Visibility at risk for women as rights-holders – a study with regard to a refugee camp context
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**List of Abbreviations**

COHRE, Centre on Housing Rights and Evictions
DEDAW, Declaration on the Elimination of Discrimination against Women (1967)
DEVAW, Declaration on the Elimination of Violence against Women (1993)
DRS, Dispute Resolution Structures
ECOSOC, UN Economic and Social Council
ECtHR, European Court of Human Rights
ExCom, Executive Committee of the High Commissioner’s Programme
FGM, Female Genital Mutilation
FIDA-K, Federation of Women Lawyers-Kenya
GBV, Gender-Based Violence
HRBA, Human Rights-Based Approach
HRW, Human Rights Watch
IASC, Inter-Agency Standing Committee
IDPs, Internally displaced persons
IFRC, International Federation of Red Cross and Red Crescent Societies
IHRL, International Human Rights Law
IOM, International Organization for Migration
IRL, International Refugee Law
JRS, Jesuit Refugee Service
LWF, the Lutheran World Federation
LWF/DWS, the Lutheran World Federation/Department for World Service
NGO, Non-Governmental Organization
OHCHR, Office of High Commissioner for Human Rights
RBA, Rights-Based Approach
SD, sex discrimination
SGBV, Sexual and Gender-Based Violence
SOP, Standard Operating Procedures
UDHR, Universal Declaration of Human Rights (1948)
UNHCR, the United Nations High Commissioner for Refugees
UNSC, United Nations Security Council
UNWRA, United Nations Relief and Works Agency for Palestine refugees in the near east
VAW, Violence against Women
WFP, World Food Program
WW II, World War II
Foreword

Is there a dead end for protection of human rights for female refugees in a refugee camp context? In a preparatory phase of this research process, a detailed story shared to me confirmed the importance of taking the complex normative setting in a local refugee camp into account when discussing protection of international human rights with regard to women. Even though the story regarding a single mother and her child called on me to verify facts and trace what actually had happened to them in a severe and urgent life threatening situation, I realized that it was not possible within the kind of research studies I had been accepted for. However, the story, that I can’t disclose here, shed light to the problem of the status of women in a local community and to whether women are recognized the right to act when human rights are at risk in a protracted refugee camp setting. This is a question that echoes experiences from contact with a local customary law context in previous studies and profession.1 It is an issue that draws attention to the need to search for the knowledge of what actually shapes the legal reality for women in a situation of displacement and conditions for their possibility to be visible as rights-holder, also with regard to international human rights monitoring.

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Part I
Chapter 1. Introduction

“The refugee problem is, very centrally, an issue of rights – of rights which have been violated and of rights, as set out in international law, which are to be respected.”

1.1 Displaced people

The second decade of the new millennium has been characterized by a rapid global increase in reported numbers of displaced people forced to escape from conflicts, violence and oppression. In 2014 the number was reported to be the highest in the post-World War II era. Two years later, in the end of 2016, the number of displaced people had reached 65.6 million. The majority, 40.3 million, were reported to be internally displaced people, while 22.5 million were refugees (17.2 million under the mandate of UNHCR and 5.3 million Palestinian refugees registered by UNWRA).

Due to the violent conflict in Syria, Turkey had become the largest refugee-hosting country in the world (2.9 million refugees), while Lebanon hosted the largest group of refugees compared to numbers of nationals (1

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2 Erika Feller, ‘Asylum, Migration and Refugee Protection: Realities, Myths and the Promise of Things to Come’ (2006) 18 International Journal of Refugee Law 509, p. 518. Erika Feller was at the time of publishing Assistant High Commissioner for Protection, Department of International Protection, Office of the UNHCR. She informs the reader that the paper draws on positions developed in her capacity as Director of the same department but do not reflect “necessarily those of UNHCR”.


million refugees). The European societies have been constantly alerted on the refugee situation through the reports on rescued people, children and adults, attempting to cross the Mediterranean Sea with the aim to reach Europe for a future in safety, free from fear and violence.

At the same time, the majority of the refugees under the protection of UNHCR stay outside Europe and as much as approximately 84% of the refugees are hosted in developing countries. One of the countries on far distance from Europe that has hosted refugees for nearly a quarter of a century is Kenya in East Africa. In the end of 2013, its refugee population was estimated to be 625 000. Until 2014, when Ethiopia took over the role, the country had been hosting the biggest number of refugees in the region South of Sahara. In the end of 2016 both Ethiopia and Uganda hosted higher numbers of refugees than Kenya, even though all the three countries formed part of the identified group of the 10 major-refugee hosting states in the world.

Common for refugees in Kenya and Ethiopia has been a life in exile characterized by a protracted refugee situation due to the situation in their countries of origin, as for example Somalia and Eritrea. In 2016, two-thirds of the refugees in the world were staying in such a protracted situation. This is a situation defined to be established when 25 000 or more

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6 UNHCR, Global Trends: Forced Displacement in 2016, June 2017, p. 3.
12 Ibid, p. 23.
13 Ibid, p. 22.
refugees of the same nationality have been in exile for five years or longer in a given country of asylum.\textsuperscript{14} Compared to what was the case in the beginning of the 1990s, the average length of stay in a protracted refugee situation had in 2009 expanded from 9 years to nearly 20.\textsuperscript{15} As reflected in a report of UNHCR from June 2015, the average period for a protracted refugee situation had continued to be around 20 years and even more.\textsuperscript{16}

Taking this into account, it has to be noted that for more than a decade governments in the so called developed countries have emphasised that refugee protection should be directed to areas closer to where refugees have escaped from.\textsuperscript{17} However, certain countries which have hosted large refugee populations in protracted settings for several years, even decades, close to areas of violent conflicts, are now actively questioning their role of continuing to be hosting countries of refugees.\textsuperscript{18} One of these countries is Ken-


\textsuperscript{15} Gil Loescher and James Milner, ‘Understanding the Challenge’ (2009), Issue 33, Forced Migration Review p. 9

\textsuperscript{16} UNHCR, \emph{UNHCR Global Trends 2014: World at War}, June 2015, p. 11.


ya, that has for some years repeated its interest to close one of the two refugee camps and to see a return of refugees to Somalia.\(^{19}\)

Prior to this situation and the rapid increase of displaced people in the world, the living conditions in protracted refugee situations and their consequences for people had been a topic for UNHCR, specialized magazines and reports by authors familiar with the operational refugee camp context.\(^{20}\) The impact on protection issues and the livelihood of people had also been part of academic discussions.\(^{21}\)

### 1.2 Human rights at risk for women

With regard to women, there are reiterated observations that domestic violence is one of the dominating forms of violence against women in refugee camps, and challenges have been identified for administration of justice


due to presence of a variety of justice mechanisms. However, even though it has been observed to be one of the dominating forms of violence in refugee camp situations, it is reported to have received less attention by humanitarian actors when compared to the attention given to sexual violence, especially where perpetrators are to be found in armed forces.

It has also been argued that issues of emergency character, such as shelter, water and food for a refugee population, tend to have been given more attention in international discussion and action compared to the fact that a protracted camp situation in remote areas, on far distance from government administration and legal institutions of the host country, also needs attention with regard to the variety of justice issues that emerge in the communities of refugees. One such justice issue is the problem of violence


against women, specifically domestic violence and the indication that legal systems, for various reasons, could be a risk factor.\(^{25}\)

It is to be noted that domestic violence outside a refugee camp situation is a form of violence against women that has been in focus for a critical academic debate in the field of international human rights law for several decades, addressing interpretation of human rights, obligations of states and the status of women in acting on human rights issues.\(^{26}\) It is also a form of violence that has been underlined by the WHO as an urgent issue for the health-sector and identified as a “global public health problem of epidemic proportions”.\(^{27}\)

1.3 The person - a rights-holder

In the late 1990s a mainstreaming process was initiated within UN focusing on an integration of human rights into the UN agencies and their activ-


\(^{27}\) WHO, Department of Reproductive Health and Research, London School of Hygiene and Tropical Medicine, South African Medical Research Council, Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence, Executive Summary, 2013, retrieved 4 July 2017 http://www.who.int/reproductivehealth/publications/violence/9789241564625/en/
ities, including also the work of UNHCR. One result of this initiative was the development of a so-called rights-based approach (RBA) or human rights-based approach (HRBA), as elaborated in policy documents and training materials of UN. This is an approach described to be rooted in the international human rights framework and aimed to be integrated into an operational context of humanitarian assistance and long term development programs. In the terminology of the human rights-based approach (HRBA), individuals are referred to as rights holders, as active subjects, as persons who should be strengthened in order to be able to claim their rights.

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A detailed elaboration on the components of the human rights-based approach applicable in the UN context is found in a document from 2006 called *Frequently asked questions*. In this document the relationship between rights-holders and duty-bearers is stressed, including the importance to strengthen the capacity for rights-holders to be able to claim their rights and for the duty-bearers to meet their human rights obligations.

This recognition of the person as a rights-holder, as a subject to act on right-issues, indicates an assumption that a woman, as a person and rights-holder, holds rights in combination with an autonomous (legal) status and a recognized (legal) capacity for making various types of claims possible, in a local context as well as with regard to various international mechanisms for monitoring human rights.

However, even if institutional structures should exist, the issue of autonomous (legal) status and (legal) capacity of women relates to a discussion of prerequisites of making claims possible at all at a local level as well as in the context of international human rights mechanisms. There is research specifically discussing practices of a plural legal context locally, that underlines the linkage between the issue of legal status of women in communities and the possibility to act on human rights issues. It is indicated that it should not to be taken for granted that the hindrances to address the problem of violence against women in a local refugee camp context are always of a practical, logistical character with regard to capacity of legal institutions of the host country, or an issue of not being encouraged and empowered as an individual to take action in criminal law matters. In certain contexts the hindrances seem to have even deeper causes, drawing attention to the issue of the legal status of women in the kind of legal sys-

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33 Ibid, pp. 15, 35.

tems practiced by communities, informed by an unwritten customary law tradition.\textsuperscript{35}

With regard to the problem of violence against women in refugee camps, it has been observed that women may have to deal with a question of whether to act or not when rights are at risk. This issue seems to be considered by women in relation to the views and preferences of the traditional system of their own refugee community on one hand, and policies of UNHCR informed by international human rights on the other.\textsuperscript{36} It is from this point of position of a woman in a refugee camp that the present research will determine its purpose.

### Chapter 2. The Study

#### 2.1 Purpose and research question

The present study will direct its attention to the situation for women in protracted refugee situations, who are restricted to stay in refugee camps also when their human rights are at risk due to various forms of violence.

By taking the recognition of persons as right-holders in the framework of international human rights into account, when determining the purpose, a choice first has to be made on where to put the emphasis in the study: i) to a study that gives focus to the operational institutional capacity and responsibilities of a hosting country as a \textit{duty bearer} in a protracted refugee camp situation, including cooperation with international organizations like UNHCR or ii) to a study that directs attention to women as \textit{rights-holders} within the context of international human rights and what may shape the conditions for women in a local customary law context, as a refugee camp could be, to act in the capacity as rights-holders, especially on the problem of domestic violence.

For this research, the choice of emphasis will be the second one. Recent studies in specific refugee camp contexts underline the importance of mak-


\textsuperscript{36} Horn, 2010b, pp. 160-161; da Costa, 2006.
ing this kind of choice. These studies indicate a risk that women do not become visible as rights-holders with regard to international human rights and various legal matters.

The purpose that will guide this study: The purpose of the present research is to deepen the understanding of women as rights-holders within the context of international human rights law and what may shape the conditions for women to act in a local customary law context, such as a refugee camp environment could constitute. (chapter 3 and 5)

Guided by this purpose, the question that drives the study is the following: To what extent may there be a risk that women in a refugee camp context, distinguished by a protracted refugee situation, do not become visible as rights-holders and entrusted to act with regard to international human rights and the problem of violence against women, especially domestic violence? (chapter 4 and 6)

2.2 Decisions on delimitations

Even though this research gives attention to women in protracted refugee camp situations, the research is not aimed to be a study within the field of international refugee law or international humanitarian law. This means that this is not a study that will focus on the issue of women as rights-holders and the problem of violence against women with regard to the criteria applied for recognizing refugee status to women, according to international refugee law or in a specific national refugee determination process. Neither is this a study that aims to discuss legal matters with regard to the operational legal status of a refugee camp in terms of a humanitarian context or the issue of what kind of responsibilities various humanitarian actors present might have in such a context.


Instead, this research finds its entry-point to study the issue of women as rights-holders primarily in the context of the international human rights treaty the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), including the work of the CEDAW Committee as a treaty body, and also the international mandate of the Special Rapporteur on Violence against Women, its causes and consequences. These are two international human rights mechanisms that deal with the issue of violence against women and have followed up the problem within their monitoring mandates, respectively, for some decades.

The decision to direct attention to the international human rights discussion within the context of the work of the CEDAW Committee and the problem of violence against women was taken early in the research process. It was in respect to this problem that the issue of women as rights-holders appeared in academic discussion as an issue of concern for international human rights law and for the situation in refugee camps.

The interest for the present research is not to focus on the issue of states as subjects of international law or to clarify a legal definition of domestic violence in the context of international human rights law. Nor is the interest to determine current interpretation of legal human rights obligations of states with regard to violence against women by a detailed and extensive analysis of caselaw in the field of international human rights law. Instead, it should be emphasized here that this study shifts perspective from a study of states as the duty-bearers and their human rights obligations to a study focusing on women as rights-holders and the risk that women do not become visible in such a capacity with regard to a refugee camp context.

To take note of for the present research is that it has been conducted at a time when various initiatives have been developed within the context of international human rights law to address human rights of women. As late as in 2016, the CEDAW Committee published an open invitation on its website to comment on a drafted revised version of the General recommendation no. 19 from 1992, specifically addressing gender-based vio-

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In July 2017 the updated version was adopted by the Committee as General recommendation no. 35. This reflects the ongoing discussion constituting also the environment for the present study. However, it also draws attention to the need to make a decision to close the collection of new material in 2017 in order to be able to finalize the present research.

In order to better understand the issue of visibility of women as rights-holders in a refugee camp situation in general and with regard to the problem of domestic violence specifically, this study will give geographic emphasis to experiences from a local protracted refugee context in Africa, especially Kenya and to some extent also Ethiopia, where refugees from Somalia and Eritrea have been staying for a long time, as mentioned in the Introduction. However, it is to be underlined that this study does not intend to explore integration of international human rights obligations in legal orders of the hosting countries or to analyse legal cases that might have been handled in a local national court-system. Nor is it a study that will be able to make a detailed legal analysis of customary law practices of specific refugee communities, observed to form part of local refugee camp contexts.

These are all delimitations determined by a decision taken not to include a field study. Initially, there was an intention to include such a study for the purpose to gather material for the research. However, taking into consideration conditions for legally oriented research in African societies, to gather material on legal issues in a context determined also by an oral customary law tradition would have required a field study with support of an interpretative guidance, a person with knowledge of the local language and professional familiarity of customary law in general and legal traditions of

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42 da Costa, 2006; Gebreiyosus, 2013.
each refugee community specifically.\textsuperscript{43} For such a gathering of material it would also have been necessary to make very careful ethical considerations in order to meet the debate on ethical implications of research in refugee camp contexts in general and on sensitive topics in particular.\textsuperscript{44} This would have included a responsibility to present a research plan for approval according to criteria required for such a field study. Therefore, as a consequence of the decision, a closer legal study of normative systems present in a specific refugee camp and their specific influence on the issue of status of women in the area of domestic violence has not been possible to include in the scope of the present research.


However, to meet the interest for a study of factors that could contribute to a risk that women become invisible as rights-holder with regard to a local refugee camp context, other material will be included in the present research. This kind of material will be further described below in the presentation of the sources for the study. Here, it is to be underlined, as a delimitation, that some of these sources are integrated only with the aim to give an idea about the existence of oral customary law systems, and not with the intention to present a detailed knowledge of a specific operational legal system of a hosting country or of a system practiced by a refugee community in a refugee camp area.

2.3 Considerations in respect to the method

2.3.1 Give emphasis to the question

The present study focuses the issue of to what extent there is a risk that women do not become visible as rights-holders with regard to a protracted refugee camp situation. Even though the study is not conducted in the field of international refugee law, the discussion by Anna Schmidt regarding methodological issues caught my interest due to material included in the study. In her article ‘I know what you’re doing’, Reflexivity and Methods in Refugee studies, she discusses choices of methods with regard to the questions asked, the audience to be addressed and the environment in focus for a study.\textsuperscript{45} Her focus is the debate in refugee studies regarding methodological issues at the time of her article (2007) and the fact that refugee studies include several academic disciplines, e.g. Law, Political Science and Anthropology, each of them with its own methods.\textsuperscript{46}

She also refers to the interface between academia and policy-makers and the problems that have occurred in the communication due to such matters as discrepancy in expectations, problems with access to material and a critique stating that use of an academic language causes barriers instead of understanding.\textsuperscript{47} Her argumentation directs attention to a risk of refugee research to be identified primarily with specific policy positions.\textsuperscript{48} Therefore, she underlines the importance of giving space for debate regarding

\textsuperscript{45} Anna Schmidt, “I Know What You’re Doing”, Reflexivity and Methods in Refugee Studies” (2007) 26 Refugee Survey Quarterly 82
\textsuperscript{46} Ibid, p. 84.
\textsuperscript{47} Ibid, p. 87.
\textsuperscript{48} Ibid, p. 91.
questions asked in refugee studies and not only direct interest on how to respond.\footnote{Ibid, p. 97.}

Taking this observation of Anna Schmidt into consideration for the present study, the character of this study is rather one to be guided by an approach that gives space for the research question as such, with regard to the interest to deepen the understanding of the issues in focus, rather than to argue for a certain position on how to respond to the problems in a specific refugee camp context. With reference to this, the study has its roots in experiences from previous studies in international law and professional practice outside an academic structure.\footnote{Zetterqvist, 2008, pp. 7-9; Zetterqvist, 1990; Jenny Zetterqvist, ‘Implications of a Pluralistic Legal Context for Female Refugees in the Process of Return and Reintegration’ in J-M Enelo-Jansson, K Jezierska and B Gustavsson (ed), Altering Politics, Democracy from the Legal Educational and Social Perspectives (Örebro University 2010), pp. 136-137} It is a research that finds its point of departure in the context of international human rights law and the discussion with regard to CEDAW, an international core human rights treaty that falls into the category of recognized sources of international law.\footnote{Hilary Charlesworth and Christine Chinkin, The boundaries of international law A feminist analysis, (Manchester University Press 2016) [Original work published 2000], pp. 62-65; Per Sevastik, ‘Informell modifikation av traktater till följd av ny sedvanerätt och praxis’, (Norstedts Juridik AB Stockholm 2002), pp. 20-21, 83-84; Maria Eriksson, ‘Defining Rape: Emerging Obligations for States under International Law?’ (Örebro universitet 2010) pp. 26-27. All three authors discuss the sources of international law with regard to art. 38 (1) of the Statute of the International Court of Justice (ICJ), which includes treaties.}

However, due to the delimitations decided for the study and my interest of not changing the initial research question, it has been necessary to consider how to shape the present study in the discipline of law. Here, a Nordic legal scholarly tradition, characterized by the method of analysing content of law from a position within the legal system itself and by using sources of law as the only material, would not respond to what is needed in order to be able to address my research interest.\footnote{Claes Sandgren, ‘On Empirical Legal Science’ (2000) 40 Scandinavian Stud. L. 445, pp. 473, 479.}

Therefore, taking the Swedish university context into account for the research project, the methodological perspectives as discussed by Claes Sandgren, Håkan Andersson and Eva-Maria Svensson find interest for the way

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\[49\] Ibid, p. 97.
\[51\] Hilary Charlesworth and Christine Chinkin, The boundaries of international law A feminist analysis, (Manchester University Press 2016) [Original work published 2000], pp. 62-65; Per Sevastik, ‘Informell modifikation av traktater till följd av ny sedvanerätt och praxis’, (Norstedts Juridik AB Stockholm 2002), pp. 20-21, 83-84; Maria Eriksson, ‘Defining Rape: Emerging Obligations for States under International Law?’ (Örebro universitet 2010) pp. 26-27. All three authors discuss the sources of international law with regard to art. 38 (1) of the Statute of the International Court of Justice (ICJ), which includes treaties.
forward in the research process. In various ways they all give attention to the interrelationship between the research process and the researcher in respect to the identification of the problem to be addressed and the sources of knowledge to be used for the study.

Claes Sandgren pays attention to the influence of the pre-understanding by the researcher regarding the area of research and the problems identified to be addressed. He describes the process of research that follows on this initial phase as a dynamic one, that might lead to reformulation of the research questions and reconsiderations of the methodological issues. Håkan Andersson communicates a view that the researcher should allow herself to find her own tune and even let her character as a person colour the process and the writing. Eva-Maria Svensson emphasises that it is the individual who is the one to process the knowledge and formulate the understanding to be communicated in the research. Irrespective of the sources of knowledge used, the process of carving out the understanding cannot be independent of her. With regard to the topic of research presented in her dissertation from 1997 and the need to find an appropriate methodological approach, she problematizes the practice of the legal scholarly tradition at that time. She identifies that it does not spend much space on methodological issues, due to a practice of focusing on the task to determine status of interpretation of law within the frame of already identified legitimate sources for research (e.g. legislation, court decisions).

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54 Sandgren, 2009, p. 89. Here he discusses a model for the research process and the first component refers to the pre-understanding of the researcher: “Undersöknin gen tar sin utgångspunkt i forskarens förförståelse av området liksom av förförståelsen av problem, tillgängligt material, kunskapsintresse o.s.v. (1).”

55 Ibid, pp. 88-89.


57 Svensson, 1997, p. 97. She argues in Swedish as follows regarding the process of creating knowledge: ”Och oavsett om kunskap nås genom förnuft eller erfarenhet är det i och genom människan, dvs. subjektet, som kunskapen förstas och formuleras.”

58 Svensson, 1997. The dissertation is written in Swedish and includes an abstract in English. The title is translated to Gender and law – a problemizing of the concept of law.

59 Ibid, pp. 30-33.
Eva-Maria Svensson argues that each research problem must determine the choice of methodology, and should not be restricted to the mainstream practice of a research discipline. To her, the guiding principle for the study was the research question, not the demarcations established by a practice of one discipline. Therefore, she permitted herself to search even beyond the established borders of the discipline of law to address the subject for her study. She argues for the importance to make use of tools from other disciplines, and not only from the discipline of law, in order to be able to address her research interest. In her reasoning, she explicitly takes the position to enter the research process by an approach that includes a kind of risk. However, to her, such a risk is not a legitimate excuse for not posing the questions and seeking for the answers.

In this regard, to be in a research process that includes a confrontation by uncertainty and in such a situation stay faithful to the research question, I can identify myself with what is communicated by Eva-Maria Svensson, even though her subject and field of research differs from the present one.

2.3.2 To use qualitative components in law to study the material

With reference to the purpose and research question identified for the present research, it is of interest to notice that Claes Sandgren discusses components shaping a legal scholarship in a way that also underpins the choice of the material for this study. He argues for the need to expand the scope of what kind of sources to be included and accepted as material within legal science. In his argumentation he gives emphasis to the fact that there are clear qualitative components in the methods of law, components that would open for including also empirical sources in a research process. However, what kind of material that falls into the category of empirical sources may differ depending on the purpose of the research project.

One example of including empirical material is discussed by Maja Janmyr in her dissertation 2012, Protecting Civilians in Refugee Camps, Issues of Responsibility and Lessons from Uganda. She refers both to

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60 Ibid, p. 33.
62 Ibid, pp. 36, 347.
64 Ibid, p. 21.
66 Sandgren, 2009, pp. 53-56.
Claes Sandgren and Eva-Maria Svensson in her argumentation for combining a legal positivistic methodology with the integration of empirical material in her research, collected through a field study.\textsuperscript{68} To her, the reason for using empirical material from such a study corresponds to the referred view of Sandgren, namely “to gain a good picture of ‘positive law in the factual sense’”.\textsuperscript{69} The discussion addresses the need to include sources that reflect the words of Sandgren to “pull reality into the analysis”.\textsuperscript{70}

This combination of methods to gather data for a legal analysis, I recognize from my Master of Law thesis in the end of 1980s, including a field study exactly for the same reason – to pull reality into the analysis,\textsuperscript{71} even though not practiced to the same degree as in the study presented by Janmyr. However, the way the field study in the 1980s de facto was conducted, indicates a practice reflecting what Claes Sandgren refers to as the qualitative components typical for the methods of law, components that he finds would open also for using empirical sources, other than legal sources: i) the qualitative emphasis in study of texts, ii) to show interest in details, iii) to systematize facts, and iv) to give emphasis to the understanding rather than to produce an explanation.\textsuperscript{72}

Even though the present research process does not integrate such a field study in the method, the qualitative components as referred to are of interest for the study of the material included in the present study. With regard to the material to be studied, I find the questioning by Sandgren of drawing a dividing line between legal sources on one hand and empirical sources

\textsuperscript{68} Ibid, p. 81.
\textsuperscript{69} Ibid, p. 82.
\textsuperscript{70} Sandgren, 2000, p. 474.
\textsuperscript{71} Zetterqvist, 1990. In this study certain rights of refugees as formulated in international refugee law were in focus. During a field study in Botswana data was collected through interviews with various actors (i.e. UNHCR, authorities, International NGOs and refugees) and legal documents not available in libraries of Sweden were studied.
\textsuperscript{72} Sandgren, 2009, pp. 53, 94-95, 101-106; Sandgren, 2000, p. 477. In a retrospective perspective, these four qualitative components of methods of law could be exemplified from the Master-study in terms of i) a detailed study of not only legal material but also other published material, ii) attention was directed to details in what was communicated through texts and in interviews iii) careful documentation of the interview-material during the visit and follow-up questions based on the material collected during the field visit iv) showing interest in the society context with regard to the legal issues in focus and securing time to cross-check information and interpretations of answers.
on the other to be of specific interest.\textsuperscript{73} He argues that how to categorize the material used for a study, also in the discipline of law, has to be determined by the purpose of the study and the research interest guiding the researcher.\textsuperscript{74} Therefore, he finds that in certain types of studies, also legal sources could fall into the category of empirical material.\textsuperscript{75} He suggests that this could be the case when the purpose of a study is not primarily to analyse law in order to ascertain the current legal interpretation of a legal concept or rule:

“If the primary purpose of using legal source material is not to analyze the content of positive law, then it is natural (in a scientific context) to regard this material also as empirical.” \textsuperscript{76}

This view on the use of legal sources in a study in the discipline of law is of specific relevance for the present one, as it reflects the way in which this kind of material will be drawn into the discussion in order to meet the purpose and the research question. Added to this, his reasoning regarding the possibility to integrate empirical studies by others as material is of interest. He argues that this would be possible even if the purposes for these empirical studies might differ from the purpose of the study for which they will become included as material.\textsuperscript{77} It is explicitly stated that this kind of sources could direct attention to problems that are of relevance for a study within the discipline of law.\textsuperscript{78}

Taking all this into consideration, the present study is to be performed as a study of various types of sources, a study of empirical material that includes examples of application of the qualitative components known from methods of law as has been described by Sandgren. This means for instance a detailed study of the argumentation in some academic articles, a few court cases, field studies by other researchers and guiding materials for practitioners. A reflective reading of this kind of material, shifting between studying details, including referring more extensively the argumentation of an author, and giving attention to a broader context, will guide in developing the understanding of the issues in focus for the research interest. To be noted, in order to come closer to an argumentation by an author or to underline a vocabulary used in certain sources, a choice has been to let

\textsuperscript{73} Sandgren, 2009, p. 449.
\textsuperscript{74} Sandgren, 2009, p. 19.
\textsuperscript{75} Ibid, p. 18.
\textsuperscript{76} Ibid, p. 449.
\textsuperscript{77} Ibid, p. 55.
\textsuperscript{78} Ibid.
these sources speak by using quotations instead of presenting the argumentation by reformulations.

The approach is not to verify a certain fact or interpretation of a specific legal instrument or paragraph of a legal instrument, or to elaborate a new terminology. Instead, a reflective reading of the collected material aims to pave the way in dealing with the purpose and addressing the research question. It is the combination of studying material from a more established international human rights system on the one hand and posing questions to material addressing a more specific local refugee camp context on the other that forms the dialogue in the research process. This way of studying the material aims to shape a deeper understanding of women as rights-holders and the context of the research question as reflected by studies of others.79

Again, considering the essay of Håkan Andersson, already referred to, this way of working resonates with my interest to see the present process of research as a process of being in a dialogue with the material for the study, in order to be able to adequately answer the research question.

### 2.3.3 Integrate various types of sources

With reference to the previous section, in order to be able to address the purpose and the question formulated for the present research, there is a need of entering into dialogue with various types of sources, not all of them legal. Due to the decision not to include a field study and thus gather material through interviews, the sources for the present study will be restricted to published material, such as sources of international human rights law, research, studies, reports and guiding materials for work in refugee camps.

It is to be noted that, for language reasons, focus has been given to sources published in English and attention has been directed to the kind of material that communicates knowledge, experiences and discussions regarding the status of women, the human rights problem of domestic vio-

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79 To be clarified is that this does not mean to aim for an application of dialogue as a method used by hermeneutics as outlined by Mats Alvesson and Kaj Sköldberg in *Reflexive Methodology, New Vistas for Qualitative Research*, (2nd edition SAGE 2009), pp. 100-101.
ence and the character of a complex legal context outside as well as in a protracted refugee camp situation.\textsuperscript{80}

Some of the sources will be used more for orientation purposes with regard to the research interest, while others will be given attention through an in-depth study, in order to meet the interest to sharpen the understanding of an issue. The material integrated in the present study will be further introduced below.

2.3.3.1 Material from the context of international human rights law
In the field of international human rights law, a study of the issue of domestic violence with regard to women as rights-holders, outside a refugee camp context, gives access to a variety of published legal sources as well as academic legal research for reading. Violence against women as a human rights problem has been addressed within the context of international declarations and human rights conventions\textsuperscript{81}, in academic discussion \textsuperscript{82} and

\textsuperscript{80} Some specified searches have been done by the assistance of librarians specialized on databases for IHRL, international refugee law (IRL), and gender and African research sources, e.g. Dag Hammarskjöld Library and the Nordic Institute of African Studies in Uppsala. The selection of sources has been determined by results from a shifting combination of keywords at different stages of the research process and by abstracts of articles that have aroused interest to a closer study. The difficulties in finding sources representing academic legal research focusing legal matters regarding female refugees in refugee camps, their status as rights-holders and capacity to act in the intersection between customary law and international human rights law have been noticed several times up to 2014. In July 2017 the same indications came from the search services in databases as Heinonline, Westlaw, Human Rights Library and also from other types of databases, such as Web of Science.

dissertations\textsuperscript{83}, through positions of experts holding the international mandate as the Special Rapporteur on violence against women, its causes and consequences\textsuperscript{84}, reports by UN Women\textsuperscript{85}, and in interpretations elaborated on by regional and international monitoring mechanisms regarding the obligations of states to prevent violations and to promote and protect


\textsuperscript{83} Kouvo, 2004, pp. 239-244; Eriksson, 2010; Edwards, 2013. In the Acknowledgements it is stated that the book is a revised version of her doctoral thesis submitted in 2008.


human rights. The sources referred to here by the footnotes, are also included as material in the present study. Attention is primarily directed to the sources discussing the topic in the context of the international human rights treaty the CEDAW, including the work of the treaty-committee of the convention and its adoption of the General Recommendation No. 19 on gender-based violence against women and the recently updated version adopted as the General Recommendation No. 35.

