decade that has compared international human rights law and refugee law along the lines of their effectiveness in response to issues of gender-based violence. While some authors argue that the international human rights movement should be used as a basis for the further development of refugee legislation, others argue that the latter has ultimately affected the former, leaving a rather large gap in the discourse on this particular subject of international law. This section will
highlight popular discourse surrounding the relationship between human rights initiatives and legal norms regarding gender-based violence and refugees.

In his book, Peter Nyers explains the existing “paradox” that is refugee law. In this discussion, Nyers explains:

The Convention promotes an open-ended definition, one that is potentially open to all of humanity… by positioning an emotional experience (fear) as the core essence of refugeeness. On the other hand, this claim to universality has been challenged from the outset as merely the reflection of the global reach of Western cultural and political values. (Nyers, pg. 51)

This quote, and the section of Nyers work that follows, makes a distinct and vital argument for understanding refugee law. Despite any good nature intended by the drafters of the *1951 Convention Relating to the Status of Refugees*, the five standards for qualification of a refugee severely limit the populations of those who qualify for refugee status, and apply Western priorities to this determination.

In her article, “Gender and the ‘Membership in a Particular Social Group’ Category of the 1951 Refugee Convention”, author Andrea Binder promotes the usefulness of human rights initiatives in the advancement of currently recognized international refugee law.

The attitude that women and girls have a genuine human right to be free from discrimination and violence is endorsed by numerous international instruments and documents, the writings of human rights scholars, and the activities of human rights bodies, NGOs and international organizations. States and the international community have recognized that gender-based discrimination and violence are unacceptable, unjustified and abhorrent inflictions of harm. With a view to the object and purpose of the Refugee Convention, States should integrate a human rights perspective into the application and interpretation of the refugee definition. (Andrea Binder, pg. 193)
In this statement, Binder does not only discuss the value in applying human rights initiatives into the international legislation regarding refugees, but highlights how host states have recognized these issues of gender-based violence and refugeeism and have yet to adopt these human rights policies. While this understanding that the international human rights movement has advanced to the point that it *should* influence the efforts of international refugee legislation sounds encouraging in theory, there is little evidence of these advancements by the human rights committee in Binder’s work.

In addition to lack of empirical evidence by Binder that the human rights initiatives have impacted refugee legislation, the arguments of Valerie Oosterveld take this argument a step further as she discounts any influence of the human rights initiative on international refugee legislation. The documentation of Oosterveld’s rather provides the opposite argument, stating that advancements made by the international community in regards to defining a refugee based on gender, have influenced the international human rights movement.

In her article, “Gender Persecution, and the International Criminal Court: Refugee Law’s Relevance to the Crime Against Humanity of Gender-Based Persecution”, author Valerie Oosterveld explains how developments in the refugee field have influenced international actors such as the International Criminal Court, to adopt similar gender-sensitive dialogue when relating to persecution.
Refugee law contains important principles or rules that can be applied (but not transferred) by the ICC to the crime against humanity of gender-based persecution. Additionally, academic commentary on refugee law can helpfully guide the ICC in three ways... commentary provides insight into refugee decision makers’ approaches to persecution... commentary identifies domestic decisions that have deviated from internationally recognized norms and standards... commentators frame questions that the ICC should ask during its analysis of gender-based persecution. (Valerie Oosterveld, pg. 54-55)

Taking a different approach to the subject, author Deborah Anker stresses the complexity of the relationship between the international human rights movement and refugee legislation. In her article, Anker explains how refugee law has evolved as a result of human rights discourse as well as how human rights discourse has evolved in response to refugee law (2002, pg. 150-151). Anker goes on to explain the limitation of this influence in her assessment that “while refugee law may be formally non-intrusive and non-judgmental, it does make a determination of a state’s willingness and ability to protect a particular citizen or resident, and in so doing lays claim to an international human rights standard.” (Anker, pg. 150-151).

This idea that a set of legal policies and norms may influence the human rights standard is unique and directly applies the future arguments of this chapter in regards to repatriation. As will be seen, the desire of, and shift by, Western host governments directly impacted the human rights policy adopted by the UNHCR. The last section of this chapter will work to explain this shift in policy, preceding the discussion in Chapter Three regarding its effects on the refugee communities living in Kakuma and Dadaab.
Influence of NGOs

In addition to understanding the role of the internationally recognized legislation of the United Nations, major host countries, the African Union, it is also important to recognize the role of the non-governmental organization (NGO) and its influence in establishing a human-rights based refugee regime. While the next chapter will discuss the specific role of NGOs on the Kenyan refugee situation, this section will look at the theoretical implications of NGOs as they impact human rights. In doing so, this section will examine the work of two specific refugee focused NGOs, the Refugee Women’s Legal Group and the International Catholic Migration Commission (ICMM), and their impact upon formal refugee legislation.

In her article, “A Place at the Table: The Role of NGOs in Refugee Protection: International Advocacy and Policy-Making”, Eve Lester defines the role of NGOs as “assisting, negotiating, monitoring, reporting, analyzing, lobbying or advocating” as they are “constantly striving to achieve adequate and effective standards of law, policy and practice”. (2005, pg. 127). This definition provides a framework for understanding their significance in impacting refugee law.

In reading the work of Roger P. Winter, it becomes abundantly clear that not all NGOs are the same in context or mission. In his article published in B.S. Chimni’s “International Refugee Law: A reader”, Winter identifies fourteen different factors that may be reflected in and determine the work done by an NGO. While not of the listed determinants apply to those discussed in the scope of human rights, it is important to note
that Winter does recognize the role of ‘asylum-seeker assistance NGOs and their “assistance of a humanitarian or legal nature”. (Chimni, pg. 257)

Similarly, in her discussion on ‘The Diversity of NGOs’, Lester highlights a significant difference between northern based NGOs and southern NGOs (131-132). In her description of these two groups, Lester emphasizes the ability of southern NGOs to “understand the political, social, cultural and economic content of the countries where the majority of the world’s refugees are” (132). As will be seen in the next chapter, this prescribed value to southern based NGOs proves vital in the discussion of the Kenyan refugee situation.

In her book, *Refugee Women*, Susan Forbes Martin examines a variety of instances in which she states NGOs took a vital role in promoting and implementing human rights in regards to gender related issues of refugeeism. In this text Martin describes NGOs as “pivotal forces in lobbying governments and the UN system to take needed actions to improve response to refugee women’s situations” (1991, pg.98).

In the separate works of Susan Forbes Martin and Jane Freedman the significance of NGOs in supporting the rights of female refugees are highlighted during their overwhelming participation in the 1985 World Conference on Women in Nairobi, Kenya. As will be seen in the next chapter, the elimination of NGO involvement in Kenya has limited those able to support current female refugees.