Given the interest to address the research question in the context of CEDAW, there will be perspectives added to the present study reflecting research of scholars referring to a feminist critical view. However, it needs to be underlined that it has not been part of the method to systematically search for this kind of sources or to study the research question by applying a feminist legal academic discourse. This is not to be interpreted as a position taken against such kind of a methodology, but rather an adaptation to factual conditions and limitations in developing such an approach for the present study. Therefore, when these sources are included here, it is not with the intention of representing a specific discourse used for analysis of the material, but due to the fact that they reflect concrete results from different searches in databases focusing on discussions regarding the status

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86 For the wide range of cases discussing specifically the issue of violence against women, I refer to the academic work in previous footnotes, e.g. the research by Maria Eriksson, Alice Edwards and Athena Nguyen, that gives details on documentation and casenumbers. I also refer to the CEDAW Committee, General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, art. 5, footnotes 7 and 8, listing the cases handled by the CEDAW Committee, retrieved 26 July 2017 http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_35_8267_E.pdf.

of women and because these sources add interesting perspectives to the topic for the present research. 88

One such example is the critical study of Dianne Otto of the vocabulary of four thematic resolutions by the UN Security Council and the views on women that they communicate; The Exile of Inclusion: Reflections on Gender Issues in International Law over the last Decade and Power and Danger: Feminist Engagement with International Law Through the UN Security Council. 89 Another example is the work of Alice Edwards, e.g. Violence against Women under International Human Rights Law, which gives emphasis to the jurisprudence of international human rights with respect to violence against women.90 A third example of sources is the article by Rhonda Copelon, International Human Rights Dimensions of Intimate Violence: Another Strand in the Dialectic of Feminist Lawmaking, where she gives her summary of the international discussion until the date of her article and underlines that violence against women was recognized as a human rights issue and included in the Vienna Declaration of 1993.91 Added to these three sources is also a latter one by Athena Nguyen, Through the Eyes of Women? The Jurisprudence of the CEDAW Committee, which gives specific attention to interpretation of the treaty as developed over a period of a decade, within the procedure of the Optional Protocol to

88 To clarify here is that the selection of sources has been determined by a shifting set-up of keywords at different stages of the research process and abstracts of articles have directed interest to a closer study. To be commented is that some specified keyword-searches have been done together with assistance of librarians specialized on databases for international human rights law, international refugee law, gender and African research sources, e.g. Dag Hammarskjöld Library and the Nordic Institute of African Studies in Uppsala. The difficulties in finding sources representing academic legal research focusing legal matters regarding female refugees in refugee camps have been observed several times.


90 Edwards, 2013. Her preface gives a background to the work and position it in the feminist theoretical context.

CEDAW. She argues in her conclusion that the views presented by the Committee “have been invaluable for advancing women’s human rights”.

Within the frame of international human rights and in line with the argumentation of Claes Sandgren regarding the qualitative methodological components of law and the value of developing an argumentation based on a specific court case, the present research will give extra attention to two cases from two different continents, namely the cases Maria Da Penha Maia Fernandes v. Brazil (Latin-America) and Opuz v. Turkey (Europe) both reflecting national practices in conflict with human rights, though in different legal settings. The two cases chosen deal with a situation of domestic violence and are handled by the regional human rights monitoring institutions, the Inter-American Commission on Human Rights and the European Court of Human Rights respectively.

The cases have been discussed in academic literature, as for example by Lee Hasselbacher, Monica Hakimi and Benedetta Faedi Duramy. The case Opuz v. Turkey has also been referred to in 2017 by the CEDAW Committee in the General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19 and the case of Maria Da Penha Maia Fernandes v. Brazil has been referred to in the case of Opuz v. Turkey as well as by UN Women in the report 2011-2012 Progress of World’s Women, In Pursuit of Justice.

92 Nguyen, 2014.
93 Ibid (her very last sentence).
94 Sandgren, 2009, pp. 94-95; Maria Da Penha Maia Fernandes v. Brazil, Case 12.051, Report No. 54/01, 16 April 2001; Opuz v. Turkey, (Application No. 33401/02) Judgement 9 June 2009
However, it has to be underlined here that the present study is not aiming to put these two cases into a study of previous practice of the two regional human rights monitoring institutions. They are included here solely as examples of women acting as rights-holders in the context of an international human rights instrument and the role that the independent monitoring mechanisms have taken to make structural issues visible with regard to protection of human rights of women. Even though none of the women are refugees in a refugee camp context, their cases are of interest as examples of public visibility of the narratives of women and their experiences of domestic violence in international monitoring mechanisms.

The case of Opuz is also considered as a source for the present study with regard to the context of CEDAW and the work of the CEDAW Committee, due to the references made both to the Special Rapporteur on violence against women, its causes and consequences, and the CEDAW Committee in the reasoning of the judgement of ECtHR regarding gender discrimination and domestic violence.\(^\text{97}\)

2.3.3.2 Material addressing conditions for women in a local context

When it then comes to study the issue of women as right-holders with regard to what a local customary context could imply for women restricted to live in refugee camps, sources stem from a combination of three kinds of material, namely i) guiding material written for an operational refugee camp context irrespective of geography, ii) research discussing what characterize practices of traditional customary law systems in African societies outside a refugee camp setting and iii) various types of reports and studies focusing the situation in specific refugee camps.

Firstly, examples on guiding material addressing an operational refugee camp context that will be studied more in detail, is the UNHCR Handbook for the Protection of Women and Girls from 2008 and the Conclusion of Women and Girls at Risk, No. 105 (LVII), adopted in 2006 by the UNHCR Executive Committee.\(^\text{98}\) The Handbook gives emphasis to the situation of female refugees with regard to human rights at risk and protection practices in different phases of the displacement, also in a protracted refugee camp setting. The purpose of the Handbook is to guide UNHCR


staff in their responsibilities with regard to women and girls.\textsuperscript{99} Of special interest are the sections of the Handbook that deal with the problem of domestic violence and the issue of traditional justice mechanism with regard to human rights of women.\textsuperscript{100} A \textit{Companion Guide} from 2010 developed for training purposes in relation to the Handbook, is added as a source of information for a closer study.\textsuperscript{101} Attention will also be directed to sources that form part of a material developed to address gender-based violence, \textit{GBV Resource Tool: Establishing GBV Standard Operating Procedures (SOP Guide)} adopted in 2008 by an international humanitarian network of organizations directly operational in humanitarian situations.\textsuperscript{102} With guidance of this general tool, a SOP can be developed for each refugee context. For the present study, such a material has been found both for an urban refugee situation and a camp context in Kenya. Even though practice may change over time, attention will be given to the document found for the Kakuma refugee camp from 2007, as it gives an idea of a presence of traditional mechanisms. The document has been developed in

\begin{footnotes}
\footnotetext{100}{UNHCR Handbook for the Protection of Women and Girls, 2008, chapter 3-5.}
\footnotetext{101}{UNHCR, \textit{Companion Guide for the UNHCR Film Series for the Protection of Women and Girls}, June 2010, One copy of the booklet and the DVD in the possession of the researcher, also available at: http://www.refworld.org/docid/4c2af0462.html [accessed 5 July 2018]}
\end{footnotes}
collaboration with the organizations present in the refugee camp, and UNHCR has taken the lead in the process.\footnote{103}{UN High Commissioner for Refugees (UNHCR), Community Services, UNHCR Kakuma, \textit{Standard Operating Procedures for Prevention of and response to SGBV}, Kakuma Refugee Camp, Kenya, 2\textsuperscript{nd} revision November 2007 (SGBV SOP 2007). [Hereinafter referred to in footnotes as UN High Commissioner for Refugees (UNHCR), Community Services, UNHCR Kakuma, SGBV SOP 2007] This document was found through Google 19 August 2013 as a pdf. It is available with the author. (An updated 3\textsuperscript{rd} version from November 2011 has been shared with the author in contact with UNHCR. However, this version has not been found via Google or the UNHCR refworld. The section regarding traditional dispute mechanisms and the content in annex Terms of Reference for Traditional Arbitration Mechanisms correspond with the version from 2011, except for a smaller amendment in the latter one.) The version from 2007 was found again as a Word-document via Google and accessed 22 February 2019 via the search tool at the website of The Task Force on Protection from Sexual Exploitation and Abuse, a venue for collaboration among IASC members (UN, NGO, IOM and IFRC), \url{www.pseataskforce.org} . The long weblink, a result of the search, has here been made accessible by the following hyperlink \url{SOP Kakuma} . The Word document is accessed via a click on the title, \textit{Standard Operating Procedures for Prevention of and Response to SGBV in Kakuma Refugee Camp, Kenya}. Even though the title includes the year 2011, the document found is dated 2007.}

Secondly, the issue of traditional justice mechanisms is identified as an area for activities in the UNHCR Handbook. Referring to the geographical focus chosen for the present study, in order to achieve a brief orientation of components in the practice of customary law in African societies, South Sahara, the academic writings of Susan H Williams, \textit{Women and judging: A feminist approach to judging and the issue of customary law} and of Fareda Banda, \textit{Women, Law and Human Rights, An African Perspective} are included for a closer study.\footnote{104}{Williams, 2013; Banda, 2005.} Susan Williams refers to research in various countries and discusses the impact of the existence of customary law systems and their impact on the status and rights of women.\footnote{105}{Williams, 2013.} Fareda Banda gives a detailed attention to family law issues and the implications of a diversity of legal systems existing in the same country, specifically on the status of women.\footnote{106}{Banda, 2005, chapter 4.}

Added to this is also literature regarding a famous court case in Botswana from the beginning of the 1990s, initiated by the lawyer Unity Dow.\footnote{107}{Unity Dow, \textit{How the global informs the local: the Botswana citizenship case}, Health Care for Women International, 22: 319-331, 2001.} In this case it was argued that female citizens were discriminated against...
compared to male citizens by the statutory law on transferring citizenship to children and that therefore the law was not in accordance with the constitution of the country and international human rights. However, it is not the reasoning of the judgement per se that is in focus for a closer study, but rather the argumentation by Unity Dow and scholars about the legal context that informs the debate with regard to her case.\textsuperscript{108} One group criticizing her argumentation was the one formed by traditional leaders heading the customary law system in the villages.\textsuperscript{109}

To be noted is that Fareda Banda discusses the case of Unity Dow in the context of international and regional human rights treaties and the same case is also referred to by UN Women, the UN organization for gender equality, in the global report, \textit{Progress of World’s Women, In Pursuit of Justice}, as one of the “Groundbreaking Legal Cases that have Changed Women’s Lives”.\textsuperscript{110} Thereafter, the case has been discussed in the book \textit{Gender and Judiciary in Africa, From Obscurity to Parity}?\textsuperscript{111}

To be able to transfer this introductory brief of a customary law tradition into what might be of relevance in order to reach an understanding of what could shape a specific refugee community context, there are two more sources to be mentioned here. Both of them are included for the discussion of a traditional customary law context in Somalia around 2010-2011, a country from where the majority of refugees in Kenya originated at that time. The first one is the article \textit{Customary Dispute Resolution in Somalia} of Mahdi Abdile, discussing the customary dispute resolution mechanism called Xeer and giving specific attention to the practice of arbitration in contemporary Somalia.\textsuperscript{112} The second one is the report of the Special Rapporteur on violence against women, its causes and consequenc-


\textsuperscript{109} Dow, 2001, p. 327.


This report did not have the aim of being academic research, but to monitor the situation with regard to violence against women, including domestic violence, under the thematic UN mandate as Special Rapporteur. The report identifies a situation where rights are at risk for both women and girls.

Thirdly, the various types of reports and studies focusing the situation in specific refugee camps in general, and for women specifically, form part of previous research in the academic field, as well as of studies by consultants to UNHCR and information material published by UNHCR or international non-governmental organizations (INGOs), e.g. UNHCR, Kenya Comprehensive Refugee Programme 2015 and 2016. To be noticed is that some of the organizations referred to as a source of information in the present study are involved on a daily basis in the operational refugee camp work as implementing partners to UNHCR, responsible for certain agreed matters, e.g. protection issues or education. One of them is the Lutheran World Federation/Department for World Service (LWF/DWS), another is Save the Children and a third one is the Jesuit Refugee Service (JRS), all

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present on professional mandate for several years in the refugee camps in Kenya but also in other parts of the world.\textsuperscript{115}

For the purpose of the present research, a few studies made by consultants to UNHCR or in cooperation between a research institute and UNHCR or within the frame of the research paper series of UNHCR will be given a more detailed attention. To mention a few, we find here *The Administration of Justice in Refugee Camps: A Study of Practice* by Rosa da Costa, *Safe Haven, Sheltering Displaced Persons from Sexual and Gender-Based Violence, Case Stud: Kenya* by Rebecca Horn and Kim Thuy Seelinger, *A Surrogate State? The Role of UNHCR in protracted refugee situations* by Jeff Crisp and Amy Slaughter.\textsuperscript{116}

Rosa da Costa discusses the issue of administration of justice in refugee camps in general and with regard to sexual and gender-based violence (SGBV) specifically.\textsuperscript{117} Her study aimed to introduce the topic, with the intention that this would lead to further studies that may follow up the


\textsuperscript{117} da Costa, 2006. The report was based on a questionnaire that is attached to the report. One of the 13 countries selected for the questionnaire was Kenya with two refugee camps.
results and observations presented by her.118 Through her study, she identified a complex legal context and a problem of practices “in contravention of international human rights standards”.119 Part of the problem was the presence of a variety of justice mechanisms, a challenge she described in terms of “the complex interface of local, national, international and refugee-specific values and justice (i.e. DRS) mechanisms”.120

To be mentioned in this context is also the assessment Specification Needs of Women and Children in Dadaab Refugee Camp by Refugee Consortium of Kenya in partnership with UNIFEM.121 This report presents findings regarding traditional justice mechanisms within the Xeer-practice, discussed in the research by Mahdi Abdile mentioned above.122

2.3.3.3 Material from previous academic studies with regard to legal matters in refugee camps

Previous academic research focusing the presence of violence against women in refugee camps appears to have been a repeated item for empirical studies where data collection has taken place through field studies. These studies have touched upon gaps in structures to address the problem of protection of human rights of women, even though not specifically from a strictly legal point of view. Sources for the present study are for instance the articles Between a protracted and a crises situation: Policy responses to Somali refugees in Kenya of Anna Lindley, Who Am I? Identity and citizenship in Kakuma refugee camp in northern Kenya by Linda Bartolomei, Eileen Pittaway, and Emma Elisabeth Pittaway, Coping Strategies of Sudanese Refugee Women in Kakuma Refugee Camp, Kenya by Jessica Gladden

118 Ibid, p. 3.

The difficulties caused by presence of a complex legal context in refugee camps to address the problem of violence against women as identified by the study of Rosa da Costa, seems to have been less in focus for legally oriented academic studies after the publication of her study in 2006. However, from 2011 some studies of interest for the present research have been published. To be noted, a few of them give more attention to the discussion of responsibility of the hosting state and UNHCR in an operational humanitarian context, while others give more of specific attention to the view of refugees regarding the status of the legal situation in the camps, the issue of the status of women in a refugee camp context and the different forms of violence against women. They have been studied either as sources to determine the focus for the present study and its delimitations or in various degrees as sources for analysis in the chapters to come. Below follows a brief presentation of these studies.

Anna Lise Purkey discusses legal matters with regard to a protracted refugee situation in three articles of which the first one, Whose Right to What Justice? The Administration of Justice in Refugee Camps, builds on the study of Rosa da Costa, and the other two follow up on the topic, A

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Dignified Approach: Legal Empowerment and Justice for Human Rights Violations in Protracted Refugee Situations and Questioning Governance in Protracted Refugee Situations: The Fiduciary Nature of the State-Refugee Relationship.\footnote{126} Purkey confirms that sexual and gender-based violence “typifies many of the most problematic aspects of the administration of justice”\footnote{127} and that there are weaknesses in the capacity of justice systems to respond in accordance with international standards due to limitations in both “legal and practical knowledge and skills”\footnote{128}.

Another research is the dissertation of Maja Janmyr, Protecting Civilians in Refugee Camps, Issues of Responsibility and Lessons from Uganda.\footnote{129} She discusses the issue of responsibility for human rights violations in refugee camps and gives attention to the issue of physical protection of both refugees and internally displaced persons in a context characterized by insecurity due to military activities.\footnote{130} While Purkey focuses her discussion on the role and responsibility of the hosting state and how to increase access to the legal system for refugees in a camp context, Janmyr directs attention to the question to what extent other actors than the host state can have duties with regard to human rights, e.g. UNHCR.\footnote{131}

In her article What Happens to Law in a Refugee Camp?, Elizabeth Holzer presents a slightly different approach to the topic of refugees and their relationship to the hosting state and legal systems as practiced in a refugee camp setting.\footnote{132} She discusses in detail the issue of refugees as “international legal subjects”\footnote{133} in a refugee camp context and how they by action show a kind of empowerment. Based on her field work for 15 months in Ghana, including ethnographic research in Buduburam refugee

\begin{footnotes}
\footnote[127]{Purkey, 2011, p. 134.}
\footnote[128]{Ibid, p. 136. See her reference to UNHCR in footnote 105.}
\footnote[129]{Janmyr, 2012.}
\footnote[130]{Ibid, abstract.}
\footnote[131]{Ibid, abstract and chapter 5-6.}
\footnote[132]{Holzer, 2013.}
\footnote[133]{Ibid, p. 837.}
\end{footnotes}
camp for the period 2006-2011, she explores the relationship to law as it surfaced in the development of a legal subjectivity of people.\textsuperscript{134} The importance of taking the experiences of the refugees and the conditions in a specific refugee camp context into account is illustrated also by the study of Yonas Gebreiyosus, \textit{Women in African Refugee Camps, Gender Based Violence against Female Refugees: The case of Mai Ayni Refugee Camp, Northern Ethiopia}.\textsuperscript{135} He directs a detailed attention to the problem of gender-based violence against female refugees.\textsuperscript{136} The study identified an environment in the camp shaped by the lack of documented data, a lack of trust in courts to actually handle cases of gender-based violence and a practice amongst the refugee community to discourage female refugees from taking cases to the legal institutions.\textsuperscript{137} Added to this is also the information that a traditional system was practiced by the refugee community to handle situations of gender based violence.\textsuperscript{138}

Two final examples of academic studies of interest for the present study from previous research are the article \textit{Displacing Equality? Women’s participation and humanitarian aid effectiveness in refugee camps} by Elisabeth Olivius, presented in PhD-studies within the discipline of Political Science and Gender Studies and the research paper \textit{Women refugees and sexual violence in Kakuma Camp, Kenya, Invisible rights, justice, protracted protection and human insecurity}, presented by Claire Waithira Mwangi for a degree of Masters of Arts in Development Studies.\textsuperscript{139}

In the research paper of Claire Waithira Mwangi, a field study in Kakuma refugee Camp, Kenya, is presented with focus on the presence of sexual violence and existing institutional structures and practices to address the problem. Her research directs attention to the situation of women from Somali refugee communities and discusses traditional dispute practices.\textsuperscript{140} In the work by Elisabeth Olivius, methods used in an operational humanitarian context are problematized in a way which is of interest for the issue of the status of women as right-holders. She directs her attention to a humanitarian practice that approaches women as instrumental for reaching certain goals in assistance, rather than giving primary attention to

\textsuperscript{134} Ibid, p. 849.
\textsuperscript{135} Gebreiyosus, 2013.
\textsuperscript{136} Ibid.
\textsuperscript{137} Ibid, pp. 37, 62-63.
\textsuperscript{138} Ibid, p. 64.
\textsuperscript{139} Olivius, 2014; Mwangi, 2012.
\textsuperscript{140} Mwangi, 2012, pp. 21-23.
unequal power relations due to gender and its consequences. Results from interviews in two refugee camps, one in Bangladesh and one in Thailand, indicate that gender equality is not present as a goal in its own right.\textsuperscript{141}

\textbf{2.4 Disposition}

The present work is divided into three parts (I-III). As seen above, Part I forms the introductory part and consists of two chapters (chapter 1-2). The first chapter sets the context of the study and introduces in brief the reader to the problem of interest for the research. The second chapter starts with presenting the purpose and the research question in focus for the study. Thereafter the decisions on delimitations are addressed. Attention is directed to the context of international human rights law and the issue of status of rights-holders with regard to women in exile, especially in the context of the CEDAW-convention, and the international mandate of the Special Rapporteur on Violence against Women, its causes and consequences. In the section that follows, the methodological considerations are described with regard to the choices of approach made for the study and sources selected to be able to meet the research interest. A brief presentation of the various types of material integrated in the study and the reasons for the choices are included, e.g. for a more detailed study of an argumentation or for a complementary perspective on the issue discussed. Finally, the last part is the present one presenting the structure of the study.

Part II is the one where the issues of interest for the present research are studied and discussed. This part is divided into four chapters: (chapter 3-6).

\textit{Chapter 3 Women as rights-holders in the context of international human rights:} In this chapter the development of the visibility of women as rights-holders with regard to the discussion on domestic violence as a human rights issue is studied. The theme of violence against women as reflected in the international debate is introduced in the context of CEDAW and by some examples of academic critical discussions regarding the development of the interpretation of human rights and the status of women as rights-holders. As mentioned in the section above regarding sources for the present research, this chapter will add attention to two cases discussing domestic violence against women in two different regional human rights monitoring mechanisms. The emphasis is directed to the recognition of women to be visible as rights-holders and to be able to communicate narra-

\textsuperscript{141} Olivius, 2014, pp. 99, 117.
tives that disclose facts on the ground when human rights are at risk or already have been violated.

Chapter 4: International human rights with regard to women in the context of UNHCR: With regard to the discussion in the field of international human rights law and the issue of domestic violence, this chapter will investigate the visibility of women as rights-holders in certain guiding material developed for a refugee camp situation. Attention is therefore directed to a discussion regarding the context of human rights in the work of UNHCR, the development of the mandate of UNHCR in the area of violence against women in refugee camps, and the understanding of female refugees as rights-holders.

Of specific interest for the discussion in this chapter are various policies and guidelines for an operational setting in refugee camps with focus on the problem of gender-based violence against women. Here, as mentioned above in the sections on sources, the UNHCR Handbook for the Protection of Women and Girls from 2008 will be given focus for a closer study and so also the issue of legal systems, traditional systems included, that are considered to be a risk factor in regard to human rights of women.142

Chapter 5: Aspects of local customary law tradition and the issue of visibility of women: To pave the way to the study of a specific refugee camp context, this chapter aims to bridge what has been studied in chapter 3-4 to what will be focused in chapter 6. In order to better understand what can inform the kind of complex legal structure that Rosa da Costa referred to in her study Administration of Justice of 2006 in Refugee Camps, this chapter will give attention to the presence of customary law tradition in African communities and the issue of the role of traditional justice mechanisms.143

The chapter will give a brief introduction to some of the components that shape a customary law tradition practiced in African societies, South Sahara. Aspects that are of special interest for approaching human rights issues in a refugee camp context and the issue of female refugees as rights-holders will be discussed, specifically with regard to the issue of legal status and capacity to address situations of domestic violence.

Chapter 6: Women as rights-holders with regard to the context of a local refugee camp: With reference to the discussion in the context of international human rights law regarding the human rights of women and the

knowledge about the presence of customary law practice in African local societies, this chapter will focus on a specific refugee camp context in East Africa, to get an idea of what the reality could be on the ground for female refugees. The intention is to sharpen the awareness of the conditions present in a camp area characterized by a protracted refugee situation.

Part III consists of the final chapter, Chapter 7: Concluding discussion: To be visible as a rights-holder – an issue of having the right to act locally and beyond borders. Guided by the purpose for the research and the question posed in chapter 2, this chapter will summarize the study, discuss what has been reflected through the material studied and conclude what is crucial for future legal studies with regard to the issue of visibility of women as rights-holders in protracted refugee camp situations and their capacity to act on human rights problems.
Part II
Chapter 3. Women as rights-holders in the context of international human rights

“In order for the female subject to be fully recognised, international women’s rights have to be developed further so as to make women ever stronger claimants and right-holders.”144

3.1 Introduction
In this chapter the development of the visibility of women as rights-holders is studied. This is done by focusing the discussion on violence against women as a human rights issue, in particular the problem of domestic violence. The theme of violence against women as reflected in the international debate is introduced in the context of CEDAW, including the work of the CEDAW Committee, and by some examples of academic critical discussions regarding the interpretation of human rights and the status of women as rights-holders. Attention is here directed to the topic in the broader context of UN as well as with regard to the presence of narratives of women in international and regional human rights monitoring mechanisms. This includes a study of the two cases Maria Da Penha Maia Fernandes v. Brazil (Latin-America) and Opuz v. Turkey (Europe) that have reached global interest due to severe domestic violence and the considerations made by the human rights mechanisms.145 Of specific interest for this research is that these two cases are examples of visibility of women in an institutional human rights structure and how they, through their narratives, are able to disclose not only the violence per se, but also its causes and consequences. To be noted such an institutional visibility has an influence on what actually will become publicly known and discussed at regional and global levels in human rights debate and in academia, also with regard to what measures are needed for preventing violence of women to occur and impunity to prevail.

145 Sandgren, 2009, pp. 94-95; Maria Da Penha Maia Fernandes v. Brazil, Case 12.051, Report No. 54/01, 16 April 2001; Opuz v. Turkey, (Application No. 33401/02) Judgement 9 June 2009
3.2 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and Violence against Women

In 1979, the UN General Assembly adopted the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). It entered into force in 1981 and was the fourth legally binding international human rights treaty that came into existence after the adoption in 1948 of the Universal Declaration of Human Rights (UDHR). The purpose was to reaffirm the human right of women not to be discriminated against due to sex and to underline the need for measures to be taken to address the causes of inequality in enjoyment of civil and political rights, as well as economic, social and cultural rights. These are all categories of human rights to be found in the three human rights instruments forming the Bill of Rights - the UDHR, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) - preceding the adoption of CEDAW.

For monitoring implementation of CEDAW, a Treaty-body - the CEDAW Committee was established in order to regularly consider the reports of states parties on their compliance with the human rights obligations. The Committee was also mandated by the Convention to set its own rules of procedure, to make general recommendations based on the

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knowledge and experiences drawn from the monitoring process and to annually report to the UN General Assembly on its activities.  

During the period of nearly 40 years as a Treaty-body, the CEDAW Committee has used this mandate to adopt 36 General recommendations to elaborate on certain themes of human rights, e.g. violence against women, or directed attention to the human rights situation of specific groups of women, e.g. older women or women in displacement. The adopted recommendations give interpretative guidance to the Committee in exercising its monitoring mandate of the human rights obligations of states parties, either in the regular reporting process under the treaty or in the procedure under the Optional Protocol. This is a practice corresponding to what has been developed also by treaty bodies of other international human rights conventions. Even though this kind of interpretative guidance does not have the character of a legally binding interpretation at the time of adoption, they are referred to by other actors in the field of international human rights. In the present research, we will see examples on this from the regional human rights system of Europe as well as from the work of UNCHR.

Since CEDAW was adopted in 1979, it has in November 2017 reached the number of 189 States Parties while the Optional Protocol to the Con-

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vention, adopted 20 years later (1999), has 109 State Parties.\textsuperscript{156} The Optional Protocol extended the monitoring mandate of the CEDAW Committee from focusing submitted state reports on implementation of human rights obligations, to open for rights-holders individually or represented by for example an NGO to communicate violations of rights directly to the Committee.\textsuperscript{157} However, in order to have the communication examined by the Committee, the rights-holder first has to exhaust all remedies available within the jurisdiction of the State party to the Optional Protocol.\textsuperscript{158} It is to be noted that in the regular treaty-monitoring process of submitted reports of state parties to the convention, this kind of legal condition is not required for an NGO in order to present its views on gaps in the protection of human rights of women through a so called alternative report to the CEDAW Committee.\textsuperscript{159} This is an opportunity for NGOs, encouraged by the CEDAW Committee, that has developed into an established practice combined with presence of NGOs in the public hearings of states parties.\textsuperscript{160}

\begin{footnotesize}
\begin{enumerate}
\item[156] Rebecca J. Cook and Simone Cusak, ‘Combating Discrimination Based on Sex and Gender’ in C. Krause and M. Scheinin (ed), \textit{International Protection of Human Rights: A Textbook} (Åbo Akademi University, Institute for Human Rights 2009), p. 205; For the status of ratification, see UN Human Rights Office of the High Commissioner, \textbf{STATUS OF RATIFICATION INTERACTIVE DASHBOARD}, retrieved 8 July 2018
\url{http://indicators.ohchr.org/}
\url{http://www.refworld.org/docid/3b00f29a24.html} [accessed 19 June 2018].
\url{http://www.refworld.org/docid/3b00f29a24.html} [accessed 19 June 2018]
\item[159] Edwards, 2013, pp. 108-110; For information regarding the reporting cycle and the entry points for NGOs, see UN Office of the High Commissioner for Human Rights (OHCHR), \textit{Fact Sheet No. 30, The United Nations Human Rights Treaty System: An introduction to the core human rights treaties and the treaty bodies}, June 2005, No. 30, p. 20, available at:
\url{http://www.refworld.org/docid/479477490.html} [accessed 8 November 2017]
\item[160] Committe on Elimination of Discrimination Against Women, ‘Statement by the Committee on the Elimination of Discrimination against Women on Its Relationship with Non-Governmental Organizations’, 45th Session, 18 Jan - 5 Febr 2010, par. 7 and 10, retrieved 21 June 2018
\url{https://www.ohchr.org/Documents/HRBodies/CEDAW/Statements/NGO.pdf}
\end{enumerate}
\end{footnotesize}
The adoption of CEDAW in 1979, legally binding states to eliminate the causes to discrimination of women, took place at the time of the UN Decade for Women (1976-1985) and was a continuation of a process for change that had been initiated with the Declaration on the Elimination of Discrimination against Women (DEDAW) from 1967. In the preamble to this Declaration, the General Assembly expressed its concern that “there continues to exist considerable discrimination against women”. An intention for change is reflected in the final paragraph that urges not only States but also others to promote implementation of the Declaration:

“Governments, non-governmental organizations and individuals are urged, therefore, to do all in their power to promote the implementation of the principles contained in this Declaration.”

The adoption of a core convention on human rights addressing specifically women as rights-holders, sprung out from experiences and observations that human rights issues with regard to women had not received substantial attention and adequate recognition in the application of existing international human rights instruments. At the time of adoption of CEDAW, the emphasis regarding the right to non-discrimination had been directed to a more formal obligation of states not to discriminate women compared to men, rather than giving attention to whether the right to non-discrimination also contributed to a substantive equality in practice for women.

To meet what has been referred to as “marginalization of women” in international human rights law, both DEDAW from 1967 and CEDAW from 1979 elaborated on the international understanding of discrimination of women with regard to human rights, gave attention to structural causes of inequality and addressed measures that might be needed to enhance the enjoyment of human rights. Rebecca Cook has characterized CEDAW in

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163 Ibid, article 11:2.


165 Otto, 2010b, pp. 346, 349.


terms of a human rights instrument that “moves from a sex-neutral norm […], to a norm that acknowledges that the particular nature of discrimination against women is worthy of a legal response.”¹⁶⁸ However, there is also an argumentation by Hilary Charlesworth and Christine Chinkin that has problematized the choice of creating special women human rights instruments, as CEDAW. From their point of view, as presented in 2000, it rather contained a risk of women’s rights to be marginalized and not to be addressed by what they referred to as the “‘Mainstream’ human rights institutions”¹⁶⁹, including for instance the Human Rights Committee. This risk is also underlined by Diane Otto, even although she also argues that CEDAW has increased the understanding of what measures that would be needed in order to reach a situation of equal enjoyment of human rights for women.¹⁷⁰ One example of this is the attention given by the CEDAW Committee to the problem of violence against women.

3.2.1 Violence against women

The problem of violence against women emerged in the global debate in the 1980s. Initially it was discussed more in terms of a social problem to be addressed as a health issue and a domestic law matter from a criminal law-perspective, rather than as an issue for human rights institutions.¹⁷¹ However, the distinction made in international law between a private and a public sphere with respect to state obligations and its implications for an integration of the experiences of women into the human rights law, was critically discussed by feminist scholars, especially as regards violence against women.¹⁷² Dianne Otto points to the fact that CEDAW as a specific human rights treaty focusing women as holders of rights, unfortunately failed to explicitly address violence against women and rights associated with security of the person.¹⁷³ This is a failure suggested to be a reflection

¹⁶⁹ Charlesworth and Chinkin, 2016, pp. 218.
¹⁷⁰ Otto, 2010b, p. 347.

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of the understanding by institutions at the time of the drafting process, when focus on security matters rather was directed to the situation for men.\textsuperscript{174}

However, in 1992 the CEDAW Committee used its interpretative mandate and adopted the General Recommendation no. 19 in order to address the invisibility of the issue of violence against women.\textsuperscript{175} This Recommendation clearly expresses the view of violence against women as a blocking factor for access to human rights: “Gender-based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men.”\textsuperscript{176} The Committee states that gender-based violence directed against women is included in the CEDAW-definition of discrimination:

“The Convention in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.”\textsuperscript{177}

\textsuperscript{174} Otto, 2010b, p. 355; Chinkin, 2012, p. 444.