Perhaps one of the most influential NGOs supporting gender-based claims of refugeeism is the United Kingdom’s Refugee Women’s Legal Group (RWLG). In 1996 this non-profit organization was created with the hopes of raising awareness and
collaboration towards a better “gendered perspective on refugee law and policy” (Refugee Women’s Legal Group, ii).

In 1998 the RWLG was successful in achieving this goal with their completion and publication of the “Gender Guidelines for the Determination of Asylum Claims”. Addressing the issue of gender-based refugee claims as they are currently ignored by the United Kingdom’s refugee system, the shortcomings of this system overall, and the way in which asylum officers should handle these issues. It has been argued that this document set the precedent for the United Kingdom’s adoption of the 2011 “Gender Identity Issues in the Asylum Claim.” (Center for Gender and Refugee Studies, pg. 10) While it can be argued that this change in policy by the United Kingdom’s Boarder Agency does not go far enough in protecting the rights of gender-based violence asylum seekers, it can be seen as a step in the right direction and ultimately a testament to the effectiveness of the RWLG.

Like the RWLG, the International Catholic Migration Commission (ICMC) is designed to meet the needs of refugees globally, and focuses on those who may be marginalized from receiving asylum under current legislation. The ICMC has made their mark on the international community as they partner with the United Nations High Commissioner for Refugees and other local NGOs. (ICMC.net) However, unlike the RWLG, while the ICMC does attend international conferences regarding refugee issues, its main objective in combating gender-based violence is primarily based on-site. For example, in their mission to assist refugee women in Malaysia suffering from gender-based violence, the ICMC provides assistance such as a call-in hotline, training,
infrastructural and health support, and mini grants to those inflicted by gender-based violence (ICMC.net).

While the Refugee Women’s Legal Group and the International Catholic Migration Commission are prominent actors in supporting those afflicted by gender-based violence, they are just a few of many involved in the fight. Across the globe many non-governmental organizations are fighting both on site as well as in the courtrooms for the advancement of gender-sensitive legislation regarding the admittance of refugees. Although the impact of these groups on international refugee law is definitive, it is not always effective on a ground-level. The third chapter of this thesis will examine this phenomenon as it applies to the Kenyan state, and examine how their lack of support for NGOs may affect their evolution to a more human-rights based refugee policy.

However, the limitations imposed upon these actors must be recognized. Despite the effectiveness of NGOs in promoting human rights, authors such as Barbara Harrell-Bond note that “being identified with any public advocacy on particular issues and cases can be dangerous for individual NGOs” (pg. 17). As will be seen in the next chapter, Harrell-Bond’s assumptions were realized in the context of the Kenyan refugee system.

**Internationally Adopted Norm of Repatriation**

As was described in the previous chapter, Western host countries have taken guidance from the United Nation’s 1951 Geneva Convention Relating to the Status of Refugees and the later 1967 Protocol Relating to the Status of Refugees, and have followed a certain set of protocols when deciding how to respond to this issue. The above
section highlights how the international community has attempted to incorporate human rights concepts into the application of this legislation. However despite this effort, specific actions taken and normalized by the international community and the UNHCR have challenged this process.

In addition to reflecting their policies on internationally accepted norms such as basing international asylum on politics, and implementing non-human rights centered policies within refugee camps such as “community punishment” (Verdirame, 2002), the UNHCR has also adopted what some have referred to as “repatriation culture” (Barnett & Finnemore, 2004). Referring to the act of resettling a population back into their country of origin rather than opting for permanent resettlement in a second country, this “culture” has brought much debate to the international community. This section will provide an overview of academic theory regarding the history and potential causes of this shift in policy as well as examine its potential effects on refugee populations.

History and Potential Causes of Repatriation

In Article No.33 of the 1951 Convention, the United Nations declared that refugees have the right to non-refoulement, meaning that “No contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” (Musalo et. al., pg. 259).

Similarly, in the 1950 General Assembly Resolution 428 (V), the United Nations High Commissioner for Refugees stated that they “shall provide for the protection of
refugees falling under the competence of his Office by: (C) Assisting governmental and private efforts to promote voluntary repatriation or assimilation within new national communities.” (1950)

Subsequently, the policy as outlined by the United Nations and UNHCR regarding refoulement and voluntary repatriation of refugees theoretically coincides with that of the Organization for African Unity (now the African Union), whom adopted voluntary repatriation as a condition for refugeeism in their 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa (Novak, pg. 429).

This aspect of refugee legislation indeed reflects that established by the United Nations in their 1966 International Covenant on Civil and Political Rights, which states:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have this case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by a competent authority. (Article 13, 1966 International Covenant…)

However, as the next chapter will illustrate in the case of Kenya, the internationally accepted norms by the UNHCR has arguably violated both of these principles as they are applied to the global south.

As explained in their book, Rules for the World, Michael Barnett and Martha Finnemore describe a policy shift undergone by the UNHCR in the 1970’s and 1980’s as they refocused their efforts to repatriate refugees back in their country of origin rather than permanently resettle them in a secondary country. The time period of this shift coincided with an increase in the number of African refugees fleeing their country of
origin for reasons that author Andrew Novak cites as being rooted in anti-apartheid and cold war fears (2009, 427).

In his book, *International Immigration Policy: A Theoretical and Comparative Analysis*, author Eytan Meyers provides a series of socioeconomic theories regarding why host states felt the need to repatriate refugees back to their home countries (2004). While these explanations have roots in economics as well as security, a prominent theme that cross-cuts Meyer’s work is his theory regarding “dissimilar immigrants” and acceptance into a society (pg. 13-15). In discussing this topic, Meyers makes the claim that countries are more willing to accept “similar immigrants” from conflict areas into their domestic populations as they view “dissimilar immigrants” as a threat to security (pg. 14).

Similar to Meyers, Monica Duffy Toft explains that the exchange of resettlement for repatriation was a move supported by Western interests in her article “The Myth of the Borderless World: Refugees and Repatriation Policy”. Toft stresses that the socioeconomic and educational level of the refugees in Western host countries declined at the end of the Cold War, thus leading to a Western desire to expel such refugee influx’s (143-144).

B.S. Chimini makes a very similar claim in that this shift by the international community, particularly the global north, was the result of a desire to purify their nations of these populations that did not ‘conform’ to their national standard (2003, 195). In addition to this, in his 1998 article, “The Geopolitics of Refugee Studies: A View from
the South”, Chimini explained how this shift to repatriation coincided with what he refers to as “the myth of difference”:

…the nature and character of refugee flows in the Third World were represented as being radically different from refugee flows in Europe since the end of the First World War. Thereby, an image of a ‘normal’ refugee was constructed-white, male and anti-communist- which clashed sharply with individuals fleeing the Third World. (1998, 351)

These two arguments made by Chimini are vital within the debate concerning the repatriation of refugees, because they provide an ideological misconception, and possible discrimination, by Western countries in their efforts to relieve themselves of the burden of hosting refugees.