Through this, the theme of violence against women was brought into the language of international human rights law, located within the context of CEDAW, and became an issue also for other institutions and processes mandated to discuss matters of human rights.\textsuperscript{178} The understanding of violence against women as expressed in the General recommendation opened not only for discussing family violence but also to address the problem of violence from a more holistic approach, irrespective of the site of occurrence.\textsuperscript{179}

Human rights identified by the Committee to be at risk due to gender-based violence are for instance “The right to life”\textsuperscript{180}, “The right to equal protection under the law”\textsuperscript{181}, “The right to equality in the family”\textsuperscript{182} and “The right to equal protection according to humanitarian norms in time of international or internal armed conflict”\textsuperscript{183}. The Recommendation no. 19 also identifies the risk to see women as subordinated to men due to traditional attitudes and how this impacts on such practices as “family violence”\textsuperscript{184} and “forced marriage”\textsuperscript{185}.

Alice Edwards argues that the adoption of the Recommendation No. 19 mirrored the increased interest since the mid-1980s within the UN system to discuss and find ways to combat violence against women.\textsuperscript{186} This is an interest also reflected by Rhonda Copelon in her article, \textit{International Human Rights Dimensions of Intimate Violence: Another Strand in the Dialectic of Feminist Lawmaking}, where she gives her summary of the international discussion.\textsuperscript{187} In this article she describes the World Conference on

\textsuperscript{179} Chinkin, 2012, p. 447.  
\textsuperscript{181} Ibid, para 7 (e).  
\textsuperscript{182} Ibid, para 7 (f).  
\textsuperscript{183} Ibid, para 7 (c).  
\textsuperscript{184} Ibid, para 11.  
\textsuperscript{185} Ibid, para 11.  
\textsuperscript{186} Edwards, 2008, p. 44.  
\textsuperscript{187} Copelon, 2003.
Human Rights arranged in Vienna in 1993 in terms of a “watershed”\(^{188}\) by referring to all the testimonies of gender-based violence and the recognition of violence against women as a human rights issue, reflected in the Vienna Declaration of 1993.\(^{189}\)

The General Assembly confirmed this process in December 1993, through the adoption of the Declaration on the Elimination of Violence against Women (DEVAW).\(^{190}\) In its preamble the General Assembly referred to the importance of implementation of CEDAW for an elimination of violence against women and stressed that the adoption of the Declaration aimed at contributing to and strengthening this process.\(^{191}\) To be noted is that the resolution as a statement adopted in consensus, even though not legally binding, is applicable to all the state members of UN and not only to the states parties to CEDAW.\(^{192}\)

A further example from the 1990s of the international commitment to work against violence against women was the decision by the UN Commission on Human rights in 1994 to appoint a Special Rapporteur on Violence against Women, its causes and consequences.\(^{193}\) The mandate incorporated an invitation to gather information on violence against women from various sources, including governments as well as treaty bodies and non-governmental organizations.\(^{194}\)


\(^{192}\) Chinkin, 2012, p. 448.


\(^{194}\) Ibid, para. 7 (a).
Since its establishment, this thematic mandate as Special Rapporteur has resulted in annual reports to the General Assembly, country mission reports documenting the status of violence against women in specific countries and a review of the first 15 years of the mandate. In the methodology for reporting on violence against women, the Special Rapporteur has clustered site of occurrence of violence and the various expressions of violence into three categories, based on DEDAW; Violence in the family (e.g. domestic violence, battering, religious/customary laws), violence in the community (e.g. rape and sexual harassment) and violence perpetrated or condoned by the State (e.g. gender-based violence during armed conflicts).

In a Commentary to the UN Convention on the Elimination of all forms of Discrimination Against Women, Christine Chinkin discusses the theme Violence against Women and presents the reflection that the Special Rapporteurs on Violence against Women have had the possibility to elaborate in detail on the issues included in the General Recommendation 19 of the CEDAW Committee. In comparison to the CEDAW Committee, the holder of the mandate as Special Rapporteur has been able to focus on the current status of the problem of violence in a specific country in its mission reports, while the CEDAW Committee is to address also other human rights issues in CEDAW in its concluding observations following the state reporting process. These kinds of comments indicate that the decisions

taken in the 1990s, within the frame of CEDAW Committee mandate as well as within the broader UN-context, expanded the scope to address the issue of violence against women within the context of international human rights law.

The review of the first 15 years directs attention to the discussion to give more emphasis to the root causes to the problem of violence against women and the need to shift focus from a “victimization oriented approach to one of empowerment.”\textsuperscript{199} It is argued that by applying a human rights perspective, a life free from violence is seen as an entitlement and not only as a humanitarian concern.\textsuperscript{200} This is a view reflected also in the argumentation of scholars combining an interest in international human rights with a feminist critical perspective.

3.2.2 Protect women or recognize their rights

In the context of critique of international human rights law, Rachel Johnstone underlines the importance of being aware of other strategies for achieving equality, while at the same time not refraining from the use of the language of rights.\textsuperscript{201} She sees the opportunity to develop the practice of human rights by analyzing the work of the treaty bodies and to do so also by contributing a perspective informed by feminist scholars.\textsuperscript{202}

In her article \textit{Violence Against Women as Sex Discrimination: Judging the Jurisprudence of United Nations Human Rights Treaty Bodies}, Alice Edwards explores the interpretation of the concepts of non-discrimination and equality as communicated by human rights treaty bodies with regard to violence against women and identifies that case-law is mixed.\textsuperscript{203} According to Edwards and other researchers, the formula created by the CEDAW Committee, “VAW=SD”\textsuperscript{204} (violence against women=sex discrimination), influenced other Treaty Bodies of Human Rights instruments, e.g. the HRC

\hspace{1cm} https://www.ohchr.org/Documents/Issues/Women/15YearReviewofVAWMandate.pdf

\textsuperscript{200} Ibid, p. 35.


\textsuperscript{202} Ibid, pp. 182-185.

\textsuperscript{203} Edwards, 2008, pp. 4, 42.

\textsuperscript{204} Ibid, p. 45.
and the CEDAW, to give attention to violence against women within their specific mandates of human rights monitoring.\textsuperscript{205}

One of the concerns refers to the applied understanding of “the concepts of sex discrimination and inequality”\textsuperscript{206} and what Edwards describes as “the sameness/difference ideology”\textsuperscript{207} reflected in the practice of Treaty Bodies that she had studied.\textsuperscript{208} This incorporates an understanding that inequality “is when women are not treated the same as men”.\textsuperscript{209} She argues that this leads to focus on “non-discrimination, rather than equality”\textsuperscript{210} and according to her, less attention will therefore be given to structural causes of inequality that form the context not only for the individual woman who might have brought a case to a Treaty Body, but also for the group of women in the community.\textsuperscript{211} Rebecca Cook addresses, in her article \textit{State Responsibility for Violations of Women’s Human Rights}, the consequence of the model for discussing discrimination based on sameness and difference.\textsuperscript{212} She argues that it is not giving space to investigate what has formed “the secondary status of women”\textsuperscript{213} and in which way this is a result of legal, cultural or religious structures.\textsuperscript{214}

To Edwards, the choice of words to describe an act of violence and its causes has an impact on the perceptions of how to respond. She identifies that violence against women that can’t be linked to sex discrimination, will not fall within the definition of CEDAW. She argues that “the rhetoric of inequality seems weaker than the language of violence.”\textsuperscript{215} To her, there is a stronger condemnation of violence in the society compared to discrimination against women and her reflection is worth taking note of: “There is something counterintuitive about calling violent conduct discrimination rather than violence itself.”\textsuperscript{216}

\begin{itemize}
\item \textsuperscript{206} Edwards, 2008, p. 54.
\item \textsuperscript{207} Ibid, p. 54.
\item \textsuperscript{208} Ibid, pp. 40-43, 54.
\item \textsuperscript{209} Ibid, p. 40.
\item \textsuperscript{210} Ibid, p. 40.
\item \textsuperscript{211} Ibid, pp. 41, 43.
\item \textsuperscript{212} Cook, 1994.
\item \textsuperscript{213} Ibid, p. 155.
\item \textsuperscript{214} Ibid, p. 155.
\item \textsuperscript{215} Edwards, 2008, pp. 56-57.
\item \textsuperscript{216} Ibid, p. 57.
\end{itemize}
In her conclusion she finds that the necessary link made between violence and discrimination in the formula conflates the cause (discrimination) to the act and the act in itself (the violence). She argues that by doing so “the violence suffered by women is “exceptionalized.”\textsuperscript{217} The final sentence of her article is a question that captures the direction of her critical discussion: “Is it time to call for an explicit prohibition outlawing violence against women \textit{qua} violence?” \textsuperscript{218}

Dianne Otto seems to argue in line with Edwards when she identifies a limitation of the CEDAW-approach in that “the anti-discrimination framework”\textsuperscript{219} is hindering the Committee to condemn “gendered violence as a direct human rights violation, such as a violation of the right to life […]”.\textsuperscript{220} Otto also brings to the surface another concern with regard to the consequences of arguing for the discrimination component in relation to rights of women. In her interpretation of the practice of some of the Treaty Bodies to integrate experiences of women in their monitoring of human rights and general comments, there emerges “the old urge to protect women rather than to recognize their rights”\textsuperscript{221}. As an example of the complexity of the process to promote human rights of women, she first gives recognition to the Human Rights Committee for “an ambitious and creative ‘feminization’ of ICCPR rights”\textsuperscript{222}, and thereafter expresses a critical view that “the language of ‘protection’ is disquieting”\textsuperscript{223}. She foresees a risk of “working against legal responses that empower women as full subjects of human rights law.”\textsuperscript{224}

Her critique regarding a language that communicates protection of women and her argument of the importance to strengthen a perspective of women as full subjects is also reflected in her critical study of four resolutions adopted by the Security Council focusing the theme Women, Peace

\textsuperscript{217} Ibid, p. 59. It is not within the frame of the present study to discuss the quoted statement. However, the quote is anyhow included in this text since it gives an idea of her reasoning and what she is aiming for.

\textsuperscript{218} Ibid, p. 59. This is a topic discussed further by Alice Edwards in her publication, \textit{Violence against Women under International Human Rights Law}, 2013, pp. 192-196.

\textsuperscript{219} Otto, 2010b, p. 356.

\textsuperscript{220} Ibid, p. 356.

\textsuperscript{221} Ibid, p. 362.

\textsuperscript{222} Ibid, p. 360.

\textsuperscript{223} Ibid, p. 360. See her footnote number 75 referring to General Comment no. 28 of the Human Rights Committee.

\textsuperscript{224} Otto, 2010b, p. 360.
and Security. In two articles discussing the four Security Council Resolutions, Diane Otto argues for recognition of women as subjects in activities aiming for sustainable peace and to secure prevention of and protection from violence. Added to this, she highlights the importance to be aware of, and also to address the root causes that hinder participation of women and increase the risk of violence against women. 225

Below follows a closer study of her argumentation together with the research by Sally Engel Merry who discusses what is needed to enable women to act in situations when human rights are at risk in a local society context. Even though the discussion of the two researchers is not linked to an international treaty-based monitoring mechanism for human rights, the critical analyses are referred to more in detail. Since their perspectives are guided by an interest to problematize the language of the UN Security Council and to know the facts on the ground in a local society, respectively, this reveals what could inform the view on the status of women, if considered as holders of rights and actors or not.

3.2.3 Women as bearers of rights

3.2.3.1 Women as actors - a critical study by Dianne Otto on language in UN Security Council Resolutions

In 2009, Dianne Otto published a critical reflection regarding a decade of activism and critique of the UN from a feminist perspective. 226 The context of her reflection was the UNSC and the view on women expressed in two thematic resolutions. The first one was the Resolution 1325, adopted in October 2000, giving emphasis to participation of women in conflict resolution and peacebuilding. 227 The second one was the Resolution 1820, adopted in 2008, giving specific attention to sexual violence against women in violent conflicts.

According to her reading, the Resolution 1325 reflects in its preamble a recognition of women as "full subjects of international law" 228 by affirming the role of women as actors, e.g. with a formulation underlining their “equal participation and full involvement”. 229 To Otto, this was a new

228 Otto, 2009, p. 15.
229 Ibid, p. 16.
way of referring to women in situations of violent conflicts. Previously, the emphasis had been on a communication of the status of women as victims, weak and vulnerable and in need of protection. As a contrast to the perception of women as victims, she paid attention to some new roles communicated by the resolution 1325, namely women as “human rights and humanitarian workers”, as “bearers of human rights” and as “implementers of peace agreements”.

With regard to the Resolution 1820 (2008) adopted by the Security Council, Otto argues that the message reflects a retreat from what was positive from a feminist perspective in the Resolution 1325. She means that the UNSC, through the Resolution 1820, had resumed the role as “protector of women”. Her argumentation includes the view that a focus on vulnerability of women goes against the feminist goal of women’s emancipation.

According to Otto, this resolution was initiated by a call in a letter sent by more than 70 Congolese NGOs to address the sexualized violence in the Democratic Republic of the Congo. She comments that she does not “mean to understate the harm that can be inflicted by sexual violence”, but would suggest addressing the problem with empowerment in focus. She also raises the question whether she in her argumentation is “denying their agency”. The argumentation by Otto surfaces her concern of the risk in addressing the Security Council, an institution with both political and legal power in the context of international law, given that it is primarily not guided by the goals of feminism and a readiness of the “‘great’ powers” to be held accountable. Her answer to the question of agency expresses a view that activism is aiming for the same result as the feminist critical argumentation, though the approach for the achievement differs between the two strategies. She underlines the need of both “activism and critique”.

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230 Ibid, p. 16.
231 Ibid, p. 16.
232 Ibid, p. 17
233 Ibid, p. 17.
234 Ibid, p. 25.
235 Ibid, p. 25.
to deepen the understanding of how to work against what she refers to as “the exile of institutional cooption”.242

The following year, 2010, Otto admitted that her previous view of institutional cooption was “too pessimistic”.243 This time she presented a modified and less critical view regarding the same Security Council resolutions that she had discussed in 2009 from her feminist scholar perspective. Her more positive view is informed by the messages communicated in the two follow-up resolutions in 2009 on Women, Peace and Security, namely the Security Council Resolution 1888 244 and the Security Council Resolution 1889.245 She finds that the approach to empowerment of women reflected in the Resolution 1325 has been strengthened.246

She notices a shift in the language of the Resolution 1888 compared to the Resolution 1820 from what she describes as “protective approach”.247 Both resolutions give focus to sexual violence, but the Resolution 1888 now gives attention to “structural inequality”248 as reason for the violence while the other one had communicated “inevitable vulnerability”249 as a such reason. Otto underlines the linking made in the Resolution 1889 between the space for women to participate and the importance of physical security and the socio-economic conditions available.250 As part of the progress with regard to her feminist perspective she mentions that both the Resolutions 1888 and 1889 have included a variety of mechanisms for monitoring and accountability purposes, e.g. a Special Representative of the Secretary General to address sexual violence in armed conflicts.251 In her conclusions, she confirms the need for both feminist activism and cri-

243 Otto, 2010a, p. 112,
246 Otto, 2010a, p. 118.
247 Ibid, p. 112.
248 Ibid, p. 112.
249 Ibid, p. 112.
250 Ibid, p. 118.
tique: “Indeed, feminism will only thrive in the intersections of activism and critique, in the interaction between power and danger.”252

3.2.3.2 Double subjectivity – a study by Sally Engel Merry of rights consciousness of women and the encouragement to act

The second example of research discussing violence against women is the one done by Sally Engel Merry in the 1990s in Hawaii, covering a period of a decade. This research reflects a combination of measures directed to individual cases of domestic violence as well as to the broader context of a local society. In an interview study in one of the port cities of Hawaii, her focus was on battered women and their experiences of contact with legal authorities in a context where a shelter practice had been established together with women’s support-groups and education of the community. 253

Of special interest to her was the process of a change in the self-definition of women, to an adoption of “a rights-defined identity”254, and how their contact with the society outside home influenced such a process of change, e.g. by bringing cases of violence to a public forum like a court. She argues that

“It is not that the right to protection from assault has changed, but that the meaning of the sphere of the family as a private domain secluded from legal scrutiny has changed to one more porous.”255

Whether to address the legal system or not, included decisions that were not always easy for the women to take, as it also had social consequences, for example with regard to their relationships. 256 In this process of change of being able to break the silence, the research surfaced a “double subjectivity as rights-bearers and as injured kinsmen and survivors”. 257 Sally Engle Merry argues that the two identities coexist but do not merge. 258 Her observation is that a framework of rights adds to an understanding of obligations that follows on kinship. 259 In terms of a consciousness of human rights to be established, one of the findings was the importance of institu-

252 Ibid, p. 120.
253 Merry, 2006, pp. 181-183.
254 Ibid, p. 182.
256 Ibid, pp. 188, 191.
tional structures, their presence as such and that they are supporting a shift in subjectivity and are responding seriously to claims.\textsuperscript{260}

The aspect of physically and mentally crossing the threshold of home and approaching a women’s support group, a shelter or the legal system appears to have been dependent on an environment communicating a confirmation of women to have legal capacity to break the silence and act in situations of violence. Merry describes this in terms of a process of re-definition of subjectivity by “doing legal activities” \textsuperscript{261}, including a shift for women in their understanding of the relationship between their social worlds and the law.\textsuperscript{262}

These observations of Merry are of interest for the chapter to come that will give specific attention to conditions for women in another local context, a refugee camp environment (chapter 6). However, for the focus of the present chapter we will take note of the quoted lines above, that pointed to a change of the view on the sphere of the family as a private domain to one more porous. This directs us back into the international discussion in the context of work of the CEDAW Committee and the Special Rapporteur on Violence against Women, its causes and consequences, and the considerations regarding state responsibility.

3.3 Domestic Violence against women

3.3.1 Responsibility of states

Due diligence is a concept discussed in the context of international and regional human rights mechanisms to judge on the responsibility of states, also for acts committed by private persons or other private actors.\textsuperscript{263} Even though due diligence as a principle originates from a practice developed over centuries with regard to such issues as diplomatic relations, the concept of today falls very much within the area of international human rights.\textsuperscript{264} It is a concept referred to in UN documentation and it has been

\textsuperscript{260} Ibid, pp. 181, 192.
\textsuperscript{261} Ibid, p. 186.
\textsuperscript{262} Ibid, pp. 186-187.
\textsuperscript{264} Gould and Shelton, 2015, p. 578; Eriksson, 2010, pp. 229-231.
developed in case-law, both internationally and regionally.\textsuperscript{265} The application of the due diligence principle has not only been discussed with regard to violence against women, but also in relation to corporate activities.\textsuperscript{266} Of importance is to what extent the state has acted to prevent, punish and compensate abuses of human rights.\textsuperscript{267}

The development of the application of such a standard in particular with regard to violence against women was described by Yakin Ertürk, the Special Rapporteur on violence against women, its causes and consequences, in her report of 2006 to the UN Economic and Social Council (ECOSOC).\textsuperscript{268} She referred to the context for this development by directing attention to the inconsistency in the practice of human rights law on how to address the problem of domestic violence and the view that this was a matter for the private sphere. The inconsistency in addressing the problem was grasped by the following formulation in the report:

\begin{quote}


\end{quote}
“In many parts of the world the struggle for human rights seems to end at one’s doorsteps.” 269

Ertürk also referred to the case of Velasquez Rodriguez v. Honduras of the Inter-American Court of Human Rights from 1989, often discussed in literature as a case that established a responsibility of the State to actively prevent and respond to human rights abuses, also when acts were committed by non-state actors.270 However, this case did not discuss violence against women but addressed the issue of responsibility in a violent context known for the presence of abduction, murder and disappearance of people due to the political situation in the country.271 Honduras was held responsible for not having an effective administration of justice to act upon detentions and disappearances, in a context where several disappearances had taken place for years.272

To be noted, a few years after this decision regarding Velasquez Rodriguez, the CEDAW Committee adopted the General recommendation no. 19, as have been mentioned above, in section 3.2.1. In paragraph 9 the principle of due diligence was underlined by the Committee, with regard to responsibility of States for acts of violence against women:

“9. It is emphasized, however, that discrimination under the Convention is not restricted to actions by or on behalf of Governments (see articles 2(e), 2 (f) and 5). For example, under article 2 (e) the Convention calls on States parties to take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise. Under general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations.


of rights or to investigate and punish acts of violence, and for providing compensation.”

After the adoption of the General Recommendation No. 19 of the Committee, as observed by Ertürk in 2006, the due diligence principle concerning violence against women was referred to by the UN-system and reflected in discussions of Human Rights Treaty Bodies and by practices of various regional human rights mechanisms. In her report, Yakin Ertürk argued that “it can be concluded that there is a rule of customary international law that obliges States to prevent and respond to acts of violence against women with due diligence.” This is a formulation quoted by a regional human rights court, the European Court of Human Rights (ECtHR), in a judgement from 2009 on domestic violence, Opuz v. Turkey.

With regard to this court case, the report of Ertürk has been discussed by Lee Hasselbacher in the article State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, And International Legal Minimus of Protection. Hasselbacher refers to the report of Ertürk as a “landmark report codifying ‘due diligence’ as a tool to assess a nation’s progress in addressing domestic violence” and argues that the Special rapporteur “echoed and reinforced the language of the due diligence standard”. With reference to the finding of Ertürk of “a rule of customary international law that obliges States to prevent and respond

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275 Ibid, para. 29.

276 Opuz v. Turkey, (Application No. 33401/02) Judgement 9 June 2009, par. 79.


278 Hasselbacher, 2010, p. 201.

279 Ibid, p. 199.
to acts of violence against women with due diligence." Hasselbacher argues that the Special Rapporteur “concluded that the due diligence standard had reached such a level of international consensus that it should be universally recognized and applied.” The argumentation by Hasselbacher draws attention to the discussion regarding criteria for when a rule of customary international law should be considered as established. Even though this is not a topic for the present study, it is anyhow of interest to take note of the argumentation and the kind of references Hasselbacher makes to the report by the UN Special Rapporteur on Violence against Women.

Thereafter, in 2015, another holder of the mandate as UN Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, made a remark in her report to the General Assembly of an inconsistency that she had found in the rulings of the ECtHR when dealing with the obligations of non-discrimination and due diligence. She argues that it is only in one of the court cases where ECtHR addresses violence against women, namely the case of Opuz v. Turkey, that she finds that “the Court provides any insight into the scope of such obligations”. In this case of domestic violence she finds that the Court makes references to various regional and international human rights instruments as well as giving emphasis to “the binding nature of the Convention on the Elimination of All Forms of Discrimination against Women”. However, she stresses that this kind of references has not been practiced by the court in subsequent cases on violence.

To be noted is that the remark of inconsistency and other observations regarding references to international human rights instruments are presented in a report which gives detailed focus to results from a study of the current status of legal standards and practices of the three regional human rights systems, the African, the European and the inter-American systems. Given the focus of the present research, it is beyond the scope for

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280 Ibid, p. 199.
281 Ibid, p. 199.
283 Ibid, para. 45.
284 Ibid, para. 45.
285 Ibid, para. 45.
286 Ibid, p. 2 and section III.
the study to follow up the court practice with regard to these reported findings of an inconsistancy in the practice of ECtHR after 2009. However, it is of interest to note the observation made by the Special Rapporteur that the regional human rights court did include references to international human rights instruments in the case of Opuz v. Turkey regarding the problem of domestic violence. This is a court case considered as material for this research before 2015.

Therefore, below, we will give more attention to this court case of Opuz v. Turkey (2009), through a comparative reading of the case of Maria da Penha v. Brazil in the Inter-American System of Human Rights, a case referred to by the ECtHR as well as by the Special Rapporteur Rashida Manjoo in her report from 2015. The study of the two cases will direct attention to the women’s experiences from domestic violence and to the integration of CEDAW and the work of the CEDAW Committee in the judgment of ECtHR.

The two cases of Opuz v. Turkey and Maria Da Penha Maia Fernandes v. Brazil become illustrations of the fact that when women as rights-holders are able to act and bring their narratives to a human rights mechanism, the problem of violence against women in society and its causes and consequences become publicly visible, known and considered also outside the specific court room and a specialized academic debate. Accordingly, the case of Maria de Penha v. Brazil has been referred to by the UN Women Report 2011-2012 In Pursuit of Justice.


288 Opuz v. Turkey, (Application No. 33401/02) Judgement 9 June 2009, paras. 83-86, paras. 185-187 and paras. 189-190. See also the two sections “Relevant international and comparative law material” and “The Court’s assessment”.


The UN Women addressed the problem of gender-based violence and presented the case of Maria Da Penha Fernandes v Brazil in the Inter-American Commission.
3.3.2 Visibility as rights-holders - the narratives of Maria da Penha and Nahide Opuz regarding domestic violence

A regional Human Rights Court system does not have a mandate to discuss occurrence of human rights violations, accountability for a State Party according to human rights obligations and responsibility for prevention of further human rights violations, until it has got an application of a case that falls under its jurisdiction to handle and is also classified as admissible. The applicant on the other hand, has no possibility to have a case accepted for monitoring of a regional Human Rights Court system until her experiences and story have been presented to and considered by all the existing remedies of the legal system of the State in the territory of which the alleged violation has taken place. In other worlds, all national legal remedies must be exhausted. This is due to the understanding of the sovereignty of a State to keep and handle issues within its own jurisdiction and in accordance with its domestic legal system, before any individual application to international human rights mechanisms can be accepted for judgment.290

However, two cases from the first decade of the third millennium in two different regional Human Rights court-systems opened up for admitting an application even though the domestic legal systems had not formally finalized a legal process regarding domestic violence. The first case is from 2001 in the Inter-American Commission on Human Rights regarding Maria Da Penha Maia Fernandes v. Brazil291 and the second case is from 2009 in the ECtHR regarding Opuz v. Turkey.292 Both cases concern the responsibility of a State Party in a situation of protracted inefficient judicial mechanisms, in situations of severe threats and physical injuries due to domestic violence.

When the Inter-American Commission on Human Rights presented its report in April 2001, 18 years had passed since Maria De Penha Maia Fernandes survived two attempts by her husband to murder her.293

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292 Opuz v. Turkey, (Application No. 33401/02) Judgement 9 June 2009

293 Maria Da Penha Maia Fernandes v. Brazil, Case12.051, Report No. 54/01, 16 April 2001, para. 9
1998, when she filed her petition to the Commission, the criminal case against her former husband was still pending.294

In 2009, when the judgment of the ECtHR was published, the applicant Mrs Nahide Opuz had since the mid-1990s been under threat and repeated domestic violence from her husband.295 During that period, she had several times brought her situation to the attention of the authorities, which for a variety of reasons did not fulfill legal processes against the perpetrator.296 In 2001 she survived an attack by her husband, who had stabbed her several times.297 The threats and violence over the years had also been directed against her mother, who was shot dead by her son-in-law in 2002.298 A legal procedure started in 2002, but in 2008 he was released with reference to an appeal and the time already spent in detention.299 At that time, the applicant was divorced from him, but feared attacks and asked for the protection of the authorities.300

The two regional Human Rights institutions identified several human rights violations with reference to how the States had acted in the individual cases. The Inter-American Commission held that Brazil had not met its obligations with regard to several of the rights of the Convention of Belém do Pára301, e.g. the right of a woman to a life free from violence and the right to equal protection before and of the law.302 The Commission concluded that Brazil had “violated the right of Mrs. Maria da Penha Maia Fernandes to a fair trial and judicial protection”303 recognized in the American Convention. The European Court held Turkey accountable for violations against the right to life in article 2 ECHR (the death of the mother of

294 Ibid, par. 18.
296 Ibid, paras. 9-69.
297 Ibid, para. 37.
298 Ibid, para. 54.
299 Ibid, paras. 55-57.
300 Ibid, para. 59.
302 Maria Da Penha Maia Fernandes v. Brazil, Case12.051, Report No. 54/01, 16 April 2001, para. 58.
303 Ibid, para. 3.
the applicant), the right not to be subjected to torture, to inhuman or degrading treatment or punishment in article 3 ECHR (the failure to protect the applicant against domestic violence) and finally for violations of the right not to be discriminated against in article 14 ECHR (read in conjunction with articles 2 and 3).304

However, the two Human Rights institutions also gave a direction to the states for the future, with the purpose to achieve a change in practice with regard to authorities acting upon physical violence against women and upon its underlying causes. Both institutions identified that the inefficient and unresponsive judicial systems in the individual cases reflected a discrimination against women and an acceptance of impunity of perpetrators, rooted in the society. Here, the Inter-American Commission on Human Rights referred to “a pattern”305 and continued by stating that

“The condoning of this situation by the entire system only serves to perpetuate the psychological, social, and historical roots and factors that sustain and encourage violence against women.”306

This terminology, chosen by the Inter-American Commission, to describe the finding of a situation that sustains and encourages violence against women, is more or less mirrored in the stating by ECtHR “that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence”.307

Even though the problem of domestic violence was addressed with regard to the situation in two different society contexts, the two regional human rights monitoring institutions commented on a similar pattern - a lack of commitment to show interest and adequately address the problem on a more general and institutional level in society. For the judgment in the case of Nahide Opuz and the issue of lack of commitment, it is of interest for the present research, that the ECtHR had considered not only Concluding Comments by the CEDAW Committee addressing protection issues in Turkey, but also reports from NGOs regarding domestic violence in the area from where the applicant came.308

Below, a closer study will follow of the way the work of the CEDAW Committee as well as the decisions by UN and the argumentation of the

305 Maria Da Penha Maia Fernandes v. Brazil, Case12.051, Report No. 54/01, 16 April 2001, para. 55.
306 Ibid para. 55.
308 Ibid, paras. 192-197.
Special Rapporteur on violence against women, its causes and consequences, were taken into consideration by the ECtHR to judge on what had been disclosed through the narrative of Nahide Opuz with regard to domestic violence.

3.3.3 References by the ECtHR to CEDAW and the work of the CEDAW Committee in Opuz v. Turkey

The judgment of the ECtHR includes clear and detailed references, also citations, to CEDAW and the interpretation of the CEDAW Committee as expressed in the General Recommendation No. 19 and its practice within the context of the Optional Protocol regarding discrimination, gender-based violence and due diligence.\textsuperscript{309} Added to this, the Court both cited the Declaration in 1993 of the UN General Assembly (CEDAW) and the report in 2006 of the Special Rapporteur on violence against women, its causes and consequences, with regard specifically to due diligence.\textsuperscript{310}

These references are to be found in the judgement under the section "II. RELEVANT LAW AND PRACTICE"\textsuperscript{311}, where the court goes through the position of United Nations concerning domestic violence and discrimination against women, as well as under the section "IV. ALLEGED VIOLATION OF ARTICLE 14 READ IN CONJUNCTION WITH ARTICLES 2 AND 3 OF THE CONVENTION"\textsuperscript{312}, where the court assesses the meaning of discrimination in the context of domestic violence.