While some authors such as Michael Barnett and Martha Finnemore credit the UNHCR as attempting to choose the “‘least bad’ of the alternatives” when choosing their policy for relocating refugees (2004, pg. 74), they do not cite this as the only reason for this shift by the UNHCR:

…In the face of state demands, the reasoning goes, UNHCR has had little choice but to associate itself with forced repatriation, judging that it is better to compromise its principles and help however it can than to sit on the sidelines with its principles intact as refugees suffer more than they otherwise would. (2004, 75)

This statement by Barnett and Finnemore highlights two key elements of this shift in international policy. Not only was the move to repatriate refugees the choice of the host states, this initial repatriation era and refugee movements were not voluntary on the part of the refugees themselves but at the will of the international community. As will be discussed below, the implementation of this policy has had a negative impact upon refugee populations in the global south.

*Impact of Repatriation in the Global South*
Regardless of the reasoning behind this shift, the adoption of “repatriation culture” by the international community and the ethics behind this culture has led to much debate in the academic community. Aside from the argument surrounding the forcible repatriation of denied refugees (Nanda, 1989), the accepted norm described above of removing refugees whom have resided within host countries that have granted them asylum, has led many to question the willingness and rights of these refugees.

In their book, *African Refugees: Development Aid and Repatriation*, editors Howard Adelman and John Sorenson explain the known difficulties of repatriating populations back into their home countries (97). However, despite these difficulties, Adelman and Sorenson explain that in instances where conflict resolution plays in the favor of the refugee, voluntary repatriation is still a viable option (97-100). This optimistic view of repatriation echoes that of the international community, as they support repatriation as a plausible option for refugees. However, while the conditions may exist for such a movement of peoples, it does not guarantee their willingness to go. That is, the individual facing repatriation may not feel safe in repatriating due to other conditions within his or her host country.

In Article V of their 1969 Convention, the Organization for African Unity clearly emphasizes the *voluntary* nature of this repatriation (Musalo, et. al. 415). However in their text, Barnett and Finnemore make the claim that while traditional repatriation practices emphasized the ‘voluntary’ move of refugees, this standard has been altered to suit the needs and desires of the international and host community. They claim that “this
culture shifted the operational meaning of “voluntary” so that the voice that counted was the agencies and not the refugees.” (2004, 75)

The significance of this point cannot be understated. As Barnett and Finnemore points out, the needs and desires of these refugees are not always being met, and they are being relocated into potentially dangerous situations. The argument could be made that this forced removal of refugees violates said refugees rights to asylum, as they still hold to a ‘well-founded fear of persecutions’.

This issue of forcible repatriation becomes a greater issue when it is coupled with the United Nations promise of non-refoulement, or process by which “refugees cannot be forcibly repatriated to a country where there is a reasonable expectation of persecution” (Hollenbach, pg. 29). While the legal basis for handing the flows of refugeeism within secondary countries is concentrated on the rights of the individual, the implementation of these statutes provide little support for those whom may not wish to repatriate back to their home country.

While some scholars are convinced by the idea that the UNHCR has committed itself to the permanent resettlement of African refugees whom are unwilling to repatriate (Kibreab, 1985), other such as George Okoth-Obbo express concern over the true voluntary nature of the repatriation process (2001, 124). Similarly, B.S. Chimini warns of misinformation being released to refugees regarding the situations in their home countries in order to facilitate voluntary repatriation (2000, 357).

It should be noted that the United Nations has indeed made efforts to improve upon the implementation of its repatriation policy. As can be seen in the Executive
Committee of the High Commissioner’s Programme, the United Nations reaffirmed its commitment to the “physical, legal, and material safety” of the world’s refugees during repatriation (2004). Similarly, in the UNHCR Executive Committee’s Conclusion No. 101 (LV)-2004- Legal Safety Issues in the Context of Voluntary Repatriation of Refugees, the organization noted that it was:

*Reaffirming* that voluntary repatriation, local integration and resettlement are the traditional solutions for refugees, and that all remain viable and important responses to refugee situations; *reiterating* that voluntary repatriation, where and when feasible, remains the preferred solution in the majority of refugee situations; and *noting* that a combination of solutions, taking into account the specific circumstances of each refugee situation, can help achieve lasting solutions… (2004)

Even if this restatement of their stance on repatriation and their desire for the safe, successful, and voluntary repatriation of refugees nullifies the arguments made by Barnett and Finnemore regarding the question of the influence of Western actors (which it does not address), it may be too late in regards to the current refugee situations in areas such as Dadaab and Kakuma. As the next chapter will explain, these internationally established norms have ingrained themselves in the refugee processes of the global south- a fact that has had dire consequences on those refugees facing gender-based violence.

While the legal basis for handing the flows of refugeeism within secondary countries is concentrated on the rights of the individual, the implementation of these statutes provide little support for those whom may not wish to repatriate back to their home country.
Conclusions

This chapter has provided not only a brief overview of the discourse surrounding human rights and refugee law, but also notes the existence of a prominent internationally accepted norm of repatriation which has directly affected the world’s refugee population. While it can be assumed that the international community will settle upon international refugee legislation in the coming decades, its relationship to the international human rights community is still in question. However, despite this uncertainty, the presence and influence of non-governmental organizations will continue to play a role in establishing the foundation linking refugee legislation and the international human rights movement.

Regardless of what intentions may be had by the international community in creating this norm of repatriation, the inherent effects of its ‘voluntary’ move of refugee populations back into their countries of origin cannot be overlooked when discussing the Kenyan refugee situation. As the next chapter will demonstrate, the standardization of this practice has drastically affected the role of the Kenyan government in its relationship with those whom it is hosting.

As will be discussed in the next chapter, the exclusion and limitation of NGOs in Kenya and the effects of repatriation by the United Nations High Commissioner for Refugees (when combined with the lack of gender-based violence legislation as discussed in the first chapter), creates a cocktail of ineffective refugee policy within the refugee context.
CHAPTER THREE: REFUGEES, INTERNATIONAL NORMS, AND GENDER-BASED VIOLENCE: THE ROLE OF THE KENYAN GOVERNMENT

A host to two of the three largest refugee camps in Eastern Africa, Kenya has become a primary focus for refugee studies academics when analyzing refugee policy. This section will outline the theories and concerns of these academics regarding the Kenyan government’s approach to dealing with the refugee population in their country. It should be noted that while refugees currently reside throughout the country, this thesis will only discuss the population residing in Kenya’s two northern refugee camps, Dadaab and Kakuma.

This chapter will work to apply the concepts of the international standard for refugeeism, the internationally recognized norms of repatriation, and the human rights movement through the work of NGOs that have been discussed in the previous chapters of this thesis, and examine how the actions of the Kenyan government have reflected and responded to these factors.

The first section of this chapter will compare the international standard of defining a refugee to that of the Kenyan government and its historical response to refugeeism. This section will highlight how the Kenyan government has failed to uphold their commitments through the Organization for African Unity in their protection of refugees. Following this, the discussion will shift to understanding the Kenyan government’s reaction to the influence of non-governmental organizations and how this response may have impacted human rights efforts in the region. The final section of this chapter will provide a theoretical argument explaining how the institutionalization of
repatriation policies and actions in relation to refugees as they have been implemented by the United Nations High Commissioner for Refugees, ultimately affects marginalized refugees who undergo gender-based violence. Overall, this chapter is intended to demonstrate how the Kenyan government’s reactions to the previously established international norms and processes have created a situation by which marginalized refugees, specifically gender-based refugees are unable to benefit from international or domestic policy.

Conceptualizing the Situation

Prior to discussing the Kenyan adoption of repatriation policies and its subsequent effects on gender-based refugees, it is important to first have a solid understanding of the Kenyan refugee situation. This section will describe the historical foundation for the overwhelming presence of refugees in Kenya as well as provide a general overview of Kenyan policy in response to this shift.

While Kenya has been a host country to refugees since the 1930s (Lomo, 2012) its refugee population did not exceed 14,500 prior to 1991 (E. Odhiambi-Abuya). Then, in the late 1980s and early 1990s the failure of the Somali government forced the flight of over 400,000 refugees into the resistant state of Kenya (Milner, 2009). Not long after this influx, the political instability in Rwanda, the DRC and Sudan led to a greater push of refugees into Kenya. Today, the exact numbers of refugees may be unknown, but the UNHCR estimates there to be approximately 380,000 (Lomo, 20012) to 465,000 (State News Service, 2013) refugees from across eastern Africa.
Overwhelmed by the amount of refugees flooding into the country in the early 1990s, the Kenyan government immediately removed themselves from all responsibilities to govern these individuals, and ordered their relocation to the northern refugee camps of Dadaab and Kakuma (Milner, 2012, 88). The result was the systematic takeover of these camps by the UNHCR and other non-governmental actors (Crisp, 2000). It should be noted that on 18 December 2012, the Kenyan government reemphasized this policy by declaring that all refugees in urban areas of Kenya must resettle in the camps (Kiama and Likule, pg. 34).

This is not to imply however, that all Kenyan’s wholeheartedly supported this move for abdication of responsibility. In 2005, the Kenyan Section of the International Commission of Jurists from Nairobi published the “International Human Rights Standards: Reporting Obligations- Convention Relating to the Status of Refugees and the Protocol Relating to the Status of Refugees”. As this document points out, the Kenyan government’s reliance on the UNHCR and denial of assistance to refugees located within the country represents the government’s failure to meet its obligations as a host country (2005).

Kenya’s first formal legislative refugee policy was adopted in 2006 and led to the establishment of the Kenyan Department of Refugee Affairs, Refugee Affairs Committee, and Refugee Appeal Board. However, despite providing a concrete standard for the handling of refugees, this document has been criticized as not holding to the true values of the international legislation on which it was based (Lomo, 2012). In addition to this, it can be argued that this forcible containment of refugees within the camps of Dadaab and
Kakuma violates the human rights of these refugees as stated in the 1966 *International Covenant on Civil and Political Rights*. Article 11.1 of this document states that “everyone lawfully within the territory of a State shall, within that territory, have the rights to liberty of movement and freedom to choose his residence” (2002, United Nations Human Rights). The rest of this chapter is constructed so as to evaluate the relationship between these international standards for human rights as they apply to the Kenyan government’s response to gender-based violence in Dadaab and Kakuma, the deference of these refugee populations to the UNHCR and the resulting use of repatriation in dealing with these refugees.

**Responding to Gender-Based Violence in Dadaab and Kakuma**

*The Issue: Defining Gender-Based Violence in the Context of Dadaab and Kakuma*

Brief Cultural Context

In order to understand the plight of female refugees residing in Dadaab and Kakuma and the reaction of the Kenyan government, one must first understand the national context for dealing with gender-based violence in Kenya. Prior to 2006, Kenya did not have once consolidated piece of legislation designed to respond to claims of sexual violence by its citizens. (“Legislating against Sexual Violence…”, 2007) While the passing of the 2006 Sexual Offenses Act amended this issue, it did not come without opposition. In an interview, Kenyan parliament member Hon. Njoki Ndungu explained that this opposition was the result of “deep-seated cultural gender biases” against producing legislation regarding the rights of women. (2007, 151)
A primary example of this cultural gender bias and its indifference to rape was apparent in the “St. Kizito Tragedy”. This tragedy took place in 1991 in Meru Kenya when, as part of a protest by male members of the St. Kizito mixed secondary school, 70 girls were raped and 19 were murdered. The atrocities produced unhurried reactions from police officials and mixed reports from the media regarding the issue. (Steevens, 1997).

While the 2006 Sexual Offenses Act has been passed, these “deep-seated cultural gender biases” still remain- particularly in the context of refugee women.

Defining and Conceptualizing Gender-Based Violence among Refugees

Gender-based violence is an issue that has found itself rooted into the very structure of life in the Kenyan refugee camps of Dadaab and Kakuma. As this section will demonstrate, gender-based violence has become a means to an end, both on the part of refugee officials, the women involved, and the local/refugee perpetrators. This section will highlight cultural and structural issues that arise when women in these camps become victim to gender-based violence and must choose if and how to report the crime.

In describing the flooding of Somali refugees into the Dadaab refugee camp in the early 1990s, Peter Kagwanja explains how gender-based violence became a prominent issue within the confines of the camp (2000, 22). While the occurrence of these crimes are well documented by academics and international groups, the details of these attacks vary in terms of the persons whom commit the crimes, the reasons for committing the crimes, and whether or not the victim is willing to report the crime.

Prior to this discussion however, one must have a solid understanding of the scope by which the term “gender-based violence” is encompassed. In their 2002 report, “A
global overview of gender-based violence”, authors L. Heise, M. Ellsberg and M. Gottmoeller defined gender based violence as the following:

Gender-based violence includes a host of harmful behaviors that are directed at women and girls because of their sex, including wife abuse, sexual assault, dowry-related murder, marital rape, selective malnourishment of female children, forced prostitution, female genital mutilation, and sexual abuse of female children. Specifically, violence against women includes any act of verbal or physical force, coercion or life-threatening deprivation, directed at an individual woman or girl that causes physical or psychological harm, humiliation or arbitrary deprivation of liberty and that perpetuates female subordination. (2002, 6)

As can be seen from the above definition, gender-based violence is a complex issue that affects women on many levels and in a variety of situations.