In section II, the definition of discrimination of women in CEDAW is cited and the work of the CEDAW Committee is presented.\textsuperscript{313} This is followed by quoted parts of article 4(c) in the UN General Assembly Declaration on Violence against Women of 1993, urging states to "exercise due diligence"\textsuperscript{314}, and a quotation of the Special Rapporteur from the report of 2006, discussed above, directing attention to the issue of an existence of a rule of customary international law:

"the Special Rapporteur on violence against women considered that there is a rule of customary international law that ‘obliges States to prevent and respond to acts of violence against women with due diligence’.\textsuperscript{315}

\textsuperscript{309} Ibid, paras. 72-77.
\textsuperscript{310} Ibid, paras. 78-79.
\textsuperscript{311} Ibid, p. 12.
\textsuperscript{312} Ibid, p. 43.
\textsuperscript{313} Ibid, paras 72-77.
\textsuperscript{314} Ibid, para. 78.
\textsuperscript{315} Ibid, para. 79.
In the latter section, section IV, the Court states that in its assessments it “takes into account the international-law background to the legal question before it.”316 Here, in its considerations of the definition and scope of discrimination against women, the Court explicitly cites CEDAW by quotation of article 1 and thereafter refers to the position of the CEDAW Committee that violence against women, including domestic violence, is a form of discrimination against women.317 The Court also makes a reference to its paragraph 74 in section II of the judgement, dealing with the General recommendation No. 19 of the CEDAW Committee and the duties of States to take measures effectively protecting women against gender-based violence.318

Added to this, in section IV, paragraph 188, the Court cites the resolution 2003/45: Elimination of Violence against Women, from 23 April 2003 of the United Nations Commission on Human Rights.319 This citation deals with the recognition that “all forms of violence against women occur within the context of de jure and de facto discrimination against women and the lower status accorded to women in society and are exacerbated by the obstacles women often face in seeking remedies from the State.”320

Even though not referred to by the Court, to be noted is that the same resolution included a decision to prolong the mandate of the Special Rapporteur on Violence against Women, its causes and consequences, for three years, meaning the period from when the report of 2006, previously quoted in the judgement, was presented by the holder of the mandate.321

The inclusion of references to the work of the CEDAW Committee on violence against women and the quotation chosen by ECtHR from the report of the Special Rapporteur in its presentation of the development within the UN, in combination with that the Court for its considerations

316 Ibid, para. 184.
318 Ibid, para. 187.
320 Opuz v. Turkey, (Application No. 33401/02) Judgement 9 June 2009, para. 188.
“also takes into account the international-law background to the legal question before it.”322, indicates that ECtHR is approaching a point of confirming the existence of a rule of international customary law to be applied as referred to and quoted in par. 79 of the judgement. However, it is to be noted that this is not explicitly stated by the Court.

Nevertheless, with reference to the concerns expressed in the academic discussion in the beginning of the 1990s regarding marginalization of CEDAW and the CEDAW Committee, the integration of these sources into a judgment on violence against women by a regional human rights court from 2009, rather reflects an example of the opposite. 323 As we will see in the following, this specific inclusion has also been observed by the CEDAW Committee as late as in 2017.

3.3.4 References by the CEDAW Committee to the ECtHR and the case Opuz v. Turkey

To be noted, the judgement by the ECtHR in the case of Opuz v. Turkey, has been integrated by the CEDAW Committee as one of the sources referred to in its General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, adopted in July 2017.324 The Committee finds that its General recommendation No. 19 “has been a key catalyst”325 for a process of 25 years of State practice, that reflects an endorsement of the interpretation of the Committee that discrimination against women – as defined in art. 1 of CEDAW - includes gender-based violence against women.326 In paragraph 2, the Committee makes a remark on a practice suggesting an international legal prohibition of gender-based violence against women:

“The opinio juris and State practice suggest that the prohibition of gender-based violence against women has evolved into a principle of customary international law.” 327

325 Ibid, para. 2.
327 Ibid, para 2.
To underpin the influence of the General recommendation No. 19 of such a prohibition to have been evolved, the Committee presents in its footnote 3, attached to paragraph 2, a detailed list of examples of State practice. These consist of improvement of legal and other measures, adoption of regional legal human rights instruments specifically dealing with violence against women and various decisions within the context of the UN. In the same footnote, the CEDAW Committee also refers to judicial decisions by international courts as “a subsidiary means for the determination of customary international law” and explicitly chooses the case Opuz v. Turkey as one of the examples. Even practices of non-parties to CEDAW that reflect an interest to address the problem of violence against women are mentioned in the same footnote 3. One expression for this is the invitation of the Special Rapporteur on violence against women to visit Somalia in 2011, a mission that will be discussed further in chapter 5 of the present study.

The observation of a prohibition of gender-based violence against women as integrated into customary international law is stated by the Treaty-body of CEDAW in the beginning of its new General recommendation. This is followed by more than 50 paragraphs and in paragraph 8, the Committee says that the document is to be seen as a complement and an update of the guidance given to States through the General recommendation No. 19. It is an update made “to mark the twenty-fifth anniversary” of the adoption of the General recommendation No. 19 and to give guidance for States to put even more effort into addressing the problem of gender-based violence against women and what is phrased by the Committee as “high levels of impunity.”

However, the wording in the second paragraph – “that the prohibition of gender-based violence against women has evolved into a principle of customary international law” – leads to the question if this remark of the Committee suggests that the prohibition of gender-based violence against women as a principle of customary international law, does also reflect an existence of a human right of women, in and of itself, inde-

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328 Ibid, para. 2, including footnote 3.
329 Ibid, para. 2, including footnote 3.
330 Ibid, para. 2, including footnote 3.
331 Ibid, para. 8.
332 Ibid, para. 3.
333 Ibid, para. 6.
334 Ibid, para. 2.
pendently of the right not to be discriminated against as women. If so, it would be in line with the direction of the critical argumentation of Alice Edwards and Dianne Otto as presented above. The statement might also be interpreted as a response to the conclusions presented by the Special Rapporteur, Manjoo Rashid, in her report of 2015 following her study of three regional systems: “The present report highlights that the addressing of violence against women as a human rights violation, in and of itself, is reflected only in the three regional legally binding instruments discussed above.”335 In the final paragraphs of her report, she argues for an international legally binding human rights law instrument to be adopted, that reaffirms the commitment “that violence against women is a human rights violation in and of itself.”336

To take note of here is that the various paths in the international human rights debate and reported practice, some of them addressed in this chapter, seem to take a direction of being consolidated into a center where the question posed by Alice Edwards and quoted above echoes and calls for a renewed attention: “Is it time to call for an explicit prohibition outlawing violence against women qua violence?”337 However, to follow up on this issue is beyond the scope of the present study.

Nevertheless, the quoted observation of the CEDAW Committee is adopted in the General Recommendations No. 35, July 2017, and gives emphasis to the recognition of women as rights-holders in international human rights law in general, and with regard to the problem of gender-based violence against women in particular. This is stressed by the terminology used by the Committee in the same General Recommendation referring to women as “right holders” (para. 26 a)) and by underlining the right


336 Ibid, paras. 66.

of women to be acknowledged as “subjects of rights” (para. 28) with agency and autonomy.338

3.4 To summarize

As we have seen in this chapter, the CEDAW convention reaffirmed the recognition of the human right of women not to be discriminated against with regard to enjoyment of human rights, violence against women has been addressed as a human rights problem in the academic debate and by international and regional human rights mechanisms, and the responsibility of states to prevent and respond to domestic violence has been identified with regard to human rights obligations. However, even if women are recognized international human rights and referred to as rights-holders in the context of international human rights law and in the work of the CEDAW Committee, the visibility of women as rights-holders in the area of domestic violence with a recognized capacity to act in their own right is for various reasons not to be taken for granted. The narratives of the rights-holders will not reach out to be presented by themselves if they do not have a recognized and protected legal voice and if they not are encouraged to act on the matter, either with legal measures in individual cases or by joining a group to claim preventive measures on a community level.

The steps to be taken by women in order to disclose the problem of violence at the domestic level, also by addressing international human rights mechanisms on the issue, need to be considered with regard to the resistance that they might meet in a local society context, including the institutional structure and the problem of impunity.

Here, the findings of Sally Engel Merry are of interest, also for the chapters to come. Her study, focusing conditions for women to act in a local community context, shows the presence of what she refers to as a double subjectivity of women - an identity as rights-bearers and as injured kinsmen that coexist. Therefore, the initiatives of women to break the silence, pass the threshold of the home and even go for visibility through legal actions, will depend on a supportive environment, including shelter and women-groups, and institutional structures that take the problem of domestic violence, as well as the recognition of the right for women to act as rights-bearers seriously.

With regard to international monitoring of human rights, the access to human rights mechanisms also has an impact on the visibility of women as rights-holders and their experiences of human rights abuses and its causes, and what may become judged upon with regard to state obligations regarding human rights of women. This was reflected by the two regional human rights cases, Maria Da Penha Maia Fernandes v. Brazil and Opuz v. Turkey, focused in the present chapter as an illustration of visibility. The women were listened to by human rights institutions with a legal monitoring mandate and they attained legal confirmation - even though too late to prevent violence against them - that central human rights as the right to life, non-discrimination and the right to equal protection of the law existed internationally for them as women and should have been protected and secured nationally.

Such a visibility has an influence on what will become published, known and discussed at regional and global levels in human rights debate and in academia, also with regard to more structural issues that surface by the facts presented to a human rights mechanism, either in an individual court case of domestic violence or by NGO-reports to the CEDAW Committee. Accordingly, the problem of violence against women and the lack of commitment to adequately address this problem have continued to be an issue in the human rights debate, including published reports and judgements from various human rights monitoring mechanisms. As we have seen in this chapter, the work of the CEDAW Committee and the argumentation of the holders of the mandate as Special Rapporteurs on violence against women, its causes and consequences have been taken into consideration, also by the ECtHR in the case Opuz v. Turkey. This is a judgement that has been referred to by the CEDAW Committee in its General recommendation No. 35 from July 2017, to underline arguments for the development in the international human rights context on how to address gender-based violence.

Given what has been known through the narratives of both Maria Da Penha Maia Fernandes and Nahide Opuz and the observations made by the two human rights mechanisms regarding a pattern of passivity in society to address domestic violence, it is of interest to here add a perspective by Elina Pirjatanniemi regarding measures to address the problem of domestic violence. In her article *Missing Promises – No War Against Intimate Terror*, she directs attention to that domestic violence can gradually increase into a terror-like situation and when the criminal law system finally reacts to such a situation, it is often too late to actually protect the individual
woman.\textsuperscript{339} Therefore, she gives emphasis to the importance of broadening strategies in order to proactively work for a safe environment for women, including to address structural issues in the society.\textsuperscript{340}

To keep in mind for the chapters to come; Women will become \textit{visible as rights-holders} when they have been \textit{entrusted a right to act} in their own capacity in society and in human rights mechanisms, and there is an environment that supports and encourages women to take action in such a capacity, individually or collectively, to present their narratives regarding the problem of domestic violence, to claim protection of their human rights and to contribute to prevention of further violation of human rights of women.

\textbf{Chapter 4. International human rights with regard to women in the context of UNHCR}

“It requires an attitudinal shift in how we work with and for persons of concern. They are not passive recipients of humanitarian aid but “‘rights-holders’” with legal entitlements.”\textsuperscript{341}

\textbf{4.1 Introduction}

As we have seen in chapter 3, domestic violence is addressed by international and regional human rights mechanisms as a human rights issue affecting various human rights. Responsibility of states to prevent violence against women by measures at a more structural level in society and to act on individual cases of domestic violence has been identified. The issue of visibility of women as rightholders in society and in institutional structures appeared to be related also to whether they have a voice and are recognized a right to act regarding the problem of domestic violence, locally as well as in international human rights mechanisms.

The present chapter will direct attention to a discussion regarding the context of human rights in the work of UNHCR, the development of the mandate of UNHCR in the area of violence against women in refugee camps, the understanding of female refugees as rights-holders and legal systems as a risk factor. This includes a short introduction to the mandate of UNHCR in general and in relation to women in particular. The devel-

\textsuperscript{339} Pirjatanniemi, 2009, p. 52.
\textsuperscript{340} Ibid, pp. 52-53.
\textsuperscript{341} UNHCR Handbook for the Protection of Women and Girls, 2008, chapter 2.2, p. 27.
opment of the mandate will be addressed briefly with references to directives from the UN General Assembly and other organs to guide the exercise of the mandate.

With regard to the issue of visibility of women, the UNHCR Handbook for the Protection of Women and Girls from 2008, and a Companion Guide from 2010 to the Handbook are of special interest for this chapter. The reflection of the work by the CEDAW Committee concerning the problem of violence against women in general and with regard to situations of displacement is also of interest in this context. The General recommendations No. 30 on women in conflict prevention, conflict and post-conflict situations and No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women have been observed to a limited extent, by a few references. The two General recommendations were adopted by the CEDAW Committee in 2013 and 2014 respectively, after the UNHCR Handbook for the Protection of Women and Girls was published, and are included in this chapter as examples of the ongoing work of the CEDAW Committee to address also the actual human rights situation of displaced women within the context of its international monitoring mandate.

4.2 A mandate by the international community

4.2.1 Women to enjoy protection and assistance on equal basis

In December 1949, the UN General Assembly decided to establish a High Commissioner’s Office for Refugees. Initially, the idea was to give a protection mandate to an international organisation in situations where the relationship between a state and a citizen was broken due to flight and to intervene on the behalf of a refugee in order to secure certain rights. The Statute of UNHCR, adopted in 1950, formed the legal basis for the re-


sponsibilities of UNCHR in its operational role in the international protection of refugees. Soon after the establishment of UNHCR, the organization was accompanied by the 1951 Convention relating to the Status of Refugees (the 1951 Refugee Convention). Soon after the establishment of UNHCR, the organization was accompanied by the 1951 Convention relating to the Status of Refugees (the 1951 Refugee Convention).

The drafting process of the 1951 Refugee Convention was influenced by the urgency in addressing the refugee crises of a Europe in ruins after World War II, when the circumstances characterizing the situation were not covered by the previous agreements regarding refugees in Europe, and also influenced by an interest of getting a general international definition of who is to be recognized as a refugee.

An explicit reference to the Universal Declaration of Human Rights of 1948 (UDHR) in the very first paragraph of the preamble to the 1951 Refugee Convention reflected an understanding of an interrelationship between human rights and international protection of refugees in the develop-

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With the definition of who is a refugee (art. 1), the principle of non-refoulement (art. 33) and also the rights recognized, such as a right to non-discrimination due to race, religion or country of origin (art. 3), the rights to public education (art. 22), freedom of movement (art. 26), or access to courts (art. 16), the 1951 Refugee Convention illustrates this interrelationship, even though not explicitly covering all the human rights that were included in UDHR or to come in human rights treaties from the mid-1960s and onwards.

Initially limited to people displaced due to events before 1951, the application of the 1951 Refugee Convention was extended by the adoption of the 1967 Protocol relating to the Status of Refugees, to refugee situations all over the world and to events occurred irrespective of time. The need for a change of application, from a narrow European context to a universal one, was identified by UNHCR with reference to the refugee situations emerging in other parts of the world, e.g. Africa, and the discrepancy between applicability of the 1951 Refugee Convention and the wider man-

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The protection mandate of UNHCR of today is guided not only by the 1950 Statute, but also by resolutions of the UN General Assembly and ECOSOC, together with such documents as the Executive Committee con-
clusions, guidelines and handbooks. The obligation of UNHCR to follow directives given by the UN General Assembly and ECOSOC is anchored in the Statute, e.g. para 3 and 9. In late 1950s, the Executive Committee of the High Commissioner’s Programme (ExCom) was established by the ECOSOC as a subsidiary organ of the General Assembly and members are elected by the Council. It meets annually in October and is guided by adopted Rules of procedure.

When consensus on protection issues is reached by ExCom, it is expressed in conclusions that will influence interpretation. The character of these kinds of decisions has been described to have "a strong political authority as consensus resolutions of a formal body of government representatives" and also to be included in the “body of refugee law”. Goodwin Gill argues that these kinds of decisions have to “be taken into account, although their precise weight in the normative context will vary with subject-matter, wording and intent.” With regard to the issue of the binding character of the conclusions, a distinction has been made between states on one hand and UNHCR on the other. For UNHCR, a conclusion


356 Lewis, 2005, p. 79. See also the footnote number 50 where the author refers to paras. 3 and 9 of the Statute.


358 UN High Commissioner for Refugees (UNHCR), A Thematic Compilation of Executive Committee Conclusions, 7th edition, June 2014, June 2014, available at: http://www.refworld.org/docid/5698c1224.html [accessed 11 July 2018]; For more information regarding ExCom conclusions, see also http://www.refworld.org/type,EXCONC,UNHCR,,,,0.html , retrieved 11 July 2018

359 Hathaway, 2005, p. 113.


361 Ibid, p. 17. Here, Goodwin-Gill also mentions the other sources included in this body of refugee law, namely “the UNHCR Statute; successive General Assembly and ECOSOC resolutions; multilateral and regional treaties on human rights or specific refugees problems; customary international law; the 1951 Convention/1967 Protocol; and national laws and procedures.”
is considered to be binding and a “source of guidance”\textsuperscript{362} for the work. Concerning women and girls, issues of protection have been given explicit attention in the work of UNHCR and in conclusions by ExCom since the 1980s.\textsuperscript{363} In a conclusion from 2006, ExCom acknowledged the importance to ensure that women and girls “can enjoy protection and assistance on an equal basis with men and boys”.\textsuperscript{364} This was stated by ExCom with reference to problems related to the position and legal status of women and girls that could cause less ability for them to get access to rights, compared to men and boys.\textsuperscript{365}

The protection mandate of UNHCR has been combined with a material assistance mandate and the interdependence of the two has been highlighted for instance by a General Assembly resolution discussing the situation in Africa in 2006.\textsuperscript{366} This interrelation between the legal protection of refugees and the need for material assistance has been present from the early days of UNHCR.\textsuperscript{367} The initial emphasis on a more diplomatic role in protection was soon combined with humanitarian assistance to secure survival of refugees.\textsuperscript{368}

The importance of both material assistance and protection has been recognized several times with regard to female refugees both by the General Assembly and ECOSOC.\textsuperscript{369} However, the material assistance, aiming to


\textsuperscript{364} UN High Commissioner for Refugees (UNHCR), Conclusion on Women and Girls at Risk No. 105 (LVII) - 2006, 6 October 2006, No. 105 (LVII) - 2006, (Executive Committee 56th session), pre-ambular para 3, available at: http://www.refworld.org/docid/45339d922.html [accessed 20 June 2018]

\textsuperscript{365} UN High Commissioner for Refugees (UNHCR), Conclusion on Women and Girls at Risk No. 105 (LVII) - 2006, 6 October 2006, No. 105 (LVII) - 2006, (Executive Committee 56th session), pre-ambular para 3, available at: http://www.refworld.org/docid/45339d922.html [accessed 20 June 2018]


\textsuperscript{367} Goodwin-Gill, 2006, p. 3.

\textsuperscript{368} Ibid, p. 3.

cover such things as food, shelter and fresh water in order not to risk the health and life of refugees, is dependent on the priorities of states concerning voluntary funding to international relief. Gaps in funding affect the rights of refugees in general and female refugees specifically. Susan Forbes Martin underlines that shortage in funding is a persistent problem and as a consequence, shortage in food and safe drinking water also impact on the security of female refugees and their health due to risks for violence and malnutrition.

The interrelatedness between risks of gender-based violence and limited resources for livelihood has been confirmed by an evaluation of food assistance in protracted refugee situations, presented jointly by UNHCR and the World Food Programme (WFP) in December 2012. Four refugee contexts were evaluated (in Bangladesh, Chad, Ethiopia and Rwanda) and common to all of them were restrictions such that refugees were not allowed formal integration, land was insufficient and their mobility was circumscribed. One finding was the practice by what is called “food-insecure refugee households” to force both girls and women into marriage as a way to reduce the number of household members to feed. The same evaluation also revealed that female refugees in Ethiopia found that interventions against gender-based violence did not give attention to root causes and that protection services were less efficient in camps for Eritreans, compared to in camps for Somalis.

4.2.2 A mandate in the context of Human Rights

Given the fact that UNHCR is established by the UN General Assembly as a subsidiary organ, the organization is bound by the UN Charter and its purpose to promote human rights. Although the human rights of refugees are considered to be primarily the responsibility of states with regard

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373 Ibid, p. ii.
374 Ibid, para. 30.
375 Ibid, p. ii and para. 32.
376 Goodwin-Gill, 2006, p. 5.
to their human rights obligations, there is anyhow an expectation on UNHCR to contribute to the promotion and protection of human rights. Compared to when UNHCR was established, UDHR has been followed by several Human Rights instruments and a variety of monitoring mechanisms at the international level, such as the UN Human Rights Council, Special procedures and Treaty-Bodies of the core conventions on human rights. Added to the monitoring mechanisms mentioned is also the Office of the High Commissioner for Human Rights (OHCHR), that was established in 1993 to strengthen the promotion and protection of Human Rights. It has a supporting role with regard to the work of the Human Rights monitoring mechanisms. To be noted is that this role of OHCHR does not include a protection mandate with regard to refugees, such as the one given to UNHCR.

In the UN Human Rights Council 2013, the view on the protection mandate of UNHCR was underlined by the Assistant High Commissioner who stated: “The refugee and statelessness experiences attest to the continuing gap between the theory and the practice of human rights. UNHCR’s


work is situated squarely in this gap.” 381 While the Assistant High Commissioner of UNHCR refers to a continuing gap between theory and practice of human rights, James Hathaway refers to the protection potential present through human rights conventions. He argues that threats to the human dignity of refugees could be responded to by “synthesizing refugee-specific and general human rights”. 382 He is discussing the problem of physical threats and violence against female refugees in refugee camps, and explicitly mentioning the situation in Kenya. 383 He argues that the 1951 Refugee Convention 384 will not give guidance on addressing the problem as the Convention is silent on the issue of physical security. 385 Due to this he suggests that refugees “are able to claim the guarantees of physical security set by the Human Rights Covenants” 386. He does so with references to the Human Rights Committee 387 and its General Comments no. 15 from 1986 (The position of aliens under the Covenant) and no. 31 from 2004 (The nature of the general obligation imposed on state parties to the Covenant). 388

In the latter General Comment, the Human Rights Committee refers to what was indicated in 1986 and states that the enjoyment of rights in the Convention should not be limited to citizens of a state party. The enjoyment of rights must be available to all individuals who are in the territory

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382 Hathaway, 2005, p. 110.
384 Ibid, p. 75, see footnote 1 of Hathaway giving the full name for the Refugee Convention as “Convention relating to the Status of Refugees, 189 UNTS 2545, done July 28, 1951, entered into force Apr.22, 1954 (Refugee Convention)”.
385 Ibid, pp. 448-449.
386 Ibid, p. 450.
or subject to the jurisdiction of the state party and, as stated by the committee, this should be the case “regardless of nationality or statelessness, such as asylum seekers, refugees”. 389

Taking this into considerations, the Human Rights Committee communicates recognition of refugees as rights-holders within the context of the Convention, also when they are living in a refugee camp in the territory of a state party.

With regard to female refugees specifically, the protection of human rights has been underlined also by the CEDAW Committee, established for monitoring implementation of the Convention on the Elimination of All forms of Discrimination against Women (CEDAW). 390 The interpretation of the Committee is that CEDAW reinforces protection of human rights of women who stay as refugees in a state that is a State party to the treaty. 391 This has been expressed by the CEDAW Committee in its General Recommendation no. 30, 2013:

“The provisions of the Convention prohibiting discrimination against women reinforce and complement the international legal protection regime for refugees and displaced and stateless women and girls in many settings, especially because explicit gender equality provisions are absent from relevant international agreements, notably the 1951 Convention relating to the Status of Refugees and its 1967 Protocol.” 392

It is to be noted that prior to the adoption of this general recommendation, UNHCR and the CEDAW Committee had been in contact to discuss the issue of inequality of women and violence against women and girls. One


392 Ibid, para. 22.
example of such a contact is a joint seminar that took place in 2009. In a concept note for this seminar, the importance of the positions of the CEDAW Committee regarding gender-based violence for the work of UNHCR were expressed as follows:

“The Committee’s recognition, that gender-based violence against women and girls constitutes discrimination against women on the basis of sex and a violation of human rights, is particularly important and has informed UNHCR’s policies, guidance and actions in this area. Successive General Recommendations, notably General Recommendation No. 19 on violence against women, have been critical in the international community’s recognition of gender-based violence against women in all contexts, including throughout displacement, as an issue of human rights, rather than a private concern.”

In a Background paper, prepared for the same seminar, Alice Edwards argued in her capacity as an external consultant that CEDAW is applicable irrespective of the legal status of the person, irrespective of whether the person is an asylum seeker or has been recognized refugee status. She found that the role of CEDAW is both to complement and to reinforce the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol

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Relating to the Status of Refugees. What matters is that the person stays within the jurisdiction of the State party of CEDAW.

In a Summary of the background paper, Alice Edwards also discussed what she found to be the advantages of including CEDAW into a context of displacement. One of these advantages was the possibility to not only address symptoms of inequality in a refugee context, but also to consider the issue of root causes of violence. She did so by referring to the immediate risk of violence against women when collecting firewood and argued that in order to address the problem of violence, it would not be enough to find an alternative way to meet the need of firewood:

“The Convention requires more than merely eradicating the symptoms of women’s inequality, for example, reducing rates of violence against women by bringing in firewood, but it requires also that the root causes of that violence be investigated and addressed, including, importantly, with women taking a leading role in designing and developing appropriate responses”

With regard to the monitoring role of the Treaty Bodies, the CEDAW Committee and the Office of UNHCR also discussed the practice of UNHCR to give confidential information. In the Background paper, Alice Edwards addressed not only the CEDAW Committee and UNHCR, but also NGO’s to be more involved in the monitoring mechanisms with regard to protection of human rights of refugees. With an interest to enhance the possibility for the Committee to publicly discuss information regarding specific human rights situations, UNHCR was asked to consider submissions to be public in the monitoring process under CEDAW. However, another option mentioned in the seminar discussions was the possibility

396 Ibid, Executive Summary, p. ix, para. 2.
397 Ibid, Executive Summary, p. x, para. 7.
399 Ibid, par. 25 (b).
that information could be passed on to the Committee by another actor, as
for example an NGO.\textsuperscript{402}

There are also other examples of exchange between the CEDAW Com-
mittee and UNHCR. One is a General Discussion on women and access to
justice, arranged in February 2013 by the CEDAW Committee.\textsuperscript{403} The
discussion was part of a process aiming at a General recommendation on
access to justice.\textsuperscript{404} At this discussion, UNHCR contributed both a written
and an oral statement, referring to experiences of female refugees commu-
nicated in consultations 2011 regarding Sexual and Gender-Based Vi-
oblene.\textsuperscript{405} The experiences draw attention to failure of responsible authori-
ties to investigate, prosecute and redress in cases of violence against wom-
en, as well as to the consequences of lack of confidence in legal structures
to respond adequately:

“Women also told UNHCR that the failure to investigate and prosecute
sexual violence and the inability of victims to seek and achieve redress has
eroded confidence in law enforcement actors and the judiciary, and has pre-
vented victims from coming to a sense of resolution with what has happened
to them and moving forward with their lives.”\textsuperscript{406}

Referring to what has been discussed in chapter 3, these experiences of
women in a situation of displacement correspond to what has been dis-

\textsuperscript{402} UNHCR, \textit{Examining the particular relevance of the Convention on the Elimina-
tion of All Forms of Discrimination Against Women to the protection of women of
cern to UNHCR. Joint seminar of CEDAW Committee and UNHCR, New
York, 16-17 July 2009, Summary of proceedings, publication date 26 March 2010,
21 June 2018]

\textsuperscript{403} Committee on Elimination of Discrimination Against Women, ‘General Discus-
sion on Access to Justice 18 February 2013’, retrieved 30 May 2018
http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Accessstojustice.aspx

\textsuperscript{404} Committee on Elimination of Discrimination Against Women, ‘General Discus-
sion on Access to Justice 18 February 2013’, retrieved 30 May 2018
http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Accessstojustice.aspx; Commit-
Note for Half a Day Discussion’, (endorsed by the Committee on the Elimina-
tion of Discrimination against Women at its 53rd Session), retrieved 30 May 2018
http://www.ohchr.org/Documents/HRBodies/CEDAW/AccessstoJustice/ConceptNot
eAccessToJustice.pdf.

\textsuperscript{405} UN High Commissioner for Refugees (UNHCR), ‘Access to Justice for Victims
of Sexual and Gender- Based Violence’, January 2013, retrieved 31 Maj 2018
http://www.ohchr.org/Documents/HRBodies/CEDAW/AccessstoJustice/UNHCR.pdf

\textsuperscript{406} Ibid, para.1.
cussed in research and in the context of international and regional human rights mechanisms regarding states responsibility, also for acts committed by private persons or other private actors.407

As regards the international debate and development in international human rights law in the field of gender equality and the problem of violence against women, the CEDAW Committee has continued its work. In 2014, the Committee adopted the General recommendation No. 32 on gender-related dimension of refugee status, asylum, nationality and statelessness of women.408 The focus is on the process of asylum, including gender-related forms of persecution, considerations to make under the principle of non-refoulement and also with regard to reception arrangements.409

Given the interest for the present research to focus on the situation for female refugees who are living in a protracted refugee camp context outside Europe, paragraph 11 of the General recommendation No. 32 is to be noted. In this paragraph, it is explicitly underlined by the Committee that the Convention is applicable “at every stage of the displacement cycle”.410 However, when these stages are mentioned, the stage of life in a refugee camp context is not included as a specified stage of the displacement cycle. The stages mentioned are instead “during the refugee status determination procedure, throughout the return or resettlement process and throughout the integration process for women who have been granted asylum.”411

What is communicated here rather seems to give attention to the stages of an asylum process focusing each individual woman outside a camp arrangement and issues regulated in international legal instruments regarding refugees specifically.412 It does not seem to reflect what characterizes life for female refugees per se in a protracted refugee situation, with no rights to leave the camp area in general or to enter an integration process specifically. However, also refugees in a camp context go through a determination phase and might also be in process of resettlement and even return as

409 Ibid, paras. 3, 15, 17-23, 34.
410 Ibid, para. 11.
411 Ibid, para. 11.
412 Ibid, para. 10.
individuals. Taking this into consideration, the General recommendation No. 32 will give guidance in defining obligations of states also in regard to refugees in refugee camps, for instance when considering the risk for gender-based violence in situations of return as outlined in paragraph 23.\footnote{Ibid, para. 23: “The Committee is therefore of the view that States parties have an obligation to ensure that no woman will be expelled or returned to another State […], or where she would risk suffering serious forms of discrimination, including serious forms of gender-based persecution or gender-based violence. What amounts to serious forms of discrimination against women, including gender-based violence, will depend on the circumstances of each case.”}

With regard to female refugees in refugee camps, there is an example of integration of the General recommendation No. 32 in the concluding observations presented by the CEDAW Committee on the status of implementation of CEDAW in Tanzania.\footnote{Committee on Elimination of Discrimination Against Women, Concluding observations of the Committee on the Elimination of Discrimination against Women – Tanzania, 9 March 2016, CEDAW/C/TZA/CO/7-8, retrieved 13 July 2018 \url{https://digitallibrary.un.org/record/830238/files/CEDAW_C_TZA_CO_7-8-EN.pdf}} The issue of gender-based violence in refugee camps is given attention and specific focus is directed to the issue of inadequate protection efforts in refugee communities and also on the problem of impunity.\footnote{Ibid, paras. 46-47.} Here, the CEDAW Committee takes note of efforts already made but also finds reasons to recommend the State party to improve its efforts, also by seeking assistance from UNHCR.\footnote{Ibid, para. 47.} This part of the concluding observations has obtained the specific headline “Refugee women”\footnote{Ibid, paras. 46-47.}, which gives public visibility in the institutional reporting structure of the international human rights monitoring mechanism to female refugees and their situation. So, even if a life in a refugee camp context is not explicitly referred to as a stage of displacement by the General recommendation No. 32, it seems to give reasons to include considerations regarding the situation for women in refugee camp settings when such a context exists on the territory of the State party to the CEDAW Convention.

Another example of addressing the problem of gender-based violence by applying the General recommendation No. 32, is from December 2015, but this time under the procedure of the Optional Protocol of CEDAW regarding a woman from Pakistan. In this case the CEDAW Committee applied its General recommendation No. 32 in the considerations of the
merits of the case, especially the paragraphs 29 and 50.\textsuperscript{418} Given the conclusions drawn by the Committee, the state in focus, Denmark, was recommended to refrain from forcibly sending the woman back to Pakistan due to “foreseeable risk of being subjected to severe forms of gender-based violence”.\textsuperscript{419} The CEDAW Committee came to another conclusion in the individual case compared to what was the position of the institutions of the State party and it also directed recommendations to the State party for the general procedure to prevent “similar violations in the future”.\textsuperscript{420} Again, as was observed in chapter 3 through the study of two individual cases regarding domestic violence, an individual case confirms what it means for the issue of visibility as rights-holder to have a recognized legal voice as a woman and to be able to present a narrative regarding gender-based violence to a human rights monitoring mechanism.

Of importance to note is that the two different examples from the monitoring task of the CEDAW Committee address the problem of gender-based violence with regard to women who are not citizens of the State party to the convention and that the CEDAW Committee sees the importance of involving UNHCR in the promotion of the human rights for women in refugee communities.