In their 2005 report, the Kenyan Section of the International Commission of Jurists make the claim that women in these camps are forced to enter into sexual relations for protection on a day to day basis (36). This idea of trading one’s sexual rights to one man for protection is addressed in the 2008 report from the Kenyan Consortium of Refugees and the United Nations Development Fund for Women. In this text, it is reported that women are indeed determined to commit themselves to a relationship if they feel they can be protected (20). However, as Stephanie Beswick explains in her article, “If You Leave Your Country You Have No Life!” Rape, Suicide, and Violence: The Voices of Ethiopian, Somali, and Sudanese Female Refugees in Kenyan Refugee Camps”, this was not always enough to protect the newly married women (92).

Loveless Schafer provides a secondary explanation as to why women in refugee settings undergo gender-based violence. In his article, “True Survivors: East African Refugee Women”, Schafer explains that this violence is the result of a desire by one man or group of men to ‘humiliate, intimidate, or punish’ a woman or her family (2002, 32).
Similarly, in her article, “Fostering Ethnic Reinvention: Gender Impact of Forced Migration on Bantu Somali Refugees in Kenya”, Francesca Declich states that rape was used by certain individuals as a means to obtain goods from their victims. Declich states that “…in order to obtain money, food, clothes and other available items, bandits did not hesitate to commit crimes of many sorts and would threaten, kill, and/or if the victim was a woman, rape, those who did not surrender.” (2000, 42)

This excerpt from Declich’s article highlights how women were targeted for and faced different dangers than their male counterparts through gender-based violence. This distinction of gender in determining the crime that has been committed was referenced in the work of Edward Newman and Joanne Van Selm. In their book, these authors highlight the key differences between abuse instated upon vulnerable men and that instated upon vulnerable women (2003, 257-258). While one form of abuse is in no way more illegal or immoral than the other, it can be argued that men have the privilege of not being marginalized to the extent of women within the refugee society. (Adelman & Sorenson, 1994)

Authors, Grephas Opata and Stephen Singo agree that gender roles as they are defined within the context of the Kenyan refugee camps, play a large part in the reasoning for women’s subjection to gender-based violence. However unlike Declich, these authors argue that it is the roles put on women to secure resources outside of the boundaries of the camp that put them at risk for gender-based violence (2004). This theory regarding the collection of goods and the resulting victimization of refugee women has been identified as a key concern of the UNHCR. A description of efforts to combat
this violence will be discussed later in the chapter in regards to security procedures within
the refugee camps.

For authors such as Howard Adelman and John Sorenson, this issue of gender-
inequality in these camps is based on the overall structure by which the camps were
constructed. In his book, Sorenson makes the assessment that women were removed from
the planning process, and thus were left out of key areas such as economics and social
structure (1994, 186). From this assumption it is easy to understand how refugee women
residing in these camps are forced to provide sexual favors to men in order to survive.

In addition to the physical ramifications of gender-based violence, women who
undergo sexual abuse find themselves facing a variety of emotional dilemmas. Whether it
is in regards to undergoing the violence itself or in deciding to report it, these women
face potential shunning from their family and community.

In describing this issue as it pertains to the refugee population in Dadaab,
Beswick states:

If a married woman is raped, she is sometimes abandoned because it is assumed
she has a virus... Others have performed abortions on themselves with coat
hangers. Others take malaria tablets to get rid of unwanted pregnancies because
an unmarried pregnant Somali “cannot be accepted in Somali culture”... some
women had husbands who abandoned them after they were raped. (2001, 93)

This desperation exemplified by Beswick is simply a testament to the effect that culture
may have on how a woman who has been subject to gender-based violence chooses to
handle the situation.

Another influential factor in addressing the issue of gender-based violence in
Dadaab and Kakuma is the notion of allowing the communities to handle the issue
amongst themselves. For example, in Dadaab, the community specific process by which women are to bring claims of gender-based violence is referred to as “mashala”. While this process does bring light to the claim, it does not have the same legal standing as those of government courts. In their report the Refugee Consortium of Kenya and the United Nations Development for Women, explain how this process limits women’s voice in stating their claim. In addition to this, the report claims that this religiously-based proceeding does not always produce justice for the victim as those deciding upon the event may be persuaded by monetary or other bribes (2008, 30). In his article Kagwanja explains how the UNHCR was complacent with this approach as they did not want to overstep into what was deemed a cultural matter by the community (2000, 23).

In addition to being pushed into communal proceedings as opposed to formal, state run proceedings, women who wish to pursue legal retribution for the crimes committed against them are driven to silence by another factor- fear. Opata and Singo explain this push to remain silent as a community driven fear of retaliation (2004, 35). The Refugee Consortium of Kenya and United Nations Development Fund for Women state that there is a specific ethnic element to the structure of the Dadaab refugee camp upon which a hierarchy is built (2008, 19). The authors also emphasize that any punishment distributed through the communal form of justice is collective across the entire ethnic group (2008, 21). In understanding this, and provided the statement by Opata and Singo, it is easy to understand why a woman from a lower level class would not wish to report an account of gender-based violence and claim someone of an upper-
class as the perpetrator. In doing so, the resulting collective punishment may lead to a retaliating effort by the higher class.

It should be noted that this section is not to state that the situation regarding gender-based violence in refugee camps cannot be successfully contested. In their articles, “Gender-based violence in refugee camps”, authors Jeanne Ward and Beth Vann explain how the interagency effort by Tanzanian government officials, local and international non-governmental organization and the United Nations have led to a successful system of combating gender-based violence in Tanzanian refugee camps (2002). However, as will be discussed in the following section, this model of collective support from government, non-governmental organizations, and the UNHCR is not present in the Kenyan case example.

Unfortunately, by maintaining their neutral position, and by not turning over any legal proceedings to the Kenyan government, the UNHCR is subsequently limiting the rights of the women within these refugee camps. In addition to this, by promoting the use of cultural practices to dictate the outcomes of gender-based violence claims, and in recognizing the ineffectiveness of these proceedings, the UNHCR is in a sense turning a blind eye upon the issue of gender-based violence. However, as the next section will demonstrate, the blame is not entirely with the UNHCR. While the position of the UNHCR comes from a policy rooted in neutrality, the Kenyan government is equally, if not more, to blame.
As this chapter has discussed, the primary power running the northern Kenyan refugee camps is the UNHCR. However, there is a governmental presence within the camps in the form of Kenyan police. While logic would dictate that the presence of these government funded actors would increase security within the camps, research has shown that this is not the case.