\textbf{4.2.3 Institutional guidance with regard to female refugees}

Two Handbooks of UNHCR are reflecting the development of interpretation and implementation of the protection responsibility of UNHCR, as informed by the gender and human rights discussions in UN, academic discussions and developments in judicial decisions.\textsuperscript{421} The first one is the

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\textsuperscript{419} Ibid, para. 11 (a).

\textsuperscript{420} Ibid, para. 11 (b) (i).

Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, reissued by UNHCR in 2011 at the 60th anniversary of the 1951 refugee convention. 422 In the Foreword of this Handbook, the Director of the UNHCR Division of International Protection refers to the “supervisory responsibility”423 of UNHCR given by the 1950 Statute (par. 8), the 1951 Convention (articles 35 and 36) and the 1967 Protocol (article II). Compared to the edition of 1992, the reissued edition also includes eight Guidelines on International Protection, of which the first one is from 2002 on gender-related persecution and the latest is No.8 from 2009 dealing with child asylum claims and child-sensitive interpretation of the 1951 Convention.424 The Guidelines are referred to as “legal positions on specific questions of international refugee law”425, issued by UNHCR for updating purposes.426

The second example of a handbook is the UNHCR Handbook for the Protection of Women and Girls from 2008.427 This Handbook reflects a process that started in the 1980s, of developing protection issues regarding female refugees with clear references to core human rights treaties.428 In her launching speech, the Assistant High Commissioner informed that the Handbook replaced the UNHCR 1991 Guidelines on the Protection of Women and she also made reference to the Conclusion No 105 of the Ex-Com (2006), giving special attention to protection problems regarding

423 Ibid, Foreword, p. 2.
424 Ibid, Content and pp. 77-170.
426 Ibid, Foreword, p. 2.
428 UNHCR Handbook for the Protection of Women and Girls, 2008, chapter 1, pp. 5-6 and chapter 6.1.2; Martin, 2010b, pp. 113-121. For information regarding core international human rights treaties, see the links accessible from the website of UN Human Rights Office of the High Commissioner, ‘Human Rights Bodies’ retrieved 1 June 2018 http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx
women and girls, related to gender, culture, socio-economic position and legal status.429

While the Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status are specifically focused on the legal refugee determination procedure and experiences leading up to forced displacement that could qualify for persecution and refugee status, the Handbook for the Protection of Women and Girls addresses experiences of female refugees with regard to human rights at risk and to protection practices in different phases of the displacement, e.g. in a protracted refugee camp setting. 430 The purpose of this latter Handbook is to guide UNHCR staff in their protection responsibilities with regard to women and girls.431 Since the present research does not aim to discuss the determination process for refugee status, the first handbook is not further discussed, while the second one will be in focus for a closer study below.

4.3 Refugees as Rights-Holders

4.3.1 Human Rights-Based Approach
As have been mentioned above in chapter 1.3, the mainstreaming process initiated within the UN in the end of the 1990s, aiming at an integration of human rights into the UN agencies and their activities, reached out also to UNHCR.432 The human rights-based approach (HRBA), that formed part of this process, has been adopted by the UNHCR ExCom with regard to the mandate of international protection of both women and children and the UNHCR Handbook for the Protection of Women and Children is


432 Goodwin-Gill, 2006, p. 4.
aimed to reflect this.\textsuperscript{433} A commitment to this approach and what it means to UNHCR is communicated as something that should influence the attitudes towards people as well as the way of doing the work. An important part of the shift in attitudes is to perceive the person as a rights-holder and not as a passive recipient of aid. This shift in approach is expressed in the \textit{UNHCR Handbook for the Protection of Women and Girls from 2008} with the following lines:

“It requires an attitudinal shift in how we work with and for persons of concern. They are not passive recipients of humanitarian aid but “‘rights-holders’” with legal entitlements.”\textsuperscript{434}

The integration of the human rights-based approach into the work of UNHCR is also reflected in the adopted \textit{Guidelines on International Protection} regarding children with its explicit emphasize on “the need for children to be recognized as ‘‘active subjects of rights’’ consistent with international law”.\textsuperscript{435} This understanding of children to be active subjects of rights has been spelled out with a clear linking to human rights by ExCom referring to the Convention on the Rights of the Child (CRC) as an “important legal and normative framework for the protection of children”.\textsuperscript{436}

A consequence of the rights-based approach with regard to female refugees and the view of not seeing them as passive recipients of aid but as rights-holders, is to give emphasis in the work to what is described in terms of their “participation and empowerment”.\textsuperscript{437} Part of this is the argumentation to leave the view of perceiving women “as being inherently vulnerable” and give attention to “avoid (further) violations of women’s and


\textsuperscript{434} Ibid, chapter 2.2, p. 27.

\textsuperscript{435} \textit{UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees}, 22 December 2009, HCR/GIP/09/08, par. 3, available at: http://www.refworld.org/docid/4b2f4f6d2.html [accessed 19 June 2018]

\textsuperscript{436} \textit{UN High Commissioner for Refugees (UNHCR), Conclusion on Children at Risk No. 107 (LVIII) - 2007, 5 October 2007, No. 107 (LVIII) - 2007, (Executive Committee 58th session), Fundamentals for child protection, (b)x.}, available at: http://www.refworld.org/docid/471897232.html [accessed 19 June 2018]


\textsuperscript{438} Ibid, chapter 3, p. 65.
This position to recognize women as active participants in a work for human rights is in line with the argumentation of Dianne Otto, as discussed above in chapter 3, e.g. regarding the language of resolutions of the Security Council and the importance of affirming the role of women as bearers of human rights and actors.

The UNHCR Handbook for the Protection of Women and Girls develops what is found needed in an operational context for increasing the participation and empowerment of women in general. There are challenges identified that the work would meet, due to resistance in the community and even amongst some members of the UNHCR staff who hesitate to act for protection of human rights of women with reference to local culture.

To address this problem and to give emphasis to the human rights of female refugees, the Handbook outlines a variety of responses directed not only to women but also to community leaders and national ministries. Again, the language used in the Handbook reflects a commitment to give attention to international human rights, to make the rights known and to be proactive in the work. To exemplify this, it is explicitly underlined that there is a responsibility for the staff of UNHCR to work systematically to “uphold the rights enshrined in international instruments”, to “raise awareness of women’s and girls’ rights” and to “take action to promote gender equality”.

Part of this is to regularly make assessments concerning protection risks. According to the Handbook, the analysis of the risks should be guided by “the views of persons of concern - “the rights holders” and a rights-based approach that make use of “international legal standards” for the analysis. The international legal framework is briefly introduced in chapter 6 of the Handbook. One of the sections in that chapter addresses international human rights law and specifically the Convention on the

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439 Ibid, chapter 3, p. 66.
440 Ibid, chapter 2.4 and for the definition of the two concepts see pp. 40-41.
441 Ibid, chapter 2.2, pp. 28-29.
442 Ibid, chapter 2.2 and 2.4.
443 Ibid, chapter 2.2, p. 29.
444 Ibid, chapter 2.2, p. 29.
446 Ibid, chapter 3.2, p. 76.
Elimination of All Forms of Discrimination Against Women.\textsuperscript{449} To be noted is that UNHCR finds the human rights mechanisms to be an additional way to strengthen protection of displaced people, but it is also stated that it is not part of the scope of the Handbook to discuss the various human rights mechanisms that have been established.\textsuperscript{450} Instead the chapter refers to other material produced by UNHCR for a more detailed knowledge. \textsuperscript{451} This corresponds to the objectives of the Handbook to direct attention of staff to consult additional resources to strengthen protection of rights of women and girls.\textsuperscript{452}

4.3.2 Legal systems as a risk factor

Even though UNHCR has an international protection mandate, it does not include a legal jurisdiction on the territory of a refugee camp.\textsuperscript{453} In a study from 2006, commissioned by UNHCR, a complex legal context with presence of a variety of justice mechanisms was identified to exist in refugee camps.\textsuperscript{454} The challenge described by the consultant, Rosa da Costa, was formulated in terms of “the complex interface of local, national, international, and refugee-specific values and justice (i.e. DRS) mechanisms”.\textsuperscript{455} This situation surfaced difficulties in addressing specifically violence against women and directed attention to a problem of practices “in contravention of international human rights standards”\textsuperscript{456}, also in the area of family law. What was identified by Rosa da Costa as a complexity in the legal context of a refugee camp setting is reflected in the Handbook for Protection of Women and Girls from 2008. The issue of violence against women is recognized as one of the challenges in situations of displacement and so is also the problem of lack of justice mechanisms to address the situation.\textsuperscript{457} These are conditions that might block an empowering process

\textsuperscript{449} Ibid, chapter 6, pp. 338-341.
\textsuperscript{450} Ibid, chapter 6, p. 339.
\textsuperscript{451} Ibid, chapter 6, p. 333.
\textsuperscript{452} Ibid, Introduction to the Handbook, p. 2.
\textsuperscript{454} da Costa, 2006.
\textsuperscript{455} Ibid, p. 9. DRS is an abbreviation for Dispute Resolution Systems of refugees.
\textsuperscript{456} Ibid, p. 74.
for women to be able to participate in decision-making in general and to act in cases of domestic violence.\textsuperscript{458}

Therefore, the distinctions made in the Handbook between what is called protection as \textit{an objective, as a legal responsibility} and as \textit{an activity} catch interest.\textsuperscript{459} These three dimensions of protection are based on an understanding of protection as agreed by the Inter-Agency Standing Committee (IASC), of which UNHCR is a member.\textsuperscript{460} This is protection defined as “all activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law, i.e. human rights law, international humanitarian law and refugee law.”\textsuperscript{461}

According to the Handbook, protection as \textit{an objective} refers to the aim of full respect for rights “as provided for in national and international law.”\textsuperscript{462} The dimension of \textit{legal responsibility} refers to obligations of States, but also to the responsibility of UNHCR in accordance with its Statute and resolutions such as these of the General Assembly and conclusions of ExCom.\textsuperscript{463} Finally, the dimension of protection as \textit{an activity} is explained to be “responsive,”\textsuperscript{464} “remedial”\textsuperscript{465} and “environmental building,”\textsuperscript{466} including to stop rights violations, to promote access to justice and to promote respect for rights.

An observation expressed in the Handbook is that there is a delayed or even denied justice due to unwillingness to prosecute crimes in refugee camps located in remote areas.\textsuperscript{467} Added to this is a risk for threats and social ostracism for women or girls who address a national system instead
of keeping to traditional mechanisms for justice and settling cases in a way that, in the Handbook, is referred to be the “the family way”\textsuperscript{468}. In situations of gender-based violence against women, there might be an attitude of keeping it a private matter, especially in situations of domestic violence.\textsuperscript{469} It is also something that can cause tensions between refugee communities and people with a role to act on situations of violence against women or girls.\textsuperscript{470} This gives a picture of a variety of aspects to consider, not all of them strictly legal, that influence whether human rights of women and girls will be acted upon or not in a refugee camp context.

ExCom has addressed the issue of risk factors as either \textit{environmental} or \textit{individual} in its two Conclusions, No. 105 with regard to female refugees specifically and No. 107 with regard to children.\textsuperscript{471} For the refugee camp situation, the recommendation of ExCom of how to meet the risk factors is developed in the Handbook for the Protection of Women and Girls, for example in chapter 3.\textsuperscript{472} The Handbook identifies the importance to combine responses to situations that cause an immediate risk for an individual female refugee with a response to different structural issues reflected in such matters as attitudes and legislation that would need a longer process to give results.\textsuperscript{473}

In its Conclusion No. 105, ExCom mentions several risk factors for women and girls and refers explicitly to “legal systems, which do not adequately uphold the rights of women and girls under international human

\begin{footnotes}
\item[470] Horn and Seelinger, 2013, p. 9.
\end{footnotes}
This is followed up in the Handbook with an emphasis on the importance to specifically “identify the ‘risk factors’ that threaten their rights”.

Three of the risk factors that have been identified are phrased as:

- “Position of women and girls in society”
- “Legal systems which do not adequately uphold their rights”
- “Protection systems which do not adequately uphold their rights”

With regard to the first point, explicitly identifying the position of women and girls in the society as a risk factor, it is supposed to be influenced by factors as “discrimination and marginalisation”. In order to better understand the distinction made between the second point - legal systems on the one hand and the third point - protection systems on the other, some guidance could be given by the list of issues identified to influence the risk factors. What constitutes legal systems as a risk factor directs attention to weaknesses in the present systems to respond to situations of violence, e.g. “justice systems that do not fully address harmful practices or domestic violence” or “traditional justice systems that do not respect international norms”. In case of conflict between what can be referred to as traditional system and international norms respectively, the position of UNHCR communicated through the Handbook gives preference to international legal principles:

“UNHCR should not endorse decisions of such mechanisms that violate international legal principles and should, where necessary and possible, intervene to protect women and girls.”

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479 Ibid, chapter 3, p. 67.

480 Ibid, chapter 3, p. 67.


482 Ibid, chapter 5.4.3, p. 257.
A special section in chapter 5 of the Handbook gives attention to the presence of traditional justice mechanisms in refugee communities and the kind of activities that UNHCR can perform to address the problem of violence against women.\textsuperscript{483} Underlining the principle that the issue of administration of justice is a responsibility of the State, the section outlines a variety of responses to meet the challenges of practices that do not act on violence against women in line with international human rights.\textsuperscript{484} These responses include different kinds of measures to strengthen the community in the knowledge about the rights of women and also of children.\textsuperscript{485} Another example of suggested responses is to ensure that there is an operational communication between the two systems at the local level and to provide a possibility for women to have access to a judicial review in case they find that they have been discriminated against by a traditional justice mechanism.\textsuperscript{486} The need to be active in relation to various justice mechanisms has continued to be underlined by the UNHCR. In the report \textit{Update on refugee women: promoting gender equality and eliminating sexual and gender-based violence} from 2013, the various types of hindrances to women to get access to formal systems in cases of sexual and gender-based violence were addressed as well as the need to be active in relation to “the role of traditional justice mechanisms”.\textsuperscript{487} With regard to the reference made in the Handbook to “protection systems”\textsuperscript{488} as a risk factor, there is a variety of components that would influence the systems not to uphold human rights. According to what is listed, this risk factor seems to be dependent on lack of such things as knowledge, awareness and adequate operational mechanisms to address a variety of situations. Components that influence an operational context are identified in terms of “lack of standard operating procedures to report on, and respond to, SGBV”\textsuperscript{489}, “lack of awareness about women’s and girl’s

\textsuperscript{483} Ibid, chapter 5.4.3, pp. 255-262.
\textsuperscript{484} Ibid, chapter 5.4.3, p. 198.
\textsuperscript{485} Ibid, chapter 5.4.3, p. 258.
\textsuperscript{486} Ibid, chapter 5.4.3, p. 258.
\textsuperscript{489} Ibid, chapter 3, p. 68.
and “insufficient presence of female and international staff or female law enforcement or security officers”.491

4.3.3 Addressing risk factors
One way of meeting the kind of risk factor identified with regard to legal systems has been for UNHCR to follow up the publication of the Handbook with a so-called Companion Guide from 2010, in the form of a booklet, including a DVD.492 The fourth section of the booklet deals specifically with the theme gender-based violence. The film Breaking the cycle of violence forms part of the DVD-material and includes interviews of staff from both UNHCR and organizations mandated to work in a refugee camp area in Kenya, Dadaab.493

Violence against women is referred to as a global phenomenon and the Dadaab refugee camp in Kenya shows no exception in this regard from violence in private as well as in public spheres. The message communicated regarding the problem reflects observations of the various types of risk factors mentioned above. It is argued that the position of women in the society forms part of the problem and it is described in terms of that “culture places women at the back of the seat”494, that women “have no voice”495 at house level and that, they are “fully dependent on male relatives”496 for access to services.

As examples of operational responses to the situation with regard to legal matters, the film addresses the problem of gaps between laws and implementation of laws. A practice has been developed, according to which a mobile court from Garissa comes once a month to sit in the camp.497 How-

491 Ibid, chapter 3, p. 68.
495 Ibid, Community services (Magalla Aden Abdi), UNHCR.
496 Ibid, Assistant protection officer (Mwongeli Makau Mkuzi), UNHCR, Dadaab.
497 Ibid, Senior Protection officer (Terrance Pike), UNHCR, Dadaab.
ever, the work of the court is dependent on a readiness of refugees to use the legal system of the host country by reporting on cases on the one hand and a process of investigations that could meet the criteria for prosecution on the other. Different measures are communicated to facilitate this and one is to actively strengthen legal awareness and to reach out to the community level via so called support groups, formed by refugees with their own experiences from violence. At the same time, it is commented that lack of evidence makes it difficult to reach the point of prosecution for violations that has occurred in the private sphere.

Similar concrete examples on initiatives of acting on the problem of violence against women are presented in the Handbook for Protection of Women and Children. One of these examples is reported from a refugee camp situated in Guinea, where participatory video has been used as a tool to pave the way for communication purposes.498 This methodology is reported to have facilitated for refugees to overcome hesitations to report violence against women and increased the dialogue with the refugee community regarding topics considered to be sensitive, as for example early marriage and domestic abuses.499

The kind of measures addressed in the training material of UNHCR and in the field practice presented in the Handbook of 2008, attach to discussions in articles by researchers from a latter date. In two articles from 2011 and 2013, respectively, Anna Lise Purkey gives attention to legal matters specifically with regard to the context of protracted refugee camps. In her first article, Whose Right to What Justice? The Administration of Justice in Refugee Camps, she builds on the report by da Costa from 2006, cited above, and on the discussion regarding the role of states as de jure responsible for protection issues, while UNHCR has been given a de facto authority in camp areas.500 To be noted is her remark in the introduction that “little comprehensive research has been done”501 regarding the issue of administration of justice in refugee camps. She confirms that sexual and

500 Purkey, 2011; For the issue of de facto authority see also Crisp and Slaughter, 2009.
gender-based violence “typifies many of the most problematic aspects of the administration of justice”\(^{502}\) and that there are weaknesses in the capacity of justice systems to respond in accordance to international standards, due to limitations in both “legal and practical knowledge and skills”.\(^{503}\) She argues for a “rights-based”\(^{504}\) intervention and discusses measures to be taken on activities in camp contexts, e.g. training and practice of mobile court system, in order to give presence to the justice system of the host state and to get a clarification with regard to jurisdiction within the area of the refugee camp.\(^{505}\)

With regard to the experiences from refugee camps of using a participatory video, her subsequent article from 2014, *A Dignified Approach: Legal Empowerment and Justice for Human Rights Violations in Protracted Refugee Situations* is of interest.\(^{506}\) In this article, she argues for legal empowerment of refugees as a measure to strengthen the administration of justice and to increase the opportunities for refugees as individuals to gain control over their situation.\(^{507}\) She argues for this to be applied as a bottom-up approach to legal issues in order to make access to justice possible and contrasts it to what she sees as a top-down approach, represented by rule of law initiatives focusing on state institutions and not on groups of people who are disadvantaged.\(^{508}\)

Purkey confirms that the model of legal empowerment would meet challenges, but at the same time she also argues for the view that the principles of a human-rights based approach will be concretized by using the law and the legal mechanisms in place.\(^{509}\) To her, legal empowerment would enhance the possibility for refugees, who do not have a political say vis á vis the host state, to hold the hosting government accountable for human rights obligations.\(^{510}\)

However, a slightly different perspective on the topic of refugees and their relationship to the hosting state and legal systems as practiced in a refugee camp setting, is presented by Elizabeth Holzer in her article *What*  

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Happens to Law in a Refugee Camp? from 2013.\(^{511}\) Her argumentation is based on a field work for 15 months in Ghana, including ethnographic research in the Buduburam refugee camp in the period 2006-2011.\(^{512}\) She explores the relationship to law as it surfaced in the development of a legal subjectivity of people and discusses in detail the issue of refugees as “international legal subjects”\(^{513}\) in a refugee camp context and how they by action show a kind of empowerment.\(^{514}\) In comparison to the research by Purkey, who gives specific attention to how to strengthen the legal system of a host country and how refugees may use it, Holzer problematizes the role of a national legal system as practiced by a specific host country. She does so from the point of view of the refugees in a certain refugee situation and illuminates the legal conditions by giving more of focus to the active role of refugees and their understanding of international human rights in such a context.

Part of her findings is a situation where refugees, based on experiences, found themselves to be alienated from the law of the host country and instead turned to international human rights in their argumentation from the point of view that as humans, they have human rights.\(^{515}\) As a reflection of this, they have collectively directed their claims towards UNHCR in matters regarding shelter, food, education and work as well as resettlement.\(^{516}\)

While Purkey argues for measures to strengthen what can give access to an already existing legal system of the host country, Holzer gives focus to a bottom-up movement where refugees identify themselves closer to international human rights than to the law of the host country.\(^{517}\) Her study indicates that the views of refugees and their experiences of the legal administration of the host country would have an impact on how refugees will respond to a situation where human rights are at risk for an individual or for a group of refugees. In this discussion, the experiences of female refugees as presented by UNHCR at a General Discussion arranged by the CEDAW Committee in 2013 are to be taken into account. As referred to above (4.2.2), in a consultation process of 2011, women had communicat-

\(^{511}\) Holzer, 2013.
\(^{512}\) Ibid, p. 848.
\(^{513}\) Ibid, p. 837.
\(^{514}\) Ibid, p. 849.
\(^{515}\) Ibid, p. 863.
\(^{516}\) Ibid, pp. 858-860, 862-865.
\(^{517}\) Ibid, p. 863.
ed to UNHCR an eroded confidence in law enforcement actors and the judiciary with regard to the problem of violence against women. 518 However, according to the same intervention of UNHCR in 2013, there might also be situations when women for various reasons give preference to have the problem handled within the traditional system of their refugee community. 519

In accordance with observations by Rosa da Costa in 2006, the studies of Purkey and Holst underline the presence of a complex legal situation in refugee camp contexts. To be noted though, is that the articles by Purkey and Holst direct attention to the legal system of a host country and to an argumentation on what would motivate or not refugees as actors in claiming rights with regard to such a system. However, the emphasis is not put on a closer study of the traditional justice mechanisms of refugee communities, systems that have been identified by both Rosa da Costa and ExCom to form part of the complex legal context and influence to what extent female refugees are willing to act in matters that concern them.

4.4 To summarize
This chapter gave a short introduction to the mandate of UNHCR in general and in relation to women in particular. Attention was directed to the context of human rights in the work of UNHCR, the development of the mandate of UNHCR in the area of violence against women in refugee camps, the issue of female refugees as rights-holders and the observation that legal systems could be a risk factor in a refugee camp context. Focus was given to some of the instruments forming the framework for addressing human rights of women also when they are in a refugee situation.

The interrelationship between international human rights and the development of the mandate and policies of UNHCR was discussed, especially with regard to the work of the CEDAW Committee. It was observed that the CEDAW Committee has been active in explicitly linking human rights of women to refugee situations and the work of UNHCR. As an international human rights treaty, the CEDAW-convention has been stated to complement the refugee law instruments, the 1951 Convention relating to the status of refugees and its 1967 Protocol. The adoption of the General recommendations No. 30 and 32 by the Committee and the use of them underline the applicability of CEDAW also with regard to women in a

519 Ibid, para. 2.
refugee situation. This gives an opportunity to address various problems of gender-based violence in refugee situations, including those in refugee camps, by integrating the work of the CEDAW Committee.

This chapter also included a closer study of material developed for a more operational context for the purpose of protection of human rights of women, namely the UNHCR Handbook for the Protection of Women and Girls from 2008 and a Companion Guide from 2010 aimed for training purposes with regard to the Handbook. The commitment to address refugees as rights-holders in the context of the human rights-based approach was focused, as was the observation in studies and by ExCom that legal systems might also be a risk factor in an operational refugee camp context. For the chapters to come, we take note of this identified risk factor and the recognition of female refugees as rights-holders, as explicitly expressed by UNHCR and in the work of the CEDAW Committee.

Before proceeding into a study of what the situation could be in a specific refugee camp context in East-Africa, the following chapter will give attention to the presence of customary law traditions in African communities outside a refugee camp setting. This is made in order to give some basic idea of what could inform the kind of complex legal structure Rosa da Costa referred to in her study of 2006.

**Chapter 5. Aspects of local customary law tradition and the issue of visibility of women**

“There cannot be a discussion about human rights without a discussion about women and the law”.520

5.1 Introduction

In the previous chapter we learnt that for the operational setting of refugee camps, UNHCR has developed various guiding documents, recognized the position of women as rights-holders according to international human rights and emphasized the importance to address various hindrances for women to achieve access to justice in situations of gender-based violence. In part of this, the need to give more attention to legal systems in general and the role of traditional justice mechanisms specifically has been under-

520 Dow, 2001, p. 323.
lined by the UNHCR in the work for protection of human rights of women in refugee camps.521

Therefore, the present chapter will give a brief introduction to some of the components that could form customary law traditions practiced in societies in South Sahara, outside a refugee camp setting. Here, attention will be directed to aspects of special interest for approaching human rights issues in a refugee camp environment and the issue of female refugees as rights-holders. Of special interest are aspects with regard to the issue of legal status of women and the conditions to address situations of domestic violence.

A short orientation will be given by referring to the work of a few researchers who have studied customary law practices more closely, either with a specific country in focus, or with a broader focus including several countries. Part of this orientation reflects presence of customary law structures in society, through two examples discussing the position of women in the society also with regard to international human rights law. The first example addresses the issue of the right not to be discriminated against as a female citizen, illustrated by references to a national court case from Botswana regarding the Citizenship Act of the country. The second example addresses gender-based violence in one of the neighbouring countries, from which refugees in the refugee camps of Kenya originate. This will be illustrated by references to an international human rights monitoring mission report by the UN Special Rapporteur on violence against women, its causes and consequences.

5.2 Characteristics of customary law

As noted in chapter 3, in order to have an individual application regarding a human rights violation accepted for consideration by certain human rights monitoring mechanisms, one of the criteria is that all national remedies have been exhausted before the case of human rights violations can be handled.522 From a legal point of view, this means that the possibility for a


woman to make use of such a human rights monitoring mechanism will be
dependent, not only on a commitment by the state to be monitored by a
human rights mechanism in individual cases but also on a recognition of
her independent legal status and a legal capacity to act, in the local com-
community context as well as within the national legal system.

However, the existence of an unlocked legal door for women to take le-
gal actions in family law matters or in cases of gender-based violence in
general and with regard to domestic violence in particular is not to be tak-
en for granted, neither in the statutory legal system applied in a certain
country, nor according to local practice of customary law. Research study-
ing specifically the legal context of women in societies applying customary
law practices shows that the hindrances are not always of a practical, logis-
tical character or an issue of not being encouraged and empowered as an
individual to take legal action. The hindrances could go deeper into the
structure of the legal system and direct attention to the issue of whether a
woman is entrusted or not by the structure of the system to act in person,
with a legal capacity and by her own right before the law. 523

5.2.1 Modus operandi
Studies that discuss what constitutes a customary law system and its vari-
ous characteristics could differ in focus. Depending on the purpose of the
studies, emphasis could be given to a customary law structure as practiced
in a specific local community context524, or a study of customary law exis-
ting in parallel with a statutory law system of a country525 or to give de-
tailed attention to certain rights-issues with regard to women specifically
and to what extent there is a space for them to act in their own right.526
Irrespective of the focus chosen, to be noted is that a customary law system
is characterized by an oral tradition of transmitting norms to be applied for
a certain community and a procedure to handle disputes that gives empha-

523 Banda, 2005; Ruppel and Ruppel-Schlichting, 2011; Stewart, 2000; Williams,
2013.
524 Hezron Randa, ‘Problems of Interaction between English Imposed System of
Law and Luo Customary Law in Kenya’ (University of Lund, Department of Law
1987); Abdile, 2012.
525 Ruppel and Ruppel-Schlichting, 2011; Peter Onyango, African Customary Law :
An Introduction (LawAfrica Publishing 2013)
526 Banda, 2005; Elsje Bonthuys and Natasha Erlank, ’The interaction between civil
L. 59 ; Oliver C. Ruppel (ed.),Women and Custom in Namibia, Cultural Practice
versus Gender Equality?, (Konrad Adenauer Stiftung and the Authors, Macmilliam
Education Namibia, Windhoek, 2008); Williams, 2013.
sis to a consultative process led by elders or chiefs.\textsuperscript{527} This kind of systems form part of the current legal context of various African countries, practices of communities that are older than the legal systems based on a written tradition of legislation and judgements of today.\textsuperscript{528} Is is described in terms of systems that, for various groups in a country, formed and still form a kind of “modus operandi”\textsuperscript{529} and “a fact of life”.\textsuperscript{530}

However, there is a variation in to what extent customary law systems operate independently of the statutory legal system of a state or as an integrated part and in what kind of legal matters the customary law is recognized in parallel with the statutory legal system of a state.\textsuperscript{531} Studies show that customary law systems could be recognized by constitutions to form part of the legal structures of the countries, including a mandate for traditional leaders to be operational in legal matters.\textsuperscript{532} There is also research that directs attention to a legal context where customary law is authorized to deal especially with family-related matters like marriage, property issues and custody even though criminal behaviour could also be observed.\textsuperscript{533}

This is partly a result of decisions taken by individual states in the process of independence from the colonialism, when they had to address the the inheritance of an administration of justice as developed by colonial powers, which to various degrees had practiced a separation of legal systems towards the population in the territory, affecting such issues as choice of law.\textsuperscript{534} For instance, the British colonial power had ruled through a practice of parallel legal systems that consisted of an imported statutory law to be applied side by side with an already established unwritten local customary law tradition, of which the introduced statutory law was aimed


\textsuperscript{529} Ruppel and Ruppel-Schlichting, 2011, p. 40; Onyango, 2013, p. 29.

\textsuperscript{530} Williams, 2013, p. 28.

\textsuperscript{531} Bonthuys and Erlank, 2004; Banda, 2005, pp. 19-21; Onyango, 2013, pp. 91-93.

\textsuperscript{532} Williams, 2013, p. 29; Ruppel and Ruppel-Schlichting, 2011, pp. 39-41.

\textsuperscript{533} Williams, 2013, p. 27; Katharina Ruppel-Schlichting and Wilmart Vissner, 'Women and custom in Namibia – The legal setting’, in Oliver C. Ruppel (ed), Women and Custom in Namibia, Cultural Practice versus Gender Equality?, (Konrad Adenauer Stiftung and the Authors, Macmillian Education Namibia, Windhoek, 2008); Bonthuys and Erlank, 2004; Banda, 2005.

\textsuperscript{534} Banda, 2005, pp. 19-21; Randa, 1987, pp. 113-117.
to be applicable to all, especially with regard to public law, while the local customary law was to be applied only to the African population and primarily so in the sphere of private law.\(^{535}\)

### 5.2.2 Claiming a right or not

In her article, *Women and judging: A feminist approach to judging and the issue of customary law* Susan H Williams refers to experiences from a decade of working with constitutional reforms in countries like, Liberia, South Sudan, Myanmar and Vietnam.\(^{536}\) Of interest to her has been to study to what extent gender equality norms as stated in constitutions become reflected in the legal systems, including customary law practices.\(^{537}\) She underlines that in countries where the constitution on one hand recognizes customary law systems to operate and on the other hand guarantees the right for women of not being discriminated against, there is a risk of in-built conflicts that are difficult to handle by the courts.\(^{538}\) It is argued that women might experience tensions in the community context and even being viewed as traitors and exposed to stigmatization when seeking protection by state against customary practice.\(^{539}\) This kind of social pressure experienced by some women might hinder other women from actually challenging the customary law rules even though they find that their constitutional right of not being discriminated against is violated.\(^{540}\)

Another aspect of the views on customary law systems is discussed by Susan Williams regarding findings in both Liberia and South Sudan, where it has been observed that people in rural areas do not have access to a formal legal system in their areas of living to handle legal matters, civil or criminal.\(^{541}\) The legal institutions, professional lawyers and judges are de facto not available to handle legal matters outside major cities and logistic and economic hindrances are too big to bring cases to the city area.\(^{542}\) This means that the population gives preference to the customary law mechanisms, both with regard to civil law matters and for criminal law cases.


\(^{536}\) Williams, 2013.


\(^{538}\) Ibid, p. 30.

\(^{539}\) Williams, 2013, p. 32; Bond, 2010, p. 562.

\(^{540}\) Williams, 2013, p. 32.

\(^{541}\) Williams, 2013, p. 28.

\(^{542}\) Ibid, p. 28.
However, this is not only for logistical reasons but also because the population has more trust in customary systems to bring justice, as these systems give emphasis to the restorative component rather than to punishment and therefore meet the interest of repairing social relations. This is a preference reflected in figures presented by Williams from Liberia, indicating that people were “twelve times more likely to choose a customary court.”

However, the figures also show a situation that as much as 59% of the civil cases and 53% of the criminal cases were never taken to any court system at all. This is a situation reflected by another study specifically focusing Liberia and Sierra Leone with regard to women’s decisions whether to take legal action or not in cases of domestic violence. The view of a system as dysfunctional and the cost factor contributed to the hesitation to make use of the criminal justice system in order to address the problem of domestic violence. The same study also identified that even if it is of importance to strengthen legal responses to violence against women, this was not a measure of priority for women given various other components affecting their lives, e.g. poverty and responsibility for children.

Williams also gives other examples of legal matters where she finds a risk of discrimination of female members in a customary law system, e.g. property rights, inheritance rights, custody issues and marriage decisions taken for girls and widows. These are all legal issues that have an impact on the daily life as women and have implications for their social and legal status not only in the family but also in the society. She points out that women are usually not allowed to serve as chiefs, nor encouraged to speak.

543 Ibid, p. 28.
544 Ibid, p. 28.
545 Ibid, footnote 8 on p. 28.
546 Rebecca Horn, Eve S. Puffer, Elisabeth Roesch and Heidi Lehmann, “‘I Don’t Need an Eye for an Eye’: Women’s Responses to Intimate Partner Violence in Sierra Leone and Liberia’ (21 May 2015) Global Public Health 1 [online journal], pp. 7-8, download by Örebro universitetsbibliotek, 24 October 2015, available 16 July 2018 https://www.tandfonline.com/doi/full/10.1080/17441692.2015.1032320. This is a study that defines domestic violence as behavior within an intimate relationship (p. 3).
548 Ibid, p. 11.
549 Ibid, p. 29.
in groups where both men and women are present.\textsuperscript{550} This means that as a group in the society they are excluded from participating in hearings of cases in the customary law system that directly affect their lives and they are also excluded from being trusted a mandate as judge in the same system.\textsuperscript{551} In her discussion, Williams underlines the importance of women not only to have been recognized certain rights but also to have the right to have a voice and a right to operate from within the cultural and customary legal system, in order to be able to recreate the rules and to realize their rights.\textsuperscript{552} With reference to her research, she argues that “customary law will be consistent with gender equality only when women are judges in customary courts.”\textsuperscript{553}

With regard to this issue of the status of women and to what extent they are recognized to act on rights or not within the context of customary law, another researcher, Julie Stewart, argues for the importance to deepen the understanding of conditions for women in each specific customary law context, before judging on discrimination of women in regard to human rights.\textsuperscript{554} In her article \textit{Intersecting grounds of (dis)advantage: The socio-economic position of women subject to customary law – a Southern African perspective}, she emphasizes that customary laws vary both between and in countries.\textsuperscript{555} She underlines that it is of importance to have a methodology of research that reveals what are actually the views of a woman on rights, and space to act for rights, in a specific customary law context.\textsuperscript{556} Her argumentation is illustrated by an observation made in a research programme on inheritance issues, where an elderly widow acted for her right to stay in the village when she was at risk to be evicted. The way she made her statement was not to actively argue in a court or referring to a written tradition of rights, but to mark her position and right to stay by sitting. Her way of claiming her right was expressed by herself as ”I just sat”.\textsuperscript{557} Through this kind of action she directed attention to her status as belonging to the community and that the recognition of her belonging formed the

\textsuperscript{550} Ibid, p. 29.  
\textsuperscript{551} Ibid, p. 29.  
\textsuperscript{552} Ibid, p. 37.  
\textsuperscript{553} Ibid, p. 26.  
\textsuperscript{554} J. Stewart, 2008, p. 148.  
\textsuperscript{555} Ibid, p. 134.  
\textsuperscript{556} Ibid, p. 142-146.  
\textsuperscript{557} Ibid, p. 145.
basis for her right to also remain in the community. However, the way in which the widow acted was first perceived by the research team as an expression of passivity and not as an act of claiming a right to be protected, which was the interpretation of the community members. Therefore, Stewart underlines that rights of women may not always be clear and investigations need to be multilateral, for the purpose of understanding the legal environment.

To further contribute to this brief orientation on the presence of customary law in local communities and what kind of implications it could have on the issue of visibility of women in legal matters, we will now look closer into two different examples. The first one gives an example of argumentation by a woman from within the court system and the statutory law context of Botswana regarding the legal status of women, while the second one gives an example of argumentation from a position as a holder of an external international human rights monitoring mandate, with regard to the issue of violence against women on mission in Somalia. Even though their points of entry for discussing the legal status of women and the issue of human rights of women differ, they both reflect some of the argumentation above with regard to what a customary law system in practice could mean for the position of women and their rights.

### 5.3 Legal status of women and the capacity to act

In the beginning of the 1990s, a lawyer in Botswana, Unity Dow, challenged the Citizenship Act of 1982 of Botswana from a legal point of view by referring to her constitutional right of not being discriminated against as a women and citizen of Botswana. This was done through a court case which has been discussed in academic literature, representing both international human rights law and anthropology, and also been referred to by

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558 Ibid, p. 145.
559 Ibid, p. 145.
560 Dow, 2001. The implications of the same Citizenship Act of 1982 was discussed in my Master of Law study, but with regard to the status and rights of children born in intermarriages in the context of a discussion on naturalization of refugees. Children born in wedlock to a mother who was a citizen of Botswana and a father who was a refugee did not acquire citizenship of Botswana by birth and therefore might be brought up in the country as de facto stateless. The findings were published in the research report *Refugees in Botswana in the Light of International Law*, Scandinavian Institute of African Studies [Nordiska Afrikainstitutet], 1990.
UN Women as late as in 2011.\textsuperscript{561} It was a case where Unity Dow, married to an American citizen, succeeded in her argumentation that the Citizenship Act in force hindered her as married to a non-citizen to transfer her citizenship to two of her children born in wedlock and that the Act therefore infringed her constitutional right not to be discriminated against as a women.\textsuperscript{562}

Below follows a more detailed study of some of the research regarding the case. Even though the case is not about a refugee woman, it is given attention here as it underlines the importance of recognition of legal status of women to be visible and able to address human rights issues, and to have them documented and discussed nationally or beyond borders. Referring to the discussion above by Susan H Williams regarding inbuilt-conflicts in constitutions caused by including the right of not being discriminated against due to gender and sex on one hand and a recognition of customary law on the other, it is to be noted that at the time of the court case of Unity Dow Botswana practiced a dual legal system where customary law and common law existed, in parallel, side by side.\textsuperscript{563} This co-existence had its background in the period of Botswana being a British Protectorate with an interest not to interfere with the traditional normative system, a co-existence that had been kept in the legislative system through an advisory role held by House of Chiefs when bills were perceived to affect customary law and the power of the chiefs.\textsuperscript{564}

The recognition of customary law and the role of traditional leaders in the country formed part of the legal society context in which Unity Dow acted by arguing for her human right of not being discriminated against. Even though the legal process took place in the 1990s, it is a case that draws attention internationally and due to the legal society context is of interest also for the present study. It has, as mentioned, been referred to as a famous example by UN Women in its report from 2011-2012, focusing


\textsuperscript{562} Banda, 2005, pp. 48-49.

\textsuperscript{563} Zetterqvist, 1990, p. 15.

\textsuperscript{564} Ibid, pp. 15-16.
legal systems and various areas of justice, including the role of women as agents for change and the presence of plural legal systems in societies.\textsuperscript{565}

\textbf{5.3.1 Questioning status quo - the critical view by Unity Dow}

Unity Dow discusses in her article \textit{How the global informs the local: the Botswana citizenship case}\textsuperscript{566} the court case where she successfully challenged the Citizenship Act of Botswana with regard to the right of women not to be discriminated against due to sex. At the time of the court case she was a private practicing attorney and by the time of the publication of her article she had been appointed as judge in the High Court of Botswana, the first women holding that position.\textsuperscript{567}

In her article she argues that women in African countries have a second class citizenship reflected in the area of personal law, an area determined both by statutory law and customary law, leading to limited rights compared to men in the area of transferring citizenship to children, to property and inheritance rights and to acting against violence within marriage.\textsuperscript{568} A part of this second class status is that women are not mandated to have a position as interpreters of customary law and this in turn excludes them from influencing a change of practice of personal law.\textsuperscript{569} With regard to violence against women, Unity Dow states that the fact that nothing had been done so far to address the battering of women “is a testament to the position of women in our societies”\textsuperscript{570}.

Through the court case, she questioned the validity of the Citizenship Act with reference to the constitution of the country. Her argumentation that she was discriminated against due to female sex was challenging the society and the prevailing views in many ways. This is reflected in her description of the kind of resistance she met from various groups in the society during the process. Except for the initial formal legal discussion whether she at all could litigate a case or not, there was also a critique from women rights activists who argued that Unity Dow had personalized her own private problem.\textsuperscript{571} However, later on when they saw that the case was about


\textsuperscript{566} Dow, 2001.

\textsuperscript{567} Ibid, p. 331.

\textsuperscript{568} Ibid, p. 323.

\textsuperscript{569} Ibid, p. 323.

\textsuperscript{570} Ibid, p. 324.

\textsuperscript{571} Ibid, p. 327.
the status of women in the Botswana society, their resistance faded away.\footnote{572} Another group critical of her was the one formed by traditional leaders heading the customary law system in the villages of the country and formally also given an advisory role to the parliament, the legislator, through membership in the established House of Chiefs.\footnote{573} Given the tradition practiced, chiefs are all male which excludes women from a judging role in customary courts and from having a seat in the House of Chiefs.\footnote{574} Unity Dow argued that the value of the case was that it resulted in a debate regarding human rights of women both in private and public arenas and that the role of international human rights law was also considered in the reasoning of the two courts, High Court and Court of Appeal.\footnote{575} As a result, her case was discussed also in the light of African treaties and with regard to the two international human rights conventions CEDAW and CRC.\footnote{576}

This is confirmed by Fareda Banda in her book \textit{Women, Law and Human Rights} where she discusses the case of Unity Dow with regard to international and regional human rights treaties.\footnote{577} At the time of the court case, Botswana was not a state party to CEDAW but to the African Charter on Human and Peoples’ Rights that in its preamble and article 2 explicitly prohibits discrimination due to sex and in article 3 recognizes the right to be equal before the law.\footnote{578} Added to these two articles, Banda also underlines the importance of article 18 in the Charter specifically addressing family matters and in 18 (3) explicitly referring to the obligation of states to “ensure the elimination of every discrimination against women and also ensure the protection of rights of women and the child as stipulated in international declarations and conventions.” \footnote{579} This international human

\footnote{572} Ibid, p. 327.  
\footnote{573} Ibid, p. 327.  
\footnote{574} Ibid, pp. 320-321, 327.  
\footnote{575} Ibid, p. 329.  
\footnote{576} Ibid, p. 329.  
\footnote{577} Banda, 2005, pp. 48-49 and in footnote 56 she refers to the case as \textit{Unity Dow v Attorney General of Botswana} [1991] LRC 574.  
rights treaty informed the reasoning of the court regarding the interpretation of the commitment to the principle of non-discrimination and equal protection before the law.\textsuperscript{580} As a result of the court case, the Citizenship Act was finally amended and Botswana also accessed CEDAW.\textsuperscript{581}

In another work, the article \textit{Global standards: Local values}, Banda discusses the development of African human rights instruments with regard to African women at a moment when the Protocol to the African Charter on the Rights of Women in Africa was a draft.\textsuperscript{582} She underlines that the development taken place in the region to adopt new human rights instruments specifically focusing rights of women, also with regard to family law matters, can be viewed as a reflection of a conclusion amongst women that as long as they “are dependent on the kindness of rights holders, that is, men, they will not enjoy their full rights.”\textsuperscript{583}

This kind of process of change is reflected by Ann-Belinda S Preis in her article from 1996, \textit{Human Rights as Cultural Practice: An Anthropological Critique}.\textsuperscript{584} The debate in the society regarding the Unity Dow case and the final change of the Citizenship Act to be in accordance with the decision of the Court of Appeal is discussed in detail with regard to issues of culture and human rights.\textsuperscript{585} She refers to her own meeting with Unity Dow, who had a strong belief that she was right in her view that the Constitution did not accept discrimination based on sex.\textsuperscript{586}

Preis argues that this was not only a legal process that took place in courts, detached from a debate in the society. It was very much the opposite and she saw it as an example of how a human rights culture interacted with existing cultural meanings in the Batswana society, within the inter-
play between human rights of women as understood by Unity Dow as lawyer and the groups of feminist networks on one hand, and the traditional political leadership in charge of power at the government level as well as the traditional customary law level on the other. In a context of discussing a critical view on culture, Preis referred to an argumentation included in the legal reasoning, that time is long past "when women were treated as chattles or were there to obey the whims and wishes of males". These are also lines quoted in the global report of UN Women mentioned above, *In Pursuit of Justice.* She finds that the process up to a change of the Citizenship Act to be in accordance with the final court decision was a “multivocal and multidimensional” one and that it was not only an issue of pressure from outside.

5.3.2 To be visible as female rights-holder – a comparative observation

Similar to the case of da Penha discussed above in chapter 3, the case of Unity Dow is, as already mentioned, referred to in the UN Women Report 2011-2012 *In Pursuit of Justice* as a case that has brought change to the society and to the lives of women. While the first case was focused on the issue of human rights with regard to violence against women, domestic violence, and the failure of a national legal system to handle a criminal law case, the case of Unity Dow concerned the issue of recognition not to be discriminated against as a female citizen compared to male citizens by the statutory law in the area of transferring citizenship to children. The two cases have in common that the human rights issues became visible and discussed within a legal system that practiced a written tradition and that the judgements were followed by changed legislation reflecting the human rights. The case of da Penha had identified the problem of a culture of impunity reflecting an acceptance of domestic violence and a neglect of

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acting on the right of women not to be discriminated against, while the Unity Dow case brought to the surface a debate regarding the influence of a customary law structure to statutory laws of the country, as well as the implications of the view on the status of women not to be recognized as interpreters of customary law.

Similar to the cases of Nahide Opuz and Maria da Penha, discussed in chapter 3, Unity Dow took her case to the formal court system and her narrative was documented, debated, judged upon and reported, also as we have seen beyond national borders. However, even though all the three cases discussed human rights of women and the gaps in protection at the national level, one difference is to be observed between them. Unity Dow succeeded to influence protection of human rights of women through the national court system, while both Nahide Opuz and Maria da Penha had to take their cases to a regional human rights monitoring mechanism in order to achieve a correction in the national legal system. This is an interesting difference, though beyond the scope of the present research to be discussed further with regard to similarities and differences in each specific society and legal context.

5.4 Violence against women

With regard to the right not to be discriminated against due to sex and the right to equal protection of the law, the wording of the third article of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women is to be noted for the African context. This is an article that corresponds to the quote from Unity Dow at the beginning of this chapter. This article explicitly underlines not only recognition and protection of human rights, but also of legal rights:

“Every woman shall have the right to dignity inherent in a human being and to the recognition and protection of her human and legal rights.”

An initial interpretation of the phrasing indicates an experience by women of being recognized human rights in international treaties but not having legal rights in the local and national context, hindering them from acting as rights-holders in the true sense for realization and protection of human rights. This is an interpretation supported by the research of Fareda Banda

on the issue in different parts of Africa and reflected in the following argument regarding the influence of customary law on human rights of women:

“Over time it has become clear that the operation of family law, and specifically customary law, has been seen as a major impediment to the enjoyment by African women of their human rights.” 594

We will now proceed to the second example, including observations from two studies that focus legal systems formed by an oral tradition in Somalia, studies indicating components of excluding women from acting in their own capacity and revealing a risk that women do not become visible as rights-holders in cases of domestic violence.

5.4.1 A customary dispute resolution mechanism in Somalia

As mentioned above, one of the characteristics of customary law is a procedure to handle disputes that give emphasis to a consultative process led by elders or chiefs. 595 Here follows a more detailed account of a research done regarding such a customary structure for handling disputes as practiced in Somalia.

In the article Customary Dispute Resolution in Somalia, Mahdi Abdile discusses a Somali customary dispute resolution mechanism called Xeer and pays specific attention to the practice of arbitration as one of three types practiced in contemporary Somalia. 596 His research is based on material from two field visits in 2009 and 2010, including interviews and presence at arbitration hearings.

Xeer is an unwritten normative system that gives emphasis to control of social relations within and between clans. 597 The practice is influenced by Somali culture and based on agreements reached by clans. 598 It has developed over centuries and continued to be practiced in most areas of the country also during the colonial period when the Europeans tried to introduce Western law. 599 Abdile argues that the system has developed further since the beginning of 1990s and taken more of the space as a consequence of the collapse of the Somali state and its legal institutions. 600 This is an

595 Williams, 2013, p. 27.
596 Abdile, 2012, pp. 87-88.
598 Ibid, pp. 88, 91.
599 Ibid, p. 106.
600 Ibid, p. 89.
observation that has been communicated also by Peter Odyango in his book *African Customary Law System: An Introduction*.\(^{601}\)

The status of Xeer, as described in the study by Abdile, is that it has the function of being “the only viable source of justice that can be legitimately used to resolve disputes in Somalia.”\(^{602}\) Crucial in the system is the importance of restoring broken relationships and the understanding that relationships to other people are central for being human.\(^{603}\) One of the typical disputes occurring is the one on access to grazing and water resources, including high risk of physical violence leading to death of clan members.\(^{604}\) The acting parties in solving a dispute are all male, in their capacity as clan leaders, as team leaders in cases involving a group of claimants, as individual claimants or as so called Ergo assisting the arbitrators.\(^{605}\) Even though a female clan member is the actual claimant, she will not act in her own capacity but will be represented by a male family member, her father, husband, son or brother.\(^{606}\)

Xeer follows a strict procedure to handle the disputes, including defining whether it falls within the category of criminal offence or a civil offence.\(^{607}\) With regard to compensation principles it is following a detailed system. For instance, a killing of a male person means a payment of 100 camels while a killing of a female person costs half that amount, 50 camels, for the perpetrator’s side. This is to be combined with a visit to the clan of the victim, with an apology also including payment in camels for funeral costs etc. However, this is presented as an offer and can therefore be either accepted or rejected and the choice made will influence the final phase of the arbitration process.

Abdile illustrates an arbitration process regarding a case where a young man for a second time had tried to run away with a girl at night, but when hindered by her grandmother he slapped the grandmother in anger. This caused high risk for revenge attacks including risk for killings, and the two clans immediately reacted to the situation by ordering arrest of the sons of the grandmother and a preventive custody of the young men from the other clan until a settlement was reached. The dispute was quickly settled and

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601 Onyango, 2013, pp. 60-61.
602 Abdile, 2012, p. 89.
603 Ibid, pp. 95-96.
605 Ibid, pp. 94, 97-98.
606 Ibid, p. 98.
the clan of the young men had to pay a compensation of 100 camels, twice as much as a killing of the grandmother would have cost. This signals the seriousness of the act of what is called quadaf, an offence that refers to injuries that are nonphysical.\textsuperscript{608} To be noted, the girl is not part of the settlement discussion. Neither is the grandmother. It appears to be an affair between the male members of the two clans to settle the situation.

It is to be noted that the article of Abdile is describing in detail a customary law system in practice. However, it does not focus the research onto the issue of problematizing the role and status of female members in the clan structures in general or in the family specifically, nor the reasons why the specific case of slapping of a female member of another clan could trigger such an urgency in blocking escalation of the conflict.

With the work of Abdile in mind, we will now look into another type of study of the situation in Somalia from the same period as the one of the field study of Abdile. However, this study did not have the purpose of academic research, but to monitor the situation with regard to violence against women under the thematic UN mandate as Special Rapporteur on violence against women, its causes and consequences. As we will see, the role of customary law is again observed to be an active part of a legal structure, though, as follows by the mandate of the Special Rapporteur, the focus is on which implications it has on the human rights problem of violence against women.

5.4.2 Domestic violence – a report from Somalia by the UN Special Rapporteur

With regard to research and other studies communicating human rights at risk in refugee camps due to violence against women, the issue of the following section will for comparative reasons give attention to findings of the Special Rapporteur on violence against women during her visit to Somalia in December 2011.\textsuperscript{609} This report identifies a situation where rights are at risk for both women and girls, a situation also reflected in structural gaps in protection and accountability mechanisms with regard to violence.

In line with the findings of Abdile, the issue of rights of women and girls in the society is reported to be influenced by customs that do not include

\textsuperscript{608} Ibid, pp. 104-105.

women in decision-making, but give men a strong position in the family. To the UN Special Rapporteur it became clear that domestic violence against women and children was “widespread and remained largely invisible due to the absence of reporting mechanisms and statistics”. In the capacity to be considered as an authority in the family, it is reported that a man benefits from an acceptance by community and police to beat his wife and children for correction purposes with reference to “the privacy of the home”.

Further, the report mentions a practice to handle cases of sexual violence by forcing “the victim to marry her perpetrator as a means to preserve social harmony.” This is interpreted as reflecting a collective interest of preference to clan relations and to benefit economically. An economic aspect is also present in marriage arrangements through a practice of dowry to be paid, not directly to the family of the girl or woman but to the clan. The rapporteur identifies that the girl child is perceived “as a source of wealth for dowry” and this becomes visible in a practice of early marriage and also of forced marriage.

At the time of the visit of the Special Rapporteur at the end of 2011, Somalia had not ratified any of the two human rights core conventions of special relevance for women and girls, i.e. CEDAW and the Convention on the Rights of the Child (CRC). However, this changed on 1 October 2015 with regard to the rights of the child, when Somalia became a state party to the CRC.

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610 Ibid, paras. 61-64.
611 Ibid, para. 17.
612 Ibid, para. 18.
613 Ibid, para. 72.
614 Ibid, para. 23.
The Special Rapporteur reported that 20 years of conflict has resulted in “a culture of impunity”\(^{617}\) and a “dysfunctional”\(^{618}\) formal justice system with judges acting with “no legal qualifications”\(^{619}\) and a Penal Code from the beginning of the 1960s not addressing violence against women in accordance with international human rights law, meaning e.g. that rape is criminalized not as a crime against the person but against morals.\(^{620}\) Similar to what was discussed above by reference to Williams, the formal legal system is not accessible for populations living outside cities and the rapporteur received information about a practice giving preference to the traditional justice mechanism that includes economic compensation to the clan, instead of imprisonment for perpetrators in cases of violence against women and girls.\(^{621}\)

In her final recommendations, the Special Rapporteur details what she finds urgent, given what had been revealed during her visit regarding violence against women and children. There are for instance recommendations focusing the legal monitoring aspects with regard to violence against women and also the relationship between customary law and the civil law system:

- a call for ratification of Convention of the Elimination of All Forms of Discrimination of Women, its Optional Protocol and the Convention of the Rights of the Child\(^{622}\)
- an emphasis to give priority to “the enactment of a law on violence against women”\(^{623}\) explicitly covering domestic violence, sexual harassment and sexual violence
- an underlining of the importance to “clarify the relationship and boundaries between customary laws and institutions and the civil and criminal justice system”\(^{624}\)


\(^{618}\) Ibid, para. 67.

\(^{619}\) Ibid, para. 67.

\(^{620}\) Ibid, para. 56.

\(^{621}\) Ibid, paras. 68-69 and 72.

\(^{622}\) Ibid, para. 83.

\(^{623}\) Ibid, para. 88.

\(^{624}\) Ibid, para. 90.
- a confirmation of the role of the civil society active in a work to empower women and the need to strengthen the reporting capacity with regard to human rights of women, especially with regard to violence against women.\textsuperscript{625}

Given the legal institutional context and practice in communities as described by Abdile and the Special Rapporteur, these are all recommendations that would need strategies shaped with a long-term perspective to be able to address and prevent the identified human rights problem of violence against women. As mentioned, the recommendation to ratify the CRC has been met, while this was not the case for CEDAW in 2017, five years after the report of the Special rapporteur had been presented. This means that the identified existence of invisibility of domestic violence against women in society would remain an urgent human rights problem, reflecting the absence of the positions developed in international human rights law to prevent violence to occur, to protect human rights of women and to eradicate impunity.

As long as there is no ratification of CEDAW, the structure for regular international monitoring in communication with the CEDAW Committee is kept closed for women and for the civil society active to address the problem of invisibility. However, since the visit and report of the Special Rapporteur, a process of developing the capacity in Somalia to address the problem of gender-based violence, to deal with the various gaps in legal systems to handle it and to pave the way for a ratification of CEDAW has started. This work is implemented within the mandate of the Somalia Protection cluster and the established GBV Working Group.\textsuperscript{626} The activities are guided by a national Strategy, adopted for the period 2014-2016, giving attention to four objectives for the work, of which the third one deals with measures to strengthen what is referred to as rule of law and the issue

\textsuperscript{625} Ibid, para. 102.
\textsuperscript{626} Global Protection Cluster, Working together for protection, Fieldprotection Clusters, Somalia, retrieved 24 October 2016
of access to justice. However, the executive summary of the Strategy underscores that the majority of the members of the GBV Working Group are humanitarian actors and therefore, due to competence and operational experiences, emphasis has been put on the first two objectives that give attention to measures for prevention and responses. To be able to meet the objective number three of the Strategy, a need of involvement of stakeholders responsible specifically for the area of rule of law and activities directed to access to justice has been identified.

To be noted here is that the adopted Strategy confirms the observations of the Special Rapporteur from 2011. It communicates a situation in the country characterized by i) a practice of various legal systems in operation where none of them is “providing sufficient legal redress for survivors”, ii) that “confidence in the formal justice system is nearly non-existent” and iii) that “Neither the police nor any traditional mechanism recognizes the specific needs or legal rights of individual GBV survivors.” A final example to add to the list of reported findings in the Strategy is that there is “no mechanism to protect the GBV service providers who often operate at their own risk.” This confirms the recommendation of the Special Rapporteur to strengthen the reporting capacity on cases of GBV.

Also to be noted is the interest to see Somalia as a state party to CEDAW. The activities implemented to meet the objectives in the Strategy are reported regularly by the Somalia GBV Sub-Cluster. To pave the way

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632 Ibid, p. 10.


for a ratification of the CEDAW, one of all the activities in 2015 was a training and dialogue on the convention, arranged in August 2015 for government officials. A year later, capacity building on CEDAW was reported to have been extended to a group of persons from the judiciary, lawyers and members of parliament.

While waiting for Somalia to accept to be legally bound by CEDAW, women and NGO’s can in the meantime follow up on the issue of the human rights of women and the problem of gender-based violence, specifically domestic violence, in communication with the Special Rapporteur on violence against women, its causes and consequences. Even though this is a mechanism available for monitoring purposes, there might be various factors blocking its actual access. One is the weakness in the reporting capacity of NGO’s on human rights issues that has already been indicated by the Special Rapporteur in her recommendations. Other blocking factors might be hesitations in being active in the public space, either as an organisation or as an individual, due to considerations of the risk in questioning the existence of violence against women in society.

5.5 To summarize

The presence of an unlocked legal door for women to be visible and take legal actions in family law matters, or in cases of gender-based violence in general and with regard to domestic violence specifically is something not to take for granted. The present chapter has indicated that there might be hindrances that are not always of a practical, logistical character, nor an issue of not being encouraged and empowered as an individual to take legal action. Instead, the hindrances and a risk for invisibility could lie even deeper in the legal system practiced. It could be an issue of women not even being entrusted by the very structure of the system to have rights or to act in person, with an individual legal capacity before the law.

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637 Consultation with civil society organizations is an integrated source of information in the work of the Special rapporteur on violence against women, its causes and consequences. See ‘Special Rapporteur on Violence against Women, Its Causes and Consequences, Consultations with civil society’, retrieved 29 October 2016 http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/CivilSociety.aspx.
Therefore, to better understand the realities on the ground, the issue of to what extent women are being recognized a social and legal status to have a voice in general discussions regarding conditions of a safe environment, or to act in various legal institutions to argue for individual rights, needs to be given more focus.

To be noted, though, is that the brief orientation presented in this chapter also underlined the importance of giving detailed attention to a study of each specific traditional justice system, especially with regard to a discussion of human rights of women. Given the oral tradition of the customary law practice and the variations in the interrelationship between the traditional legal mechanisms and the statutory legal system of a country, researchers have emphasized the importance of being cautious in the interpretation of what is observed and in what conclusions that can be drawn from the material gathered and the methodology used.

Since a variety of customary law systems also could form part of a refugee camp context and in various ways have an impact on the way of handling legal matters for women, it is of interest to pay more attention to these systems, and to do so from a legal point of view, due to the fact that international human rights of women have to be promoted and protected also in refugee camp contexts.

A customary law tradition that is applied to women in a local community in a country of origin, may be applied more or less in the same manner to women, who are living in a refugee camp together with members from the same local community. Therefore, in order to better understand the complex legal environment in a refugee camp context, in particular the components that shape the conditions for women, one way would be what has been indicated in the present chapter, namely to search for information regarding the practice of customary law outside a specific refugee camp and to draw on the knowledge from sources discussing the practice as applied in the country of origin of a specific refugee group, as well as in other countries. With this in mind we will hereby proceed into a study of a local refugee camp context in East-Africa.
Chapter 6. Women as rights-holders with regard to the context of a local refugee camp

“Women do not give evidence, alternatively their word is not trusted and has to be given credence by a man’s testimony”\textsuperscript{638}

6.1 Introduction
In the previous chapters, the discussion in the field of international human rights regarding women as rights-holders, the problem of violence against women as a human rights issue in general as well as in situations of displacement, and the presence of an orally transmitted customary law practice in African local societies have been studied. To be noted from the study so far is that the narratives of women will be echoed in various types of judgements or academic debate only if women also have a recognized and protected legal voice to present their narratives and are encouraged to act on the matter, locally as well as at an international level.

With reference to these chapters and the development of protection of human rights with regard to women, the present chapter will give attention to what the reality could be on the ground for female refugees in a specific refugee camp context in East Africa characterized by a protracted refugee situation. The focus is directed to the question of visibility for women in a local refugee camp situation and their space to act as rights-holders regarding the problem of violence against women.

6.2 Context of insecurity due to violence
As briefly described in chapter 1, Kenya has been hosting refugees for nearly three decades, due to prolonged violent conflicts and insecurity in neighbouring countries. The two established camp areas of Dadaab and Kakuma both constitute a protracted refugee situation.\textsuperscript{639} Local integration has not been permitted for the refugees, neither have they been allowed to keep animals or do farming in the camps or to work or run businesses outside


\textsuperscript{639} According to UNHCR a protracted refugee situation exists when 25 000 or more refugees of the same nationality have been in exile for five years or longer in a given country of asylum, see this study, chapter 1.1, footnote number 14.
camps. They have therefore been directed to stay in the two refugee camp areas and to be dependent of food aid for their living.640

The Dadaab refugee camp area is located in north-eastern Kenya, close to the Somalia border and the Kakuma refugee camp is situated in Rift Valley in north-western Kenya, close to the borders of Uganda and South Sudan.641 In two videos from 2012, UNHCR gives an account of the Dadaab camp history of two decades, a camp initially aimed to be open only for some months. The speaker describes the insecure environment for both refugees and humanitarian workers in Dadaab and the kind of measures taken to reduce risks of kidnapping and killing that are threatening refugees as well as humanitarian staff.642

The number of refugees hosted in refugee camps of Kenya has fluctuated over the decades and for years. In the end of 2013, the number of displaced people in the refugee camps was higher than 600 000.643 The refugee population of Dadaab, mainly Somalis, reached a number of approximately 500 000, including also a new generation of refugees born to parents who


have themselves been born in the camp.\textsuperscript{644} Figures presented for 2017 show a decline to around 488,000 registered refugees and asylum-seekers in total, of which nearly 50\% are hosted in Dadaab and 38\% are registered for Kakuma refugee camp, while the rest are staying in urban areas.\textsuperscript{645}

In the article \textit{Between a Protracted and a Crisis Situation: Policy Responses to Somali Refugees in Kenya}, Anna Lindley gave focus to the refugee situation in Kenya 2011 and the patterns of displacement linked to violence and persecution in Somalia over two decades. According to figures presented in a diagram, two peaks of arrivals of displaced people are visible, one in the beginning of the 1990s and one in 2011, of which the latter one was also influenced by a severe drought and hunger crisis.\textsuperscript{646} Lindley describes the protracted refugee situation in Kenya as a situation characterized both by decrease in funding contributions from external donors and by lack of access to durable solutions for refugees.\textsuperscript{647} She finds a situation including impunity with regard to SGBV and fear amongst Somali refugees due to insecurity in camps.\textsuperscript{648}

Such a camp environment characterized by insecurity for women was also part of the findings in a case-study, which had started 10 years earlier, a study that focused on Somali female refugees in the Dadaab refugee camp area and their interpretation of security.\textsuperscript{649} The results informed of a high risk of being raped by masked men with weapons both day and night.\textsuperscript{650} The author, Awa Mohamed Abdi, refers to the accounts of Somali refugee


\textsuperscript{646} Lindley, 2011, pp. 18-19, 26.