As was written into the 2003 Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa, the host government is required to protect its female refugees from gender-based violence. (2011, 172). This theme of government responsibility is echoed by Hollenbach in his explanation of the responsibility of governments in protecting refugees. Hollenbach states:

Notwithstanding human rights standards, host governments often show little concern for the violence experienced by refugees, including rape of refugee women. Their indifference is demonstrated by ineffective security arrangements in the camps and by inadequate investigation and prosecution of rape and other forms of sexual violence against refugee women, even when the perpetrators are state agents tasked with refugee protection. (2008, 129)

This claim by Hollenbach makes three imperative points regarding gender-based violence and security that can directly be applied to the Kenyan government’s role in Dadaab and Kakuma: the government is ‘indifferent’ to the violence, the governments agencies do not hold those responsible for the violence accountable, and the protectors themselves have been reported to have committed the atrocities. All three of these points should be discussed in regards to understanding the issue of security in the Kenyan refugee camps.
In his article, “A State of Insecurity: The Political Economy of Violence in Kenya’s Refugee Camps”, author Jeff Crisp describes a culture of “impunity” when relating to crimes committed within the camps. In this discussion, Crisp explains how specific cultures allow for the ‘buying off’ of the family of the wronged part, and the resulting lack of legal repercussions (2000, 619). In a report by the Refugee Consortium of Kenya and United Nations Development fund for Women, women within the Dadaab camp have made claims of instances where the police do not apprehend a suspect whom is accused of committing a gender-based violence crime until proof is brought forth, regardless of the potential for the flight of the accused (2008, 29).

In a 1993 report from the Africa Watch Women’s Rights Project, it was stated that a primary issue within Kenyan refugee camps was the committing of gender-based violence by the Kenyan police. In this report, Africa Watch claims that the government had in no way prosecuted the police officials who had committed the crimes. Peter Mwangi Kagwanja echoes this point in his 2000 report “Ethnicity, gender and violence in Kenya”. When informed of the crimes committed by their officials, Kagwanja describes the reaction of the Kenyan government to be “dismissive and defensive”. In this article, Kagwanja quotes an unnamed Kenyan official who stated, “It was not Kenya’s responsibility to investigate what happens in the camps, it was for Somalis to sort out themselves.” (2000, 23-24) Similarly, Kenyan Assistant Minister Julius Sunkuni went on record claiming that refugee women make false accusations of rape because they wish to “attract sympathy and give the government negative publicity” (Norowjee, 1993).
This idea that the police, as agents of the government, are not to be responsible for prosecuting gender-based violence crimes and the Kenyan government’s indifference to the crimes committed by their own officials, only further perpetrates gender-based violence in these camps. This fact, combined with the publicly recognized opinions of government officials, who believe that refugee women are not truthful in making their claims, provides little hope for any advancement to be made regarding women’s security in these camps.

While there is much literature highlighting these concerns with security, authors such as Milner are skeptical of the severity of the security situation in Dadaab and Kakuma. In his book, Milner explains how projects designed by the UNHCR assist in the limitations of violence—specifically in the case of gender based violence (2009, 100). In discussing this, Milner provides an example of the “Firewood Project”, which allowed women to stop traveling into insecure zones to receive firewood (2009, 100). The success of this project is highlighted by Opata and Singo who cite that the level of gender-based violence in refugee camps decreased by twenty-two percent between 1998 and 2001 (2004, 36). However, while Milner’s example may reflect on a slight improvement within one facet of gender-based violence among female refugees, authors such as Kathryn Farr also recognize the effort and make the claim that the issue of gender-based violence is still prominent within these camps. Also, while the “Firewood Project” has proven to be successful, it should be noted that it was implemented by the UNHCR and not the Kenyan government, thus reaffirming the fact that the government has done little to contribute to the protection of the refugees in its camps.
Regardless of their opinion on the severity, authors who describe the livelihood of refugees in the Kenyan camps of Dadaab and Kakuma almost always mention the issue of security among the female and vulnerable populations. As this section has demonstrated, this issue is not being addressed affectively by the Kenyan police, and thus the Kenyan government.

**NGOs and Human Rights in the Kenyan Context**

The previous chapter discussed the value of NGOs as they support and advocate for human rights in the wake of a Western-dominated system of refugeeism. This section will highlight the Kenyan government’s response to NGOs in the early 1990s at the height of the refugee crisis described above and in the shadow of their massive involvement during the 1985 World Conference on Women.

In her chapter on Kenya in Jon Bennett’s *Meeting Needs: NGO Coordinating in Practice*, Monika Kathina Juma provides a detailed history of the relationship between the Kenyan government and NGOs. It is in this description that she highlights the creation and implementation of the NGO Coordination Act of 1992. According to Juma, this act was meant to create “an umbrella body to coordinate NGO activity” (1995, pg. 93) within Kenya. Juma goes on to state how this document was ill received by the NGOs who believed that it infringed upon their ability to conduct activity in the region.

While the drafters of the Act claimed that their intentions were to enhance and structure coordination, Juma states that at the time of the Acts creation there was a sense of ‘competition’ between the government and the NGOs in the region (1995, pg. 109).
This idea of NGO activity in Kenya challenging the government is reflected in the work of Karuti Kanyinga. In his discussion of civil society in Kenya, Kanyinga explains how the civil society in Kenya is seen as a challenge by governmental officials as they may create “genuine civil society reforms that would alter the existing structures of power” (Matuta, pg. 201).

What resulted from the 1992 NGO Coordination Act, was a refugee system under which the UNHCR determined which NGOs it would establish as “lead actors” in assistance with managing the refugee camps. According to Juma these “lead actors” were predominantly non-local NGOs, with the exception of the African Medical Research Foundation, Appropriate Technology, and the Kenya Red Cross Societies. (Bennet, 99) While the Kenyan government eventually eased its position on limiting civil society (Kanyinga, 193-200), the system for handing the refugee crisis in Dadaab and Kakuma was firmly set.

The significance of this limitation of NGO activity, and the time in which it took place, cannot be understated. While the reasons behind the NGO Coordination Act are debatable, the impact it had upon the Kenyan refugee system is quite clear. With the limitation of local NGOs it can be argued that the Kenyan refugee system is missing the benefits that would come with their participation in the refugee process (as described previously by Lester). In regards to gender-based violence refugees, this meant a limitation to the assistance and advocacy they would receive from these groups, such as those NGOs who participated in the 1985 World Conference on Women, which took place just seven years before. As the next section will demonstrate, this concentrated
control by the UNHCR had negative effects on these refugee populations, not only in regards to its control over NGOs and policies related to gender-based violence, but also their policies related to ‘voluntary repatriation’.

**Repatriation as a Response to Refugeeism**

It is apparent through Kenyan history that despite initially accepting refugees from its East African neighbors, the Kenyan government has responded to this issue of refugee influx by adopting the UNHCR’s normalized policy of repatriation. While it can be argued that the UNHCR’s influence and administration within these camps drives the repatriation of these refugees back to their country of origin, this section will explain how Kenyan policy has reflected this desire to expel refugees.

*A History of Repatriation*

In his article, “Repatriation in Colonial Kenya: African Institutions and Gendered Violence”, Matthew Carotenuto demonstrates how the repatriation of “undesirable” individuals within Kenya has rooted itself in the policies of the country since independence (2012). The normalization of this policy was carried over into the 1990’s by former President Daniel-Arap Moi, who ordered the repatriation of over 1000 Rwandan and Ugandan refugees. In a report by Africa Watch, this repatriation was forced upon these refugees, whom were removed from the country by force. (Africa Watch. 1990) According to this report, the UNHCR was not involved in the repatriation of these refugees, but did offer sanctuary within their offices.
This culture of repatriation was temporarily halted by intervention on the part of the UNHCR. With the influx of Somali refugees entering the country in 1991, the Kenyan government attempted to evict those seeking refuge in the country. However the UNHCR’s establishment of the Dadaab and Kakuma camps ultimately provided refuge for those who remained in the country. This move by the UNHCR reflects their support and preference of the encampment process while handling refugees (Verdirame & Bond, 2005). Novak explains that this temporary nature of resettlement is chosen over a more permanent resettlement program that would require relief agencies to promote long-term, economic assistance (2009, 428). While various refugees may reside outside of these camps in present day Kenya, Dadaab and Kakuma remain the resettlement facility for refugees from the East African region.

The repatriation of Somali refugees has become a present day reality among refugees living in the Dadaab and Kakuma camps. While the Kenyan government and UNHCR have determined these repatriations to be ‘voluntary’, authors such as Barnett and Finnemore have demonstrated that the ‘repatriation culture’ of the UNHCR is questionable when referencing the ‘voluntary’ nature of refugee repatriation. (Barnett & Finnemore, 2004)

However, these concerns of Barnett and Finnemore may come too late for some Somali refugees. In an article published by the BBC news service, the Kenyan government and the UNHCR began discussions regarding the repatriation of Somali refugees in September 2012. While continued talks have produced concerns from the UNHCR regarding the stability of Somalia, the Kenyan government has demonstrated an
eagerness to remove these populations (whose numbers are estimated to reach 465,000) from its northern border (State News Service, 2013).

The Kenyan government has systematically isolated refugee populations within its borders from access to the rest of the country. It is important to note that authors such as Lomo make the claim that this is the continued isolation of these refugees is the result of security concerns (2012, 112). However, regardless of the potential reasoning behind this isolation of refugees and deferment of responsibility to the UNHCR, it can be argued that the Kenyan government has inevitably promoted the gender-related policies and repatriation policies of the West- a move that ultimately leads to the marginalization of gender-based refugees in Dadaab and Kakuma.

**Explaining the Push for Repatriation: Security Concerns**

With authors such as Milner recognizing the significant economic and social benefits obtained by a host country while housing refugees (2009, 94), the question needs to be asked as to why governments like that of Kenya are so determined to expel these groups. A common theme that is discussed in the literature surrounding the negative consequences of being a host state, is the resulting insecurity carried into the country by the refugees themselves.

In their article, “Refugees and the Spread of Civil War”, Idean Salehyan and Kristian Skrede Gleditsch provide an explanation as to how violence can be spread into countries whom host refugees. They do however make it a point to differentiate between countries who are hosting refugees from countries which border their own, and those who host refugees from non-bordering states.
violence can be carried into a host country in three ways: the direct “importation” of
violence, the “demonstration effect”, and a shift in the ethnic balance within the host
country (343). As will be discussed below, it is the first and third of these reasons, the
potential for the ‘direct “importation” of violence’ and a shift in local ethnicity that fuels
the current Kenyan government’s desire to repatriate the Somali refugees in Dadaab and
Kakuma.

While some academics argue that it is the international community and the
UNHCR’s neutrality that leads to the prominence of security issues in refugee areas
(Hollenbach, 2008), Milner theorizes that it is the growing fear regarding the Somali
population that is causing the lack of security in these camps (2009,100). Similarly, in his
article, Andrew Novak explains how the “porous” border between Kenya and its northern
neighbors have created major security concerns for the Kenyan government (2009). He
goes on to explain how refugees entering Kenya are arriving from areas that have
“radicalized citizens”. Falling in line with Salehyan and Gleditsch’s argument, it can be
understood how the potential for such radicals to enter Kenya may provoke fears from the
Kenyan government as well as the local population.

In his book, Hollenbach addresses this issue of inter-relations between refugees
and local populations- specifically in the case of refugees residing in Dadaab and
Kakuma. Hollenbach explains how the local communities did not agree with integrating
the foreign populations into the economic and agricultural sector. (2008, 93) In this
instance Salehyan and Gleditsch’s third theory applies, as the numbers of ethnic Somalis
grow and threaten the resources of the local Kenyan community, the latter is driven to take “actions to contain that threat” (Milner, 2009, 100).

While it has been argued that the influx of these potentially dangerous refugees from various countries contribute to the security concerns of the Kenyan government, the lack of participation by the government in ensuring security measures within the camp is also a valid concern. Here it is argued that the issue of security within refugee camps—particularly the occurrence of gender-based violence against refugees is emphasized by a lack of response by Kenyan police officials within the camps. The following section will provide greater detail of and insight into the gender-based violence that takes place in the camps of Dadaab and Kakuma and the failure of the Kenyan state to protect said refugees.

**The Perfect Storm: Bringing it all together**

Given the plight of the female refugee in Dadaab and Kakuma and the severity of the abuse they sustain while under the watch of the UNHCR and the Kenyan police, it is difficult not to ask the question, “Why is this still happening?” In understanding the international and even pan-African policies that have been recognized by the Kenyan state in accordance with the protection of refugees, women, and refugee women, it is difficult not to ask “How does the Kenyan government justify not acting on behalf of these women?”

The answers to these questions lie not in the legal foundation for hosting refugees, but rather in the adopted international norms for handling them. This chapter argues three
points on this topic. First, that the international community’s inability to translate human rights discourse into concrete gender-related refugee legislation has led to a sense of ambiguity in its implementation of refugee services in areas such as Kenya. Secondly, the hand of the international community in assisting refugees, the UNHCR, has succumbed to the international pressures of state governments and has shifted their policy to include the systematic reintegration of refugees back into their countries of origin. Even in instances where the UNHCR is hesitant to repatriate refugees, as in the case of Kenya, the history of this organization and the questionable nature of its policy, has led to concern from the academic community.

However, despite their failings in protecting the rights of refugees who do not wish to be repatriated, the UNHCR should not take the full brunt of academic scrutiny. While these two internationally recognized norms are cause for concern, it is only when combined with the third issue of Kenya’s limitation of human rights NGOs in assisting with this issue that one can grasp the full scope of the refugee crisis in Kenya. By passing the NGOs Act, the Kenyan government has limited not only support for gender-based violence by way of goods but also by way of advocacy for women’s rights. In addition to this, the Kenyan government has not only adopted the same policy of repatriation, they have historically pushed for the exclusion and limitation of refugees within their borders. As can be seen with the current repatriation discussion between the Kenyan government and the UNHCR, the Kenyan government has shown little regard for the welfare of said refugees upon their return home. While the UNHCR has been criticized for not following
the desires of these refugees, even they are finding themselves opposed to such a rapid repatriation effort given the current situation in Somalia.