\textsuperscript{647} Ibid, p. 20.

\textsuperscript{648} Ibid, p. 34.

\textsuperscript{649} Abdi, 2006, pp. 237, 244. Data collection took place in 2001 and included 20 in-depth interviews. To be noticed, the researcher commented in a reference (footnote 8, p. 237) her Somali background, knowledge of the Somali language and the Somali context as factors facilitating her relation to the refugees.

\textsuperscript{650} Ibid, pp. 238-240.
women regarding their position in the community and their view that “they had not only lost protection as citizens of a country, but have also lost the protection of their families and of their communities”.651

The other refugee camp, Kakuma, has also been affected by conflicts in neighbouring countries. After a long civil war in Sudan and a peace agreement signed in 2005, a fragile peace turned into new violence close to the border of Sudan and the new independent state South Sudan in 2011-2012.652 The violence escalated, and in December 2013 the situation worsened rapidly in South Sudan, forcing thousands of thousands of people to flee either to camps for internally displaced people in the country or to neighboring countries, e.g. Uganda and Kenya.653 Due to this, Kakuma hosted, in the end of 2013, a refugee population of more than 125 000 people, an increase from approximately 90 000 people within two years.654 Thereafter, updated information from one of the international NGOs says

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that the refugee population had reached to a number of 168 000 refugees by June 2014 and that as much as 65% of the refugees from South Sudan were children.\textsuperscript{655} Actions by the Kenya government in the Spring of 2014 to send urban refugees to the refugee camps contributed to the rise of numbers and added to the gaps in infrastructure of a camp established to host not more than 100 000 refugees.\textsuperscript{656} As mentioned above, the figures for 2017 show that the refugee population hosted in Kakuma refugee camp has continued to increase. In September 2017 the number reported by UNHCR counted to 184 945 people, due to the conflict in South Sudan.\textsuperscript{657}

Similar to Dadaab, women in the refugee camp of Kakuma have experiences of SGBV and impunity for perpetrators. As an example, in a study conducted in Kakuma refugee camp the researchers described the situation of sexual violence against women as “endemic”\textsuperscript{658} and found that domestic violence was very high. The impunity was a reality and actions available to address the problems were far from adequate due to the situation and the fact that women had their movement restricted to a specific protection area, some since several years.\textsuperscript{659} The researchers argued that an identity as “‘refugee women’”\textsuperscript{660} seemed to be emphasized and they critically ask if “pity and charity, rather than empowerment”\textsuperscript{661} guided the international community in its services. This comment by the researchers reflects a concern that touches upon the issue of application of a human rights-based


\textsuperscript{658} Linda Bartolomei, Eileen Pittaway and Emma Elisabeth Pittaway, 2003, p. 88.

\textsuperscript{659} Ibid, p. 89.

\textsuperscript{660} Ibid, p. 90.

\textsuperscript{661} Ibid, p. 90.
approach and to what extent there is an interest to address women as subjects of rights, rather than as objects for activities decided by others.

6.3 Risk of forced return

The insecurity caused by the violent conflicts in the region and the negative impact that this has on mobility in the camp area, protection of human rights and livelihood of civilians has been a repeating item on the agenda of UN and the UN Security Council.\textsuperscript{662} The critical human rights situation in the overcrowded refugee camps has been a topic for reports and so called


Side events in the Human Rights Council. Referring to the actions taken by the Government of Kenya regarding urban refugees and asylum seekers, Human Rights Watch alerted the UN Human Rights Council in the Spring of 2014 on the deterioration of the human rights situation, expressing concerns about impunity for violence by police and security forces. Referring to a ruling of the Kenya High Court in 2013 regarding refugees and asylum seekers staying in urban areas, one of the recommendations presented was to:

“Abide by the Kenyan High Court’s ruling of July 26, 2013 quashing the government’s December 2012 order for urban refugees to relocate to refugee camps;”

Even though the present research is not aimed at giving emphasis to criteria for asylum, it should be mentioned that the situation leading up to the referred ruling of the High Court of Kenya gives an example on actions by the government of the host country, that form part of a context where

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human rights are at risk for displaced people and at the same time affects the general situation in refugee camps. Therefore, a few more details will be given by focusing on the argumentation of UNHCR in a specific legal process.

At the end of 2012, refugees and asylum-seekers staying in urban areas were ordered by Kenyan authorities to leave these areas and go to the refugee camps. The Government of Kenya communicated a decision to UNHCR that registration of asylum seekers in urban areas should cease immediately and that all asylum-seekers were required to be relocated to the two refugee camps Dadaab and Kakuma. The same decision also communicated an expectation to make “necessary preparation to repatriate Somali refugees living in the camps and urban areas.”

On invitation as “friend of the court” (amicus curiae), a brief by UNHCR was presented to the High Court of Kenya at Nairobi Constitutional and Human Rights Division, Petition No. 115 of 2013. With reference to its mandate under the Statute and to both International Refugee Law and International Human Rights Law, UNHCR argued for the importance to take into consideration the consequences of implementing the decision of the government. At the time of the brief, the decision of the government had, according to UNHCR, already resulted in actions against refugees and asylum-seekers that caused suffering and fear. UNHCR reminded about “the cardinal international law principle of non-refoulement” and commented that the safety and security of refugees would be put at “great risk” if they were forced to return to Somalia. In conclusion, UNHCR expressed that “there are critical aspects of the directive, or its consequences, that are not in conformity with international refugee and human rights law.” In July 2013, the High Court of Kenya

668 Ibid, para. 1.1.
669 Ibid, para. 3.2 ii.
670 Ibid, para. 3.2. v.
671 Ibid, para. 3.2 v.
672 Ibid, para. 8.1.
ruled against the directive of the government, a decision that was wel-
comed by UNHCR. 673

After this ruling, it was emphasized that protection of refugees from
Somalia was still needed, as well as durable solutions other than return.674
However, in case there were refugees who would choose to return on their
own to Somalia, an agreement was reached between UNHCR and the
Governments of Kenya and Somalia on what support that should be re-
quired.675 As communicated by Human Rights Watch to the Human Rights
Council and commented by UNHCR, the human rights situation continued
to be of great concern regarding refugees on the territory of Kenya, nearly
a year after this ruling of the High Court against the directive of the Gov-
ernment of Kenya. 676

To be noted here is that while this study has been written, the situation
on the ground has been far from static with regard to such matters as
numbers of refugees and actions taken by the Government of Kenya. Due
to armed attacks on civilians at a university in Garissa in April 2015, the
Government of Kenya announced its interest of a nearly immediate shut-
down of the Dadaab refugee camp area. This was commented on by UN-
HCR and also by LWF, being one of the implementing parties to UNHCR
in the refugee camp area. Both reminded of the international obligations
with regard to protection of rights of refugees and underlined the need to

673 UN High Commissioner for Refugees (UNHCR), ‘UNHCR Welcomes Kenya
High Court Decision on Urban Refugee Rights’ (Briefing Notes, 30 July 2013)
retrieved 18 June 2018
http://www.unhcr.org/news/briefing/2013/7/51f79abd9/unhcr-welcomes-kenya-
high-court-decision-urban-refugee-rights.html

674 UN High Commissioner for Refugees (UNHCR), ‘New Procedures Set for So-
malie Refugees to Return Home Voluntarily from Kenya’, (Press Releases, 11 No-
vember 2013), retrieved 1 June 2018 http://www.unhcr.org/cgi-
bin/texis/vtx/search?page=search&docid=528102b49&query=Tripartite Agree-
ment

675 Ibid.

676 UN High Commissioner for Refugees (UNHCR), ‘Kenya: UNHCR Disturbed by
Arrests and Deportations of Somali Refugees’, (Press Releases, 17 Apr. 2014) re-
trieved 31 May 2018 http://www.unhcr.org/534fa2c76.html; UN High Commiss-
ioner for Refugees (UNHCR), ‘UNHCR Seeking Access to Detained Asylum-
Seekers and Refugees in Nairobi’ (Press Releases, 7 Apr. 2014), retrieved 1 June
2018 http://www.unhcr.org/5342b35d9.html; Human Rights Watch (HRW), ‘Ken-
2018 http://www.hrw.org/news/2014/06/16/kenya-submission-universal-periodic-
review
consider the consequences for safety and security of the refugees. The message of LWF gave focus to the consequences of a forced return for women and children:

“The vast majority of the refugees are themselves victims of persecution and violence, and the great majority of them are women and children. Forcibly returning them to Somalia would be a form of collective punishment not against terrorists or criminals, but against innocent vulnerable people.”

However, thereafter the interest of the Kenya government to close the Dadaab refugee camp and to see a return of refugees to Somalia has been repeated, and again UNHCR appealed to the government to reconsider its announcement. The situation was in detail critically commented on by international human rights organizations. To be noted, is that the matter was also brought to the High Court of Kenya through a constitutional petition in 2016 and judged upon in February 2017, in favour of the refugees not to be returned to Somalia involuntarily.

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6.4 Human rights at risk for women

Kenya is a state party to CEDAW but not to the Optional Protocol.\(^{682}\) This means that there is no formal opportunity within the context of CEDAW for female refugees to present individual cases to the CEDAW Committee regarding the situation in the refugee camps or the risk of being involuntarily returned to country of origin. However, from at least a theoretical point of view there is a possibility to respond to the invitation of the Treaty Body of CEDAW to present alternative reports within the regular monitoring process of the state party periodic reports, as discussed in the joint seminar 2009 between UNHCR and the CEDAW Committee.\(^{683}\)

With regard to this, it is to be noted that a joint shadow report was presented by the Federation of Women Lawyers-Kenya (FIDA-K) and Centre on Housing Rights and Evictions (COHRE) at the 48th session of the CEDAW Committee.\(^{684}\) However, a reading of the report displayed that it did not address the situation of female refugees in any of the refugee camps in the country.\(^{685}\) In this context, it is of interest to be aware of an obser-

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\(^{682}\) UN Human Rights Office of the High Commissioner, ‘Human Rights Treaty Bodies, Ratification Status’, retrieved 30 May 2018 [select the country of interest]


\(^{685}\) Before reading the report, a use of the search tool in the document did not respond to the following words “refugees”, “Dadaab”, “Kakuma”, “Somali” respectively “UNHCR”.

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vation presented in an assessment in 2008 regarding the Dadaab Refugee Camp\textsuperscript{686}, pointing to the fact that NGO’s working on rights of women in Kenya outside the refugee camp context were not engaged in issues regarding the situation in the camps. The indicated reasons referred to such factors as a lack of mandate due to laws regulating operational space for NGOs, distance to refugee camp areas or the understanding of refugee camps as “”protected areas””\textsuperscript{687} not accessible for them as NGOs.\textsuperscript{688}

In 2011, the CEDAW Committee anyhow paid attention to the issue of violence against female refugees and directed the following comment to Kenya in its concluding observation of the reporting process, encouraging Kenya to collaborate with UNHCR:

“The Committee reiterates its request to urgently address the situation of refugee and internally displaced women in Kenya, in particular in respect to the means used to protect these women from all forms of violence and the mechanisms available for redress and rehabilitation. It further urges the State party to take steps to investigate, prosecute and punish all perpetrators of violence against refugees and internally displaced women. It also encourages the State party to continue to collaborate with the international community, especially the Office of the United Nations High Commissioner for Refugees (UNHCR), in these efforts.”\textsuperscript{689}

A few years later, in 2013, the importance of measures and mechanisms for accountability with regard to gender-based violence was underlined by the CEDAW Committee in its General recommendation No. 30. The Committee directed its recommendation not only to Kenya as a State party, but to all state parties to the convention, to

“Adopt practical measures for the protection and prevention of gender-based violence, in addition to mechanisms for accountability, in all displacement settings whether in camps, settlements or out-of camp settings;”\textsuperscript{690}

\textsuperscript{686} Refugee Consortium of Kenya, 2008.

\textsuperscript{687} Ibid, p. 32.

\textsuperscript{688} Ibid, pp. 31-32.


In its appeal for Kenya 2014-2015, UNHCR included needs to address the issue of gender-based violence, which reflected concerns and commitments as communicated by the Division of International Protection of UNHCR to the CEDAW Committee in a General Discussion 2013. The Division underlined the message of female refugees in the regional dialogues from 2011 regarding the eroded confidence in judiciary and also emphasized the need both to contribute to a protective environment and to be aware of how justice mechanisms work in a specific context. These issues are in line with what is known from studies covering the situation since the end of the 1990s regarding violence against female refugees in the refugee camps of Kenya, for example by Guglielmo Verdirame, Linda Bartolomei, Eileen Pittaway and Emma Elisabeth Pittaway, Rosa da Costa and Rebecca Horn and Kim Thuy Seelinger.

Kenya is a state party not only to CEDAW but also, since 2010, a State party to the regional human rights instrument regarding rights of women, the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa. Given the fact that the two documents discussed in chapter 4, the Handbook for the Protection of Women and Girls of UNHCR and the Conclusion of Women and Girls at Risk No. 105 of the Executive Committee, both include women and girls in the same documents, it is to be noted that even though the Protocol to the African Charter only has women in its title, the Protocol also includes girls for its scope.

693 Verdirame, 1999.
696 Horn and Seelinger, 2013.
of application by defining the meaning of women as “persons of female gender, including girls.” This explicit inclusion of girls in the various types of documents regarding women reflects an understanding of the situation on the ground, in the society context. For the operational approach in a local refugee camp setting this means that a discussion regarding the human rights situation for women, its causes and consequences, has to address also the conditions for young female teenagers due to the risk for gender-based violence they face. Therefore, even though the focus for this research has been directed more to women, when discussing a refugee camp context, references to activities or situations regarding young female refugees in their teenage, will also appear in the present chapter through the material studied.

The process leading up to the adoption in 2003 of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, included the presentation of a drafted text developed in a network formed by African organizations, including women lawyers’ organizations and other human rights organizations focusing on rights of women. Fareda Banda alerts on articles in the Protocol specifically focusing the obligation of states to take measures for increased participation of female refugees in different decision-making structures, with the aim to ensure such matters as legal protection and involvement in management of camps.

Here, it is to be reminded of what was discussed in chapter 3 with regard to the work of the CEDAW Committee and the possibility for women to act with autonomy in human rights issues. As observed, in the General recommendation No. 35 on gender-based violence against women, adopted by the CEDAW Committee in July 2017, there is an emphasis on participation of women to ensure legal protection. In this General recommenda-

698 Ibid, art. 1 k).
700 Banda, 2005, p. 81 and her footnote 274 with reference to the Protocol to the African Charter on Human and Peoples’ Rights of Women in Africa, articles 10 (2) (c) and (d).
tion, the Committee explicitly refers to women as “right holders” and underlines that states should acknowledge women “as subjects of rights” and promote “their agency and autonomy.” As has been argued in chapter 3, this confirms the recognition of women as rights-holders in international human rights law. To be noted is also the recommendation by the CEDAW Committee in para. 41, stating that protection measures and various types of services in relation to gender-based violence should strengthen the autonomy of women and be available “irrespective of women’s residence status.” This statement by the Committee underlines the argumentation of Banda regarding the obligation of states, within the context of the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, to take measures for increased participation of female refugees in different decision-making structures.

6.4.1 Domestic violence against women in refugee camps
Studies have identified gaps in responding to situations where rights are at risk due to SGBV in a Kenyan refugee camp context. The need of physical protection due to imminent insecurity in refugee camps is an issue of concern, even though there are also activities aiming at addressing prevention aspects of the problem. According to the UNHCR Handbook for the Protection of Women and Girls, a situation leading to an individual risk could be when female refugees “oppose social norms, which violate their individual rights.” An example of such a situation is when a female refugee refuses forced or under-aged marriage, opposes female genital mutilation (FGM) or does not want to stay any longer in a situation of domestic violence.

Actions on urgent situations of violence against female refugees includes Safe Haven or Safe Houses arrangements located in the refugee camp area, even though there are examples when transfers to another refugee camp is

702 Ibid, para. 26 a).
703 Ibid, para. 28.
704 Ibid, para. 28.
705 Ibid, para. 41.
the most appropriate measure. Both UNHCR and international NGOs involved in protection of human rights of women and children have published examples of stories to inform about what kind of situations that might call for space in a Safe Haven. One example is from the Kakuma refugee camp where a special, isolated protection area has been set up close to the police station for refugees who face an immediate risk of violence from their community in the refugee camp.

In May 2013, UNHCR presented a study regarding the practice of Safe Haven in refugee situations, the Comparative report *Safe Haven Sheltering Displaced Persons from Sexual and Gender-Based Violence*. This report is based on four country-specific case-studies in Colombia, Haiti, Kenya and Thailand. The case-study discussing the situation in Kenya reminds us of information from previous studies showing that an increase of domestic violence has been identified in situations of displacement. This kind of violence was one of the main forms of violence mentioned in the

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711 UN High Commissioner for Refugees (UNHCR), *Kenya: In Need of Protection*, YouTube, UNHCR, 30 December 2011, retrieved 16 June 2018 [https://www.youtube.com/watch?v=TQJR05pFNvI](https://www.youtube.com/watch?v=TQJR05pFNvI). This is a video from Kakuma refugee camp including interviews with a Sudanese women Susan Duko and with Karen Birtok UNHCR Legal officer.


Dadaab refugee camp area and called for a need of shelter in both refugee camps, Kakuma and Dadaab.\textsuperscript{715} Similar to the passivity of authorities in the cases of Da Penha and Opuz, discussed in chapter 3, the case study from the Kenyan refugee camps has shown that female refugees could meet a reluctance of the police to handle situations of domestic violence, e.g. when it comes to reporting or intervening, due to an attitude that this may be a private issue.\textsuperscript{716} In addition to this, the study also reports that there are concerns on the security of the staff of organizations who are involved in the follow-up of these kinds of cases.\textsuperscript{717}

In the Dadaab refugee camp area, rape was represented as one of the main forms of violence.\textsuperscript{718} The study reveals that legal mechanisms communicate an incapacity or unwillingness to handle rape and that a marriage arrangement, “early and forced marriage”\textsuperscript{719}, could be practiced and considered as “a ‘solution’ to rape”.\textsuperscript{720} In the Kakuma refugee camp, information from interviews identified single women as the group most at risk for SGBV, “especially single teenage mothers”.\textsuperscript{721}

From organizations close to the operational context in Kenya it has been observed that women, who have experienced gender-based violence and who are hindered to negotiate their rights, need an enabling environment in order to get a dignified life.\textsuperscript{722} However, decreased funding and a lack of long-term perspectives regarding the needs of women, make it difficult to meet their situation.\textsuperscript{723} This observation also corresponds to results presented by Jessica Gladden, from a field study in the Kakuma Refugee

\textsuperscript{715} Horn and Seelinger, 2013, pp. 23, 34, 54.
\textsuperscript{716} Ibid, p. 21. For the cases of Da Penha and Opuz discussed, see chapter 3.3.
\textsuperscript{717} Ibid, p. 64.
\textsuperscript{718} Ibid, p. 23.
\textsuperscript{719} Ibid, p. 23.
\textsuperscript{720} Ibid, p. 23.
\textsuperscript{721} Ibid, p. 22.
\textsuperscript{722} The LWF/WS Deputy Programme Coordinator, Kenya and Djibouti, a lawyer and panelist in ‘Flykting, Kvinna, Människa – ett seminarium om identitet och bemötande’, November 19, 2012, kl. 16-18, Södra Teatern, Kägelbanan, Stockholm, arranged by UN Women in cooperation with Church of Sweden, Södra Teatern and Ecumenical Global Week.’, retrieved 2 June 2018 http://www.nordkalender.org/genus/arrangement.html?id=8266&cback=index.html, The author attended the seminar and the chair-person of UN Women, Margareta Winberg, was the moderator.
\textsuperscript{723} Ibid.
Camp regarding coping strategies of female refugees. In the discussions with women in this field study, the issue of lack of food for their children was brought up as a major concern, rather than the issue how to address the experiences from gender-based violence.

Studies from refugee camps in other countries also indicate a situation of hesitation amongst women to take legal actions when facing the risk of violence. One is the study of Yonas Gebreiyosus, Women in African Refugee Camps, Gender Based Violence against Female Refugees: The case of Mai Ayni Refugee Camp, Northern Ethiopia, in which detailed attention is directed to the problem of gender-based violence against female refugees. Of interest here is that with regard to physical violence against women, the case study disclosed that the prime perpetrator was an intimate partner, that the type of physical violence that took the form of beating or kicking was common but not primarily considered by refugees to fall into the category of gender-based violence, and finally that cases of physical violence were not reported unless they resulted in serious physical damage.

At the same time the study also identified an environment in the camp shaped by the lack of documented data, a lack of trust on the court to actually handle cases of gender-based violence and a practice amongst the refugee community to discourage female refugees from taking cases to the legal institutions. Added to this is also the information that a traditional system was in practice by the refugee community to handle situations of gender-based violence. These are all findings that correspond to observations by Rosa da Costa from 2006 and in the study of Rebecca Horn and Kim Thuy Seelinger from 2013, both referred to above, as well as in the consultations between UNHCR and female refugees in 2010-2011. In his summary, Yonas Gebreiyosus argued for a “legal literacy campaign for both female and male refugees,” but also for giving priority to counseling and economic support to women who have been subjected to violence.

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724 Gladden, 2013.
725 Ibid, pp. 79, 83-84.
726 Gebreiyosus, 2013.
727 Ibid, pp. 38, 72.
729 Ibid, p. 64.
731 Gebreiyosus, 2013, p. 77.
The various facts presented in the study by Yonas Gebreiyosus regarding the conditions of life in the specific camp indicate a reason to question, at a general level, if the refugee camp model actually gives asylum for female refugees to live in safety. This is underlined by his comment that there are female refugees who “are subjected to double trauma.” 732 due to what has happened to them in their home-country that forced them to seek asylum. With regard to the question of hesitation to take legal actions, one has to take into consideration what kind of experiences that are echoed in the views as expressed by a female refugee in the study by Gebreiyosus. The following few lines put the issue of visibility and the problem of gender-based violence into the center of a complex context, by drawing the attention to an existential dilemma of being a refugee and part of a refugee community in a camp environment:

“I think we all (male and female) are refugees and we are in this camp because of harsh conditions in our mother land. So, it is difficult to be cruel about your brother and to let him be arrested in a host country.”733

6.4.2 Indication of an operating procedure including traditional mechanisms

As discussed above in chapter 4, in its Handbook for the Protection of Women and Girls UNHCR has identified a variety of risk factors that could have an impact on the situation for female refugees in a refugee camp context. Two of the components mentioned to increase the risk for human rights violations were described in terms of a “lack of standard operating procedures to report on, and respond to, SGBV”734 and a “lack of awareness about women’s and girl’s rights”735. This section will give attention to what such a standard operating procedure could address and the following two sections will give attention to womens’ views on their space to act and a few prevention activities with regard to rights of female refugees.

As mentioned in chapter 2, there is a tool for humanitarian contexts called GBV Resource Tool: Establishing GBV Standard Operating Procedures (SOP Guide) adopted by an international humanitarian network of

732 Ibid, p. 68.
733 Gebreiyosus, 2013, p. 64 (see footnote 261 referring to interview with a female refugee)
735 Ibid, chapter 3, p. 67.
organizations directly operational in humanitarian situations.736 Such a SOP can be developed for each refugee camp context with guidance by this general tool. This kind of document has been found regarding the Kakuma refugee camp, as a drafted 2nd revision from 2007 by UNHCR together with the Government of Kenya and international and national NGOs for prevention and response to SGBV.737 Even though the situation and practice may change over time and new versions of such a SOP for a specific refugee camp context will be developed and agreed upon by organizations involved, focus will here be given to this specific version of the document from 2007. This is done in order to direct attention to the question of traditional mechanisms as an integrated component of the legal context in a refugee camp, and to give examples on matters of jurisdiction that appear through the document, specifically with regard to the situation of women.

In the introduction to the document, it is stated that the SOP should reflect a rights-based approach in responding to sexual and gender-based violence and that UNHCR has taken a lead in the development of the document.738 With reference to both the UN General Assembly Declaration on the Elimination of Violence against Women from 1993 (articles 1 and 2) and the CEDAW General Recommendation No. 19 (paragraph 6), the definition applied of sexual and gender-based violence include physical, sexual as well as psychological violence that occur in the family or within the general community and physical, sexual and psychological violence perpetrated or condoned by the State and institutions, wherever it occurs.739 The kind of violence included in the definition of occurring in the family, could be battering, dowry-related violence, marital rape and traditional practices that are harmful to women.740

In the SOP, under section 5 with the headline Responsibilities for Prevention and Response, the issue of administration of justice is addressed both with regard to a court mechanism and to the role of what is called traditional dispute mechanisms, also known as the Council of Elders and

737 UN High Commissioner for Refugees (UNHCR), Community Services, UNHCR Kakuma, SGBV SOP 2007. For more details, see footnote 103 (chapter 2).
738 Ibid, p. 3
739 Ibid, p. 4.
740 Ibid, p. 4.
established for each refugee community for the purpose to settle disputes. Similar to what was mentioned in the film *Breaking the cycle of violence*, discussed above in chapter 4, regular court sessions are to be arranged one week every month, as well as a High Court presence twice a year in the camp. Added to this are visits of the Khadi - a court integrated into the Kenya court system for the purpose to hear cases with regard to the Muslim personal law, eg. family law issues – explicitly mentioned in the SOP in order to raise awareness and to hear cases with regard to the muslim refugee community.

In cases of violence, there is a referral system in the refugee camp that makes a distinction between “Non sexual violence”, including domestic violence and FGM on the one hand and “Sexual Violence” including rape on the other hand. This distinction falls back to the national legislation of Kenya, applicable at that time (2007), which handles what is referred to as sexual violence according to the Sexual Offences Act of 2006, while the Penal Code is mentioned in the document to be applicable for offences referred to as “non-sexual”. However, irrespective of legislation, all cases identified as having a criminal character should be referred to the police and to the court system of the host country.

For sexual and gender-based violence there is also a SGBV lawyer (UNHCR protection staff) with specific responsibility to follow up cases in communication with the police and the Gender Unit of LWF, given the task according to the SOP to receive and document SGBV incidents. The

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741 Ibid, 5.5 and 5.6, p. 13.
744 UN High Commissioner for Refugees (UNHCR), Community Services, UNHCR Kakuma, SGBV SOP 2007, 4.1, p. 6.
745 Ibid, 4.1, p. 7.
746 Ibid, 4.1, p. 6. However, to be noted is that in year 2013 the Protection Against Domestic Violence Bill was presented in Kenya Gazette Supplement No. 136, (National Assembly Bills No. 28), though it was not in force when the SOP discussed here was drafted, retrieved 21 February 2019 [http://kenyalaw.org/kl/fileadmin/pd/2013/TheProtectionAgainstDomesticViolenceBill2013.pdf](http://kenyalaw.org/kl/fileadmin/pd/2013/TheProtectionAgainstDomesticViolenceBill2013.pdf).
747 Ibid, 5.6, p. 13.
748 Ibid, 4.1, p. 6, 5.3, p.11 and 5.6, p. 13.
traditional dispute committee of each refugee community, the Council of Elders, should work together with UNHCR and others in the camp administration to settle disputes and reintegrate persons who have experienced SGBV, referred to as SGBV survivors in the document.\(^{749}\) It is stated in the Terms of Reference for the Traditional Arbitration Mechanism that it should refer criminal cases, including SGBV cases, to the Kenya police as soon as they are reported.\(^{750}\) This means that the Council of Elders, on one hand is the kind of institution to be closest to the refugee community and probably the first one in the structure to get knowledge about cases of gender-based violence, while on the other hand and with reference to SOP, it does not have the jurisdiction to handle these kind of cases in the camp context.\(^{751}\)

To be noted is that the SOP explixitly limits the jurisdiction of the traditional dispute mechanisms to handle only cases in the sphere of family law, for example with regard to matters classified in the document as “Marriage and dowry related issues […] Divorce […] Pregnancy related issues”.\(^{752}\) In the Terms of Reference for the Traditional Arbitration Mechanisms, attached to the SOP of 2007, it is stated as an instruction that application of customary law to cases of personal nature should be “Consistent with Kenya laws and human rights”.\(^{753}\)

What is communicated here through this SOP-document from 2007 indicates the presence of a legal environment in the refugee camp where both customary law systems and a statutory law system form part of the legal context and where a customary law practice of each refugee community could have jurisdiction in family law matters. As briefly discussed in chapter 5, this is a division of jurisdiction that reminds about a structure practiced during the colonial period in various countries. However, what this kind of division of jurisdiction would mean in detail from a legal point of view in Kenya in general on one hand, and for prevention of human rights violations and for legal protection of specific human rights of women in Kakuma as a protracted refugee situation on the other, is still a complex

\(^{749}\) Ibid, 5.6 and Annex 7 paras. 1, 6 and 8.
\(^{750}\) Ibid, Annex 7 para 8.
\(^{751}\) Ibid, Annex 7 para 9.
\(^{752}\) Ibid, 5.6, p. 13.
\(^{753}\) Ibid, Annex 7, para. 2.
research topic beyond the scope of the present study.\footnote{As discussed in chapter 2, it is an issue that need to be studied through a legal field study including visits to the camp area and meetings with people and institutions with different roles and mandates for the operationalization in the camp context.} For the present study, though, it is to be noted that in a refugee camp context there could be a practice of division of jurisdiction and to a certain degree customary law may be integrated and recognized to form part of the institutional legal context of the camp.

Regarding marriage arrangement, a question that surfaces at this stage from the study of the SOP from 2007 for the Kakuma refugee camp is to what extent there may occur a conflict, on one hand, between the interpretation by the Council of Elders of what is to be viewed as a family law matter to be handled within its own jurisdiction, and on the other hand, what is to be seen as an issue of marriage arrangement that has to be dealt with as a criminal law matter of the host-country and therefore also should be referred by the same Council of Elders to the court system of the country. This issue of a possible conflict appears due to the fact that it has been indicated, through the kind of information communicated by the SOP-document, that forced marriages and early marriages are acts defined as harmful traditional practices and listed as types of SGBV in the monthly reporting form applied in the camp.\footnote{UN High Commissioner for Refugees (UNHCR), Community Services, UNHCR Kakuma, SGBV SOP 2007, Annex 1.} To take note of, it has been observed in the study of Safe Haven discussed above, that these kinds of marriage-arrangements might also be reasons for young female refugees to take a risk of social isolation from their refugee community by alerting UNHCR or the organizations acting in their capacity as implementing parties to UNHCR, on their need for assistance and protection of human rights.