As the second half of this thesis has shown, the Kenyan government has not only neglected to care for the refugees through their repatriation, they have also allowed this negligence to affect the everyday livelihood of the refugees living in Dadaab and Kakuma. This lack of support by the government has directly impacted at risk groups such as women who do not have the resources to protect themselves against gender-based violence. Even the Kenyan police have been cited as both onlookers of, and participants in, this abuse.

**Disclaimer**

It should be noted that this chapter solely discusses the impact of NGOs and repatriation on the local populations to refugees residing within the Dadaab and Kakuma refugee camps in Kenya. While it has been the goal of this section to describe the effects of the internationally recognized norms for dealing with refugees as they have been adopted by the UNHCR, the role of domestic factors and their effects on refugee policy in the Kenyan context should not be discounted. It is not the goal of this thesis to discount the role of these domestic factors, but rather to explain internationally recognized norms as a piece to a much larger puzzle of refugeeism and gender-based violence in Kenya. Further research must be completed in order to fully understand the domestic elements concerning this issue within Dadaab and Kakuma refugee camps.
Conclusions

It has been the point of this chapter to understand the role of that the Kenyan government plays in the ongoing epidemic of gender-based violence in the camps of Dadaab and Kakuma. While this chapter did not recognize other factors that may affect this issue, such as social construction within ethnic groups, it is not to state that these issues should not be taken into account as well. However, greater ethnographic research needs to be completed before any claims regarding this issue are to be made.

Since the adoption of the 2006 Refugee Act, the tide of the Kenyan government’s relationship with refugees residing within its borders has begun to shift. However, until this shift includes the systematic incorporation of the Kenyan government in not only incorporating the concept of gender and gender-related issues into their refugee policy, but also taking responsibility for its officials and providing adequate security measures in order to protect these refugees, gender-based violence will continue to be an everyday struggle for refugee women in Dadaab and Kakuma.
CONCLUSION

Answering the question, “If the African Union recognizes certain standards for hosting refugees and claims of gender-based violence, why is this issue not being sufficiently addressed in the Kenyan camps of Dadaab and Kakuma?”, this thesis evaluates the impact of internationally recognized norms regarding refugeeism and gender-based violence on Kenyan refugee policy.

In doing this, the first chapter of this discussion begins with an in-depth evaluation of the international standard for determining the definition of a refugee. In this section, a distinction is made between the policies of international organization in the global north (the United Nations) and the global south (the African Union). What is interesting to note from this section is the position taken by the Kenyan state in determining their definition of said refugee. As this chapter illustrates, despite Kenya formally adopting the policies of the African Union and gender sensitive human-rights doctrine, the application of this definition, and gender-related policies as they relate to refugees, follows those outlined by the United Nations.

The second chapter is a critical analysis of the human rights initiatives across the international community. This chapter provides the reader with a deeper understanding of alternatives to international refugee law, and how the human-rights movement may impact refugee law. In addition to this the reader becomes aware of the existence and significance of non-governmental actors as they impact the debate surrounding policy and refugeeism. This section becomes significant in the third chapter, along with the background information provided on repatriation. This section on repatriation represents
the impact of policy alteration and adoption by agencies such as the UNHCR. In this instance repatriation, as it has been applied by the UNHCR, highlights the ambiguity surrounding interpretation and policy within the international policy system.

The third chapter of this thesis draws upon the legislation implemented by the United Nations, the application of these standards, and the role of the Kenyan government to explain the present day crisis in Kenya’s refugee camps. Here, links between the Kenyan move to resettle refugees in Dadaab and Kakuma and the involvement of the UNHCR are made to understanding why there is a lack of protection for certain groups of people (specifically women). This chapter also highlights the role, and limitation, of NGOs in the Kenyan state and in their operations with the UNHCR.

In bringing all of this together, the choice of the Kenyan state to give control of the refugees residing within its borders to the UNHCR and limiting the role of NGOs in the country has negatively affected those residing within the camps. Regardless of the intent of the Kenyan state while making these decisions and bypassing the policies of the African Union, the result remains the same: women facing gender-based violence are not protected sufficiently within the camps.

After analyzing the Kenyan case example and comparing it to the work of authors such as Jon Bennet, Xinyuan Dai (Risse et. al) and Barnett and Finnemore, it can be argued that the Kenyan government should reevaluate its position in regards to its current responsibilities as a host country and its relationship to the UNHCR, as well as its stance on limiting NGOs and human rights initiatives within the camps. In doing so, practices such as repatriation and policies relating to women within the Refugees Act, must be
reconsidered to reflect the needs of refugees in Dadaab and Kakuma. This is not to argue that there should be no governmental control in regards to the participation of NGOs within the country, or that the UNHCR should be completely removed from the country. However, refugees within Dadaab and Kakuma would benefit from the participation of civil society in promoting human rights initiatives- a move that can only be possible with a shift away from international norms and the adoption of refugee policies as they are outlined by the African Union.

It is not the intent of this thesis to claim that international policy and norms relating to refugeeism influence all refugee camps in the global south the same manner. A key component to completing the understanding of the Kenyan case examples of Dadaab and Kakuma is the role of the Kenyan government. It can be hypothesized that similar cases would be found in countries who, like Kenya, disregard the legal premise for gender-based violence and the responsibility of the state in handling refugees as established by the African Union. However, this is merely a hypothesis and does not account for the impact of domestic factors within the specific community.

While this evaluation of the practical implications of policy development as it relates to human-rights, gender-based violence, and repatriation is vital to understanding specific aspects of the refugee crisis in Kenya, it should not be taken as a universal claim to understanding the situation in its entirety. Further research needs to be conducted in order to better understand the social implications of the current policies and social dynamics of the differing cultures within the camps. Further study could benefit from
qualitative research methods such as open-ended surveys with both men and women in the camps, interviews, and extensive observation of both social and agency interaction.

In addition to this, it should be recognized that refugees are not confined to the refugee camps in Dadaab and Kakuma. While the Kenyan state has mandated for the resettling of refugees into the northern camps (Milner, Kiama, Likule) this does not mean that the populations to whom this applies are willing to do so. The experiences of those not currently living in the camps, and any reasons they may have for not doing so, are a vital contribution to the discussion of refugeeism, gender-based violence and policy.

While this thesis does not examine every element of the refugee crisis in the global south, or Kenya, it does recognize gender-based violence and repatriation as issues that have cut across international and domestic policy (bypassing that of the African Union) that subsequently lead to the marginalization of certain refugees in Dadaab and Kakuma.
REFERENCES