Here, an updated strategy by UNHCR from 2011 regarding SGBV aiming to cover a period of five years and to give more attention to gender inequality and discrimination is to be noted.\footnote{UN High Commissioner for Refugees (UNHCR), Action against Sexual and Gender-Based Violence: An Updated Strategy, June 2011, Division of International Protection, pp. 5, 7, available at: http://www.refworld.org/docid/4e01ffeb2.html [accessed 21 June 2018]} Some of the prevention activities suggested in the strategy reflect what is mentioned in the SOP for the Kakuma refugee camp, e.g. to increase the awareness of the community regarding rights of women and children.\footnote{UN High Commissioner for Refugees (UNHCR), Community Services, UNHCR Kakuma, SGBV SOP 2007, 5.6, pp. 14-15.} There are also activities ad-
dressing children, such as Child Rights Clubs and sport activities, where SGBV issues are raised as part of the preventive activities.\footnote{Ibid, 5.3, p. 11.} Recommendations ascribed to UNHCR in a study for a Master of Art degree from 2013, focusing specifically on the administration of justice in child-related issues in Kakuma refugee camp directs attention to views on how to handle various types of disputes in the refugee context.\footnote{Clare Jerotich Kidombo, ‘Factors influencing administration of justice in child-related cases handled by UNHCR: The case of Kakuma refugee camp, Kenya’, A research project report submitted in partial fulfillment of the requirements for the award of the degree of master of arts in project planning and management of the University of Nairobi, 2013, retrieved 28 July 2018 \url{http://erepository.uonbi.ac.ke/handle/11295/63479}} Of interest here are the results reported from focus group discussions with refugee communities of Somali, South-Sudanese and Burundian refugees. As observed in other studies, this study reported a general preference to handle disputes within their own alternative systems due to unfamiliarity with the Kenya justice system, language barriers and also due to certain costs.\footnote{Ibid, pp. 56-59.} Based on the results from the survey and focus group discussions, it was concluded that there was a need to encourage children to report. The study added to this a need of capacity building activities with regard to how to handle cases when rights of children are at risk.\footnote{Ibid, p. 60.} For the alternative dispute mechanisms such as Council of Elders, a focus on strengthening reporting and follow-up on cases regarding children was underlined.\footnote{Ibid, p. 60.}

With regard to what was described for the Kakuma refugee camp and the practice of prevention activities, there are also reports from the Dadaab refugee camp context on activities aiming to strengthen girls and their awareness of rights by the example of a school activity called girl clubs.\footnote{Canadian Lutheran World Relief (CLWR), ‘Girls Speak up in the Dadaab Refugee Camp’, (Posted 13 March 2013), retrieved 28 May 2018 \url{https://clwr.wordpress.com/2013/03/13/girls-speak-up-in-the-dadaab-refugee-camp/}} It is confirmed that early marriage, teenage pregnancies and FGM form a reality for young female refugees that might also hinder them from attending school and completing their studies.\footnote{Ibid.} To address this situation, these clubs aim at giving space for girl club members to share experiences and to
develop their confidence and be encouraged to speak up against violence affecting themselves and their friends.\footnote{765}

Taking all this into consideration, the question to be asked is to what extent these kind of narratives - reflecting the conditions for female refugees in the camp and a complex legal context to address the problem of gender-based violence - will be brought also to the knowledge of the CEDAW Committee or the Special rapporteur, holding an international mandate to specifically deal with the problem of violence against women, its causes and consequences.

\section*{6.4.3 Views on the space for women to act.}

In this context of a complex legal environment and the practice of division of jurisdiction, it is worth giving attention to what has been reported in two various types of studies focusing on the situation for women in the refugee camps of Kenya, including the presence of traditional dispute mechanisms and the views of women on which legal system to approach in legal matters. The first one is an assessment from 2008 in the Dadaab Refugee camp giving attention to the needs of women and children.\footnote{766} The second one is a research paper presented by Claire Withira Mwangi in 2012, specifically addressing the problem of sexual violence in Kakuma refugee camp with regard to Somali women.\footnote{767}

The assessment of 2008 in Dadaab showed a problem of rape and of early and forced marriages, as well as comments from the police that refugees do not bring cases of violence to their attention.\footnote{768} One reason for the reluctance to involve the police was a general preference of the refugees to keep to their own justice mechanisms when dealing with various cases, another one was a view of refugee communities on the Kenyan police as foreign:

\begin{quote}
“Refugee women generally but Somalis in particular said they went to the police as a last resort on family related violence rather than as a first line of action.”\footnote{769}
\end{quote}

On the other hand, interviews with women in the assessment communicated a view that the community courts established within the Somali customary law tradition of Xeer, a tradition briefly presented in the previous

\begin{footnotes}
\item[765] Ibid.
\item[769] Ibid, p. 29.
\end{footnotes}
chapter, did not protect them from violation of rights.\textsuperscript{770} Several factors contributed to this situation and as an example, the assessment refers to the following reasons given by women: “The courts mainly rule in favor of male public opinion particularly where violations against women are concerned even when a woman is indisputably aggrieved.”\textsuperscript{771} “Compensation is given to men who are deemed to be the protectors of women”\textsuperscript{772} and “Women do not give evidence, alternatively their word is not trusted and has to be given credence by a man’s testimony”\textsuperscript{773}.

These findings indicate a status of women in relation to male members that are in line with the mission report discussed above in chapter 5 regarding the practice in Somalia in 2011, as presented by the Special Rapporteur on violence against women, its causes and consequences.\textsuperscript{774} The findings also show similarities to what was presented by Mahidi Abidle regarding the active role of male members of the community in legal processes of the customary dispute mechanism of Xeer, as practiced in Somalia close to the time when the assessment took place in the Dadaab refugee camp.\textsuperscript{775}

Based on interviews with Somali women in the Kakuma refugee camp, the second study reports a similar situation of lack of confidence in the Kenyan legal system and a preference for the traditional dispute mechanisms familiar to them.\textsuperscript{776} However, in the same study, discussing the practice with regard to the Sexual offences Act of 2006, a problem is observed regarding the silence on what occurs in the community due to the risk of threats directed against a woman if she discloses the identity of the perpetrators.\textsuperscript{777} Added to the information of an under-equipped police-presence, there is a situation where the police is reported not to respond adequately to the risk of sexual violence against women and to hand over the responsibility to women to find their own way to protect their living area by

\begin{itemize}
  \item \textsuperscript{770} Ibid, p. 30.
  \item \textsuperscript{771} Ibid, p. 30.
  \item \textsuperscript{772} Ibid, p. 30.
  \item \textsuperscript{773} Ibid, p. 30.
  \item \textsuperscript{775} Abdile, 2012. His research is discussed above in chapter 5 (5.4.1).
  \item \textsuperscript{776} Mwangi, 2012, p. 21.
  \item \textsuperscript{777} Ibid, p. 20.
\end{itemize}
physically fencing it in.\textsuperscript{778} The study identifies a discouragement of reporting to the police\textsuperscript{779} and problematizes the gap that is revealed, between the education activities offered by international NGOs with regard to sexual and gender-based violence on one hand and the failing of the institutional structure to secure protection of human rights for refugees in the camp on the other.\textsuperscript{780} Based on the aim to make a study “beyond the mere ‘humanitarian’ approach”\textsuperscript{781}, Mwangi accordingly argues in the final conclusion that “sensitization by NGO’s without real implementation widens the gap between rhetoric and reality of human rights.” \textsuperscript{782} and that there is “a greater need for women refugees to be positioned in the human rights domain in order to restore human dignity and make rights visible.” \textsuperscript{783}

This issue, the relationship between sensitization activities and structures for making implementation of human rights a reality, directs attention to the findings of Sally Engel Merry discussed in chapter 3. Her study of a local community context emphasized that for women to break the silence, pass the threshold of the home and go for legal actions, depended on a supporting environment, including shelter and women-groups, and institutional structures that take human rights seriously. Her observations with regard to the presence of institutional structures in a local context, that in her study was not a refugee camp environment, show similarities with the argumentation by Mwangi regarding the importance to transfer the sensitization on human rights into a concretization of visibility also in an institutional practice on the ground in a refugee camp context.

The two studies from Dadaab and Kakuma refugee camps underline the comment made in the film \textit{Breaking the cycle of violence}, mentioned above in chapter 4, that women “have no voice”\textsuperscript{784} at house level. Given what has been observed regarding the presence of violence and the difficulties of women to have their own voice heard in various issues affecting their life, whether in family law matters or criminal law matters, and either with regard to traditional mechanisms or national authorities, it is to be remind-

\textsuperscript{778} Ibid, pp. 20, 39.
\textsuperscript{779} Ibid, p. 22.
\textsuperscript{780} Ibid, pp. 37-42.
\textsuperscript{781} Ibid, p. ix.
\textsuperscript{782} Ibid, p. 41.
\textsuperscript{783} Ibid, p. 42.
ed that one of the dominating forms of violence against women in a refugee camp is domestic violence and the risk that such violence is not perceived as a violation to be acted upon, neither by the community nor by the authorities of the country of asylum.785

To be noted here is that the Annex 3 to the SOP drafted for Kakuma refugee camp, 2007, presents a list of Monitoring and Evaluation Indicators sector by sector, active in the local camp context, e.g. for the sectors of Health Care, Safety and Security or Legal and Judicial Support.786 The indicators are separated between the two categories of response and prevention. While the column of the Sector’s Response focuses on the interest to count the number of cases identified, reported and filed in court etc., the column of Prevention Mechanism gives attention to the need to develop trainings for various actors in the camp, e.g. health care staff, police officers, teachers, focusing on issues of human rights and sexual and gender-based violence.787 However, even though the SOP of 2007 makes references to international human rights law both for the applied definition of gender-based violence and as a guiding principle for all programming, it does not explicitly reflect measures including training of women in approaching international monitoring mechanisms. 788

This means that the purpose of addressing the problem of violence against women is not integrated as an activity for female refugees to contribute to the development of the Legal and Judicial Support or the Prevention Mechanisms by presenting their views on the situation in the camp to an international mechanism, such as the CEDAW Committee which holds a mandate to focus the human rights situation for women. To pave the way for women to make a choice whether to act on their experiences of gaps in protection, by communicating their narratives regarding the human rights situation in the refugee camp also to an international human rights mechanism, does not seem to have been considered as a prioritized measure. In case the drafted version of the SOP for 2007 was also the one implemented, this draws attention to a risk that the open invitation by the Cedaw Committee directed to women as rights-holders to present their views on the human rights situation in a specific society context will not reach out to female refugees in a refugee camp context.

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786 UN High Commissioner for Refugees (UNHCR), Community Services, UNHCR Kakuma, SGBV SOP 2007, Annex 3.
788 Ibid, pp. 4-5 and Annex 3.
Since the SOP of 2007 was drafted, the number of refugees has increased in the Kakuma refugee camp, in combination with reduction in financial contribution to the various needs for the population.\textsuperscript{789} In January 2016 the number of displaced people hosted in Kakuma was more than 184 000.\textsuperscript{790} As a consequence, \textit{The Kenya Comprehensive Refugee Programme – 2016} reports that of the 12 objectives to share the resources, the objective of sexual and gender-based violence acquired the smallest share, only 1.2 %.\textsuperscript{791} However, a part of the planning for a new camp area, Kalobeyei, was to develop a SOP on sexual and gender-based violence and to build two safe shelters.\textsuperscript{792} To what extent the invitation by the CEDAW Committee to women to share their knowledge on the situation with regard to violence against women in general and for domestic violence in particular, will be integrated as one of the activities in this SOP for the new camp is not for the present study to focus, but may be a subject to be considered for future studies.

However, what is to be underlined here is the importance of giving further attention to the issue of to what extent and how the knowledge and views regarding the situation in a specific refugee camp context could be brought to the international human rights mechanisms by female refugees in their capacity as rights-holders, for the purpose to reduce the risk for human rights violations in refugee camps.

\textbf{6.5 To summarize}

The present chapter gave attention to what the reality could be on the ground for female refugees in a specific refugee camp context in East Africa, characterized by a protracted refugee situation. The interest was directed to the issue of visibility of women in a local refugee situation and to conditions for acting in the capacity as rights-holders regarding the problem of violence against women.

The chapter shows recognition of violence against women as a problem in a refugee camp context and indicates references to international human rights in operating procedures for how to address the problem of violence against women locally. However, studies have also disclosed an experience

\begin{itemize}
\item \textsuperscript{790} Ibid, pp. 4, 47.
\item \textsuperscript{791} Ibid, p. 47.
\item \textsuperscript{792} Ibid, p. 49.
\end{itemize}
of stigmatization and gaps in measures to address the human rights problems and to eliminate threats of violence against women.

Various sources underline the importance of sharpened awareness and analysis of the presence of a complex legal context and a variety of customary law traditions in the camps. The discussion on promotion and protection of international human rights of women in a refugee camp setting needs to direct attention beyond the written laws and administrative rules. It appears to be crucial from a legal point of view to search for detailed knowledge about the practice guided by a non-written customary law structure with regard to also the social and legal status of women. For instance, it is indicated that the understanding of what is to be considered to be violence against women could differ between international human rights law and the law of the host country, as well as between the legal system of the host country and the various customary law traditions represented by each refugee community.

With reference to reported experiences of various types of gaps in addressing the problem of violence against women in the camps, an issue of concern is to what extent a woman is recognized status to act in her own right, in order to claim protection of her rights. This is a question relating to the local mechanisms as well as to international human rights instruments, such as CEDAW and the CEDAW Committee.

The knowledge of problems that female refugees face in the refugee camp environment does not seem to have been reflected in attempts to facilitate for female refugees to address the international human rights mechanisms specialized in judging on status of gaps in human rights protection. With regard to the problem of gender-based violence, the reporting mechanism of CEDAW appears not to have been integrated as a tool and space for female refugees to be visible as rights-holders, present their narratives and give voicing to their concerns regarding the reality in the local refugee camp context.

When forced into displacement and a life in a protracted refugee situation, due to reported weaknesses in institutional structures and occurrence of discouragement to act, there appears to be a risk that female refugees become invisible as rights-holders and not entrusted to act on gender-based violence, neither locally nor internationally, in order to claim the protection of human rights.
Part III

Chapter 7. Concluding discussion: To be visible as a rights-holder – an issue of having the right to act locally and beyond borders

“The right to have rights today means the recognition of the universal status of personhood of each and every human being independently of their national citizenship.” 793

7.1 Introduction
The present study has been given the title: Visibility at risk for women as rights-holders - a study with regard to a refugee camp context. By taking the recognition of persons as rights-holders in the framework of international human rights into account, it is a study that has directed its attention to women in protracted refugee situations, who are restricted to stay in refugee camps also when their human rights are at risk due to various forms of violence. The purpose has been to deepen the understanding of women as rights-holders within the context of international human rights law and what may shape the conditions for women to act in a local customary law context, such as a refugee camp environment could constitute. Guided by this purpose, the question that has driven the study has been the following: To what extent may there be a risk that women in a refugee camp context, distinguished by a protracted refugee situation, do not become visible as rights-holders and entrusted to act with regard to international human rights and the problem of violence against women, especially domestic violence?

The research process found its entry-point to study the issue of women as rights-holders, primarily in the context of the international human rights treaty the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), including the work of the CEDAW Committee as a treaty body, and also the international mandate of the Special Rapporteur on Violence against Women, its causes and consequences. Specific attention has been given to the discussion regarding violence against women. A part of this context has been the observation by Rosa da Costa in her study from 2006, The Administration of Justice in Refugee Camps: A

Study of Practice, that domestic violence is represented as one of the dominating forms of violence against women in refugee camps and that there are challenges in administration of justice due to the presence of a variety of justice mechanisms in the camps. Therefore, certain aspects of a local customary law tradition have caught interest in the present study.

To be able to address the research question, the process has taken the form of being in a dialogue with the material for the study, a continuous dialogue directing attention to material from an established international human rights system on one hand and material dealing with a local refugee camp context on the other. This has included a study of the development of international human rights law in the context of CEDAW and guiding material developed by UNHCR for an operational context with regard to female refugees living in protracted refugee camp situations.

The present chapter will conclude the study. This will be done first by highlighting some of the issues discussed in previous chapters and then by reflecting on the observations made with regard to the purpose of the study and the research question posed.

7.2 Issues discussed in chapter 3-6

7.2.1 Women as rights-holders in the context of international human rights

Chapter 3 gave attention to violence against women as reflected in the context of CEDAW and the work of its treaty-body – the CEDAW Committee, in the international debate and in some examples of academic critical discussions linked to the development of the interpretation of human rights of women.

Through the narratives of women in two regional human rights mechanisms and the reasoning in the two cases, Maria Da Penha Maia Fernandes v. Brazil and Opuz v. Turkey, a special attention was given to domestic violence and the status of women as rights-holders. Added to these two cases was an example from research by Sally Engel Merry in a local community in Hawaii identifying double subjectivity of women in situations of domestic violence, as rights-bearers and as injured kinsmen, and the importance of institutional structures taking human rights seriously together with an environment that encourages women to break the silence and go for legal actions.

It was observed that the narratives of the rights-holders will not reach out if they do not have a recognized and protected legal voice and are encouraged to act on the matter. The steps to be taken by women in order to disclose the problem of violence at the domestic level, need to be considered with regard to the resistance they might meet in a local society con-
context, the role of an institutional structure and the problem of the high levels of impunity referred to by the CEDAW Committee in its General recommendation No. 35 from July 2017.

A conclusion to be drawn is that the issue of access to human rights mechanisms has an impact both on the visibility of women as acting rights-holders and on the visibility of specific human rights that are at risk. This kind of legal voice gives visibility to human rights problems and gaps in the protection of rights. This is a visibility that reaches out, beyond a specific local context, the court room and the borders of the ratifying state. The written documentation of their narratives and the publication of judgements make their cases available for further international debate and for academic research.

7.2.2 International human rights with regard to women in the context of UNHCR

In chapter 4, a short introduction was given to the mandate of UNHCR in general and in relation to female refugees in particular. The focus of attention was laid on the interrelationship between international human rights and the development of the mandate, especially with regard to the work of the CEDAW Committee and the emphasis on seeing female refugees as rights-holders. It was observed that the issue of violence against women is recognized as one of the challenges in situations of displacement and that the CEDAW Committee had been active in explicitly linking human rights of women to refugee situations and the work of UNHCR.

The chapter included a closer study of material developed for a more operational context, the UNHCR Handbook for the Protection of Women and Girls from 2008 and a Companion Guide from 2010, aimed for training with relation to the Handbook. Attention was directed to the commitment by UNHCR to address refugees as rights-holders in the context of the human rights-based approach. Of special interest was the observation that legal systems could be a risk factor in an operational refugee camp context.

Even though this section of the study showed a visibility of women as rights-holders in the work of the CEDAW Committee and in the guiding documents by UNHCR, it was a section that also indicated awareness of problems in the local context for women with regard to issues of gender-based violence and their space to act. To question the status of female refugees and the risk of stigmatization form part of the conditions in a camp environment and are mentioned as factors, if not addressed adequately, that might block an empowering process for women to be able to act in cases of domestic violence.
7.2.3 Aspects of local customary law tradition and the issue of visibility of women

Chapter 5 gave an introductory attention to the presence of customary law traditions in African communities outside a refugee camp setting. The aim of this chapter was to give some basic ideas of what could inform the kind of complex legal structure that Rosa da Costa referred to in her study of 2006 and to give a background to the study in chapter 6 of a specific refugee camp context in East Africa. In focus of chapter 5 was the work of a few researchers who have studied the practice of customary law systems more closely, some of them with a specific country in focus, others with a broader focus. Even though their research was not addressing a refugee camp context, it was considered to be of value for the present study, to give an idea of what kind of traditional legal structures that might form part also of a legal context in refugee camps. Added to this was the work of two legal experts. One of them represented professional legal experience in arguing for human rights of women from within a national legal system, namely Botswana, while the other represented a monitoring mission mandate of the UN Special rapporteur on violence against women, its causes and consequences, discussing the human rights problem of violence against women in Somalia.

Due to the observations in various studies, this chapter draws attention to the risk that women do not become visible as rights-holders. The existence of an unlocked legal door for women to take actions in family law matters, or in cases of gender-based violence is something not to take for granted. The chapter indicated that the hindrances that might be present are not always to be addressed as an issue of a practical, logistical character or an issue of not being encouraged and empowered as an individual to take legal action. The hindrances could lie even deeper in the legal system practiced. It could be an issue of not being entrusted by the structure of the system to act in person, as woman, with a legal capacity and by own right before the law. The awareness of the existence of such a situation adds an extra dimension to the discussion regarding the risk for women to become invisible as rights-holders in the protection of human rights.

7.2.4 Women as rights-holders with regard to the context of a local refugee camp

Chapter 6 gave attention to camps located in Kenya, characterized by a protracted refugee situation that dates back to the beginning of the 1990s. The number of refugees hosted in the refugee camps has fluctuated over the decades and for certain periods exceeded more than half a million people. With reference to the previous chapters and the development of protection
of human rights with regard to women, the chapter directed attention to what the reality could be on the ground for female refugees in a refugee camp context. The sensitivity in alerting to situations of violence against women was addressed, together with the various difficulties that female refugees are facing by making known what is at risk or has already happened to them.

A document from 2007 outlining a practice of Standard Operating Procedures was studied and gave example on the presence of not only the national, but also traditional refugee mechanisms in preventing and acting in cases of violence. In the closer study of this document, a practice appeared of dividing the jurisdiction in a refugee camp in such a way that traditional refugee mechanisms handled certain family law matters, as for example marriage, while what was defined as criminal cases was expected to be referred to the police of the hosting country, Kenya. The importance to be aware of the risk, as indicated in the study of Rosa da Costa, of a conflict with international human rights of women or girls became underlined.

What has been observed from the present study is the necessity of not only focusing on the status of national mechanisms compared to international human rights, but also giving more attention to practices at the local level within a context of traditional customary law and discussing to what extent such local practices work independently of or even disconnected from national legal structures and international protection of human rights of women. With reference to reported experiences of various types of gaps in addressing the problem of violence against women in the camps, the issue of visibility of women as rights-holders appeared to be interrelated with whether women are recognized legal status and to what extent they are entrusted at all to claim protection of their human rights. This is a question relating to the various local mechanisms as well as to international human rights instruments, such as CEDAW and the CEDAW Committee.

7.3 Conclusions
At this stage of the research process, it is time to conclude and to do so by reminding about the question formulated for the study: To what extent may there be a risk that women in a refugee camp context, distinguished by a protracted refugee situation, do not become visible as rights-holders and entrusted to act with regard to international human rights and the problem of violence against women, especially domestic violence?
7.3.1 Domestic violence and the issue of disclosing the problem in the local context

In the introduction to the present research (chapter 1) it was pointed out that domestic violence was reported to be one of the dominating forms of violence against women in refugee camps, and that challenges have been identified for administration of justice due to presence of a variety of justice mechanisms. It was also mentioned that it was a type of violence that has been reported to have received less attention by humanitarian actors when compared to the attention given to sexual violence, especially where perpetrators were to be found in armed forces. With regard to the problem of violence against women in refugee camps, the same introduction also drew attention to the question for women whether to act or not when their human rights are at risk. This was an issue that seemed to be considered by women in relation to the views and preferences of the traditional system of their own refugee community.

The material studied in the present work shows awareness by UNHCR and their implementing parties of the problem of domestic violence in a refugee camp context. However, the material also indicates that the decision of female refugees to act on the problem of gender-based violence seems to include considerations regarding consequences of social exclusion and physical isolation in a special area of a refugee camp. The steps to be taken by women in order to disclose the problem of violence at domestic level, therefore need to be considered and discussed with regard to the resistance that the women might meet in a local society context, not only due to their social status but also their legal status. To be noted, the problem of violence against women is identified to be addressed as a human rights issue and women are also referred to as rights-holders by UNHCR in the *Handbook for Protection of Women and Girls*. Added to this, there is the indication of a practice for the operational cooperation between various actors, to make use of a format called SOP for SGBV, including referral mechanisms in the camp. In this respect, the human rights problems are visible with regard to women and the terminology used reflects a human rights vocabulary.

However, even though risk factors are identified for a refugee camp context, protection of human rights and implementation of policies and guidelines are not always reflected by a change on the ground with regard to realization of human rights for female refugees. Here, the findings by Sally Engel Merry, discussed in chapter 3, should be called attention to, especially the finding that was referred to as a double subjectivity of battered women. Her study of a local community context shows that in order for women to break the silence, pass the threshold of the home and even go for
legal actions as rights-bearers on one hand and as injured kinsmen on the other, a supportive environment is required, including shelter, women-groups and institutional structures that take human rights seriously. To overcome the problem of hindrance and hesitation at the individual level to make violence, or risk for violence, known, it is the combination of these commitments by the local society and institutional structures that appears to be necessary to have in place. Irrespective of whether the woman is living in a local refugee camp context or in a local context anywhere else, the need for a supportive environment seems to be nearly the same for disclosing the problem.

Taking her findings into consideration, the observations of double subjectivity is of interest to be linked also to the study by Gebreiyosus and the hesitation he identified amongst women, in a refugee camp at Horn of Africa, to take legal actions with regard to domestic violence. The hesitation he observed could be explained either by a discouragement of women by the refugee community to disclose the violence or by lack of support to female refugees to address the consequences they risk by taking action against the perpetrator, who also is a member of the community. The conclusion presented by Gebreiyoses was that in the specific refugee camp context studied, there was no strong institutional structure by the hosting country to handle the problem. This factor, in combination with a practice of traditional legal structures, led to a risk for invisibility of both the problem of gender-based violence and women as rights-holders. His suggestion of how to address the situation is of interest as it reflects a combination of measures known from other refugee camps contexts, namely counselling and economic support directed to individual women. Added to this, he suggested a legal literacy campaign, not only to female refugees but also to male refugees. By this, he included both a preventive measure that addresses the community as a collective, and the individual female refugees who have a need to find a way to continue life in the camp environment.

### 7.3.2 The division of jurisdiction and visibility at risk for rights-holders

In the present study, we have seen research and reports discussing presence of a plural legal context locally, directing attention to the issue of legal status of women in communities and to what extent women are recognized the possibility to act on legal matters, including human rights issues.

Violence against women and girls continues to be part also of a life in exile and efforts have been made over the years in the two Kenyan refugee camp areas of Kakuma and Dadaab to address the problem through various types of activities, including immediate interventions and awareness-raising regarding human rights of women and children. However, studies
as the one discussed from 2013 regarding the practice of Safe Haven in the Kenya refugee camps, short reports on arrangement of Girl clubs and practices as outlined in the Standard Operating Procedures, all underline a need to be observant on the legal aspects and tensions, between what are recognized international human rights of women and girls on the one hand and what is part of the practice of the host country institutions as well as individual refugee communities on the other.

The practice in a protracted refugee camp context to give space for different legal traditions, for a division of jurisdiction with regard to different legal matters, and for different types of mechanisms and institutions, all have implications for to what extent women become visible as rights-holders in the protection of international human rights. The present study indicates that such a division of jurisdiction, including traditional customary law structures, might encapsulate a risk that the narratives of women become hindered from reaching beyond borders of the refugee community, as well as beyond the borders of the hosting state in reaching out also to international human rights institutions. This draws attention to a risk that women in refugee camps do not become visible as rights-holders and that their experiences of gaps in addressing the international human rights problems are not adequately observed. To address the problem of domestic violence, the study shows that it is important to give attention to structural inequalities caused by the various components of legal systems practiced and to give more attention to the issue of to what extent women are entrusted to act. This was underlined by the Special Rapporteur in her mission report, discussed in chapter 5, in which she directed attention both to the invisibility of the problem of domestic violence in Somalia as such and to a general practice of giving preference to traditional justice mechanism when handling legal matters. The report also included findings regarding practices similar to those that were reported from the refugee camps in Kenya, a neighbour country, as for example the one of arranging a marriage with the perpetrator of sexual violence.

The observations made by the Special Rapporteur during her mission in Somalia and the recommendations drawn from these observations on the need to strengthen the reporting capacity with regard to human rights of women, give reasons to raise the issue how to make access to a human rights monitoring mechanism and to enable meetings also with female refugees during their stay in refugee camps with a restricted freedom of movement. Even if the status of women as rights-holders is confirmed by the CEDAW Committee in its work with respect to the problem of violence against women, the visibility as a rights-holder in relation to domestic violence including also a recognized capacity to act, either with legal measures
in individual cases or for preventive measures on a community level, is for various reasons not to be taken for granted as an integrated component of the institutional legal structure in operation in a certain country or local context.

This is a situation drawn attention to by the studies discussed in chapter 5 addressing characteristics of an oral tradition in customary law systems and the recognition of their existence in parallel to statutory legal systems of a state. Added to the findings from Somalia by the Special Rapporteur, the same chapter directs attention to other countries showing similar preferences to customary law mechanisms in handling various types of matters that fall into the sphere of legal matters. Of special interest with regard to the case of Unity Dow is the observation of an established dual legal system and a customary law practice that didn’t include women in the legal structures for interpretation of customary rules and the implications that this could have for legislative issues at the national level.

7.3.3 To be recognized the right to argue and act for rights – a focus for future research

The present study stated in the summary of chapter 3 i) that the CEDAW convention reaffirmed the recognition of the human right of women not to be discriminated against with regard to enjoyment of human rights, ii) that violence against women has been addressed as a human rights problem in the academic debate and by international and regional human rights mechanisms, and iii) that the responsibility of states to prevent and respond to domestic violence has been identified with regard to human rights obligations.

With regard to the refugee camp context in focus for the present research, we have the information about a practice of a mobile court system representing the legal structure of the host country. However, other informations available in reports and research indicate the problem of impunity especially in cases of violence against women. Given this and the international discussion on this topic, it is to be noted that the the material studied has not indicated any presence of structures in the refugee camp environment that have had the task to facilitate access for female refugees to become visible as rights-holders by presenting their narratives to an international human rights monitoring mechanism, e.g. the CEDAW Committee or the Special rapporteur on violence against women, its causes and consequences.

Given the question to what extent there is a risk that women do not become visible as rights-holders with regard to the situation in a refugee camp context, the study indicates a kind of similarity between the monitor-
ing structure of international human rights law and traditional customary law structures. The issue of the extent to which women are recognized the possibility to act in their own right, concerning the problem of gender-based violence or other human rights matters, lies in the hands of state parties to the CEDAW-convention and in the hands of the traditional customary law leadership in local communities. Both structures appear to have a power to decide whether to permit women to independently and individually pass the threshold of a “sovereign territory” and present their narratives about a situation that has an impact on their human rights. From a legal point of view, women in a refugee camp context seem to have to argue for visibility first in respect to a local customary law system and then in respect to a structure established for monitoring implementation of international human rights.

It appears from the study of the various sources for the present research, that for women in a refugee camp to be able to act as rights-holders and claim human rights as laid down in human rights conventions, the issue of visibility it is not only a matter of training in presenting facts on the ground in front of local authorities. To be visible in addressing the problem of gender-based violence and gaps in protection of human rights in a refugee camp context, it is first and foremost an issue for women to be recognized the right to act in legal matters. It is a matter of having the freedom of expression and to be recognized the social and legal status to act in their own capacity in front of the local legal structures, including the local customary law context, and to address international human rights monitoring mechanisms, such as the CEDAW Committee or the Special Rapporteur.

Taking this into account, one of the issues emerging from this study is the need for a more detailed, preferably multidisciplinary, research on the understanding of the status of the person as the subject of the right in respect to international human rights law, in comparison with the interpretation of the social and legal status of women in traditional customary law systems and its implications for access to international human rights monitoring mechanisms. This is of importance both with regard to women’s access to a more general monitoring procedure for human rights and with regard to addressing individual cases where the criterion of having exhausted all the remedies at national level is applied.

Here, for the issue of visibility of women as rights-holders, the present study directs attention to the importance of addressing the legal interlinkage between the status of women in family law matters and the question whether there exists an independent right for women to act with legal capacity in matters of domestic violence, locally as well as internationally. In this respect, there are two observations by Fareda Banda discussing the
African context that are of specific interest to take into account in future studies: i) the development of rights of women is interlinked with changes in obligations and responsibilities of the wider family structures, ii) amongst those advocating for rights of women there has been a failure to be aware of discrimination against refugee women and to include them in the engagement for rights.794

To conclude, the present study has directed attention to a risk that women in a refugee camp context, distinguished by a protracted refugee situation, do not become visible as rights-holders. To address such a risk, this study has identified the importance of being aware of the local legal context in a refugee camp in general and to show interest to the issue of whether women are recognized individual legal status and capacity to act locally, especially in the traditional customary law systems practiced. To make the visibility as rights-holders a reality, the narrative needs to be entrusted to those who are closest to the experiences of human rights violations, the knowledge of the root-causes of violence against women and its consequences - to the female rights-holders in refugee camps. Here, an environment that encourages women to present their narratives also to international human rights monitoring mechanisms surfaces as crucial. By being explicit on all this, the actual status of women as rights-holders with regard to international human rights will be clarified and hopefully lead to a visibility of women reaching out to international human rights monitoring mechanisms, the international debate and academic legal publications.

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