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Accounting for Gender in International Refugee Law: A Close Reading of the UNHCR Gender Guidelines and the Discursive Construction of Gender as an Identity

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Abstract

This thesis conducts a close reading of the United Nations High Commissioner for Refugees' "Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees" – a document that explains how legal definitions of refugee status might take into account gender issues. In it, I investigate the relationship between gender identity and the refugee status to understand how gender is constructed in relation to other terms or identity categories that determine whether an individual will be granted asylum. Performing a close reading of this text, I demonstrate that the UNHCR defines gender as a ground that may influence or dictate violence. Defining gender in this way, the text betrays a performative contradiction. On the one hand, the UNHCR treats gender as a recognizable and distinct identity—one that can be separated from other identity categories. On the other hand, their inability to articulate clear terms for describing such a gender identity—to pin down the words with which they might express this bounded gender—suggests that gender is not a stable, confined, or separable identity category. This contradiction is significant because it draws our attention to the ways human rights instruments delineate the language and vocabulary available to people asserting a claim before the law. That is, the analysis conducted in this thesis demonstrates that there is a need to pay close attention to how international human rights instruments open and foreclose an individuals' ability to account for their experiences and gain a voice in the law.

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Chapter One - Introduction

The Characteristics of the Refugee: Towards a Universal Definition

The Second World War left in its wake a refugee crisis that necessitated the creation of international laws and policies. With over 30 million people left displaced and stateless (Barnett, 2002: 243), 51 nation-states came together in response to found the United Nations (UN) in 1945 – an inter-state institution established to prevent a potential third World War, creating and defining a space for international cooperation and dialogue. The existence of an intergovernmental platform such as this facilitated the recognition that the sheer numbers of displaced and fleeing persons required some form of coordinated and lasting global response (UNHCR, 2005: 5). This, in turn, necessitated the creation of a uniform standard for determining refugee status and deciding on the basic components of a claim to asylum. Responding to such concerns, the United Nations member states adopted the Convention Relating to the Status of Refugees in July 1951 – an agreement that remains the core instrument within international asylum law to this day (UNHCR, 2005: 9). This Convention codified both the rights of refugees and the responsibilities of states, and its adoption marks the establishment of the first permanent framework concerning refugees on an international scale.

The 1951 Convention outlined for the first time the universal definition of "the refugee" within international law. It became apparent, however, that this seemingly neutral definition was, in fact, both written and read with a specific refugee in mind: the male, European, political dissident, fleeing an oppressive regime in the post-World War II context (Olivius, 2010: 3; Nyers, 1999: 25). Feminist engagements with refugee law have

since demonstrated how readings of the refugee definition have excluded the experiences of women from the scope of the Convention. This thesis, therefore, addresses the need within the literature to critically engage with the ways "gender" is constructed and read within documents defining refugee status. With the UNHCR's 2002 guidelines that explain how to conduct a gender-inclusive interpretation of the refugee concept as the point of departure, this thesis therefore sets out to answer the question of how this guiding document establishes the relationship between gender and the refugee status. I argue that the *Guidelines* treats gender as a confined, stable ground from which violence emerges. However, there is a performative contradiction contained within the very language of the UNHCR *Guidelines*, the vocabulary the text employs in discussing and defining gender conflates various meanings and lived experiences. In other words, the language of this UNHCR publication itself betrays the ways that gender is not static or enclosed, but rather a complex, dynamic, and flexible category.

This chapter begins such a study by defining the problem of the relation between gender and "the refugee" as a legal status. It does so by outlining the historical development of the Convention, and the scholarly controversy surrounding it. I mainly address the debate regarding the universal definition of "the refugee," demonstrating how this concept and its interpretation have worked to exclude certain groups from the scope of the Convention. I argue that the existence of a universal definition has produced two exigencies. The first concerns the power of nation-states vis-à-vis the international community to apply autonomous understandings of the refugee definition, and the second concerns the way power may be exercised through acts of interpretation. Establishing the historical context the Convention and refugee definition was drafted within, and the scholarly debate that

has followed, will provide contextualization for the review of the literature that follows, and ultimately situates the rationale and background for my thesis question and research plan.

1.A. Historical Overview

The adoption of the 1951 Convention on the Status of the Refugee (hereafter the Convention) marked a watershed moment within the international regime of refugee protection. Not only did it represent a worldwide will to address the issue of displaced persons (UNHCR, 2005: 9), the Convention also endorsed one single definition of a "refugee," as opposed to earlier instruments that had designated specific groups or populations as refugees (UNHCR, 2010: 3).[1] The first article of the 1951 Convention holds that a refugee is someone who:

> [a]s a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [sic] nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it (UNHCR, 2010: 14).

An asylum seeker must in other words be able to establish multiple conditions: he or she must prove that the experience of fear amounts to persecution and that this fear is *well-founded* – that the claimant's subjective fear is backed up by "sufficient facts to permit the finding that the applicant faces a serious possibility of persecution" (Goodwin-Gill, 1996: 41). Furthermore, the claimant must prove that this persecution is *on account of*, or

[1] All references to the 1951 Convention or the 1967 Protocol, are according to the following document published by UNHCR: *Convention and Protocol Relating to the Status of Refugees* (2010). Available at http://www.unhcr.org/3b66c2aa10.html

in other words, because of, one or more of the altogether five enumerated grounds for persecution.[2] The emphasis on a refugee as someone "outside the country of his nationality," highlights the importance of, and respect for, territorial borders and sovereignty within this refugee regime, and establishes "the inability of an international organization to look within a nation's borders" (Barnett, 2002: 246).

The Convention designated a special role to the Office of the United Nations High Commissioner for Refugees (UNHCR), which had been established a year earlier. This agency was created as the successor of the International Refugee Organization (IRO), and as a subsidiary organ of the General Assembly (UNHCR, 2005: 7). Within the preamble to the 1951 Convention, the UNHCR is charged with the task of overseeing "the conventions providing for the protection of refugees", and it is recognized that "the effective co-ordination of measures taken to deal with this problem will depend upon the co-operation of States with the High Commissioner" (UNHCR, 2010: 13). The UNHCR mandate, which has been expanded from its original formulation, is to "provide, on a non-political and humanitarian basis, international protection to refugees and to seek permanent solutions for them" (UNHCR, 2005: 7). The UNHCR is in charge of putting together international treaties and supervising their application" (Barnett, 2002: 247).

Although the 1951 Convention marked a development towards a universal definition of the refugee concept, it still delineated clear limitations to its scope. Reflecting the "reluctance of States to sign a 'blank cheque' for unknown numbers of future refugees," (Goodwin-Gill, the UN Office of Legal Affairs website), the Convention contained

[2] The five protected Convention grounds are race, religion, nationality, membership of a particular social group and political opinion.

temporal and geographical restrictions to the criteria, limiting its application to those who had become refugees due to events taking place prior to January 1, 1951. Signatory states were furthermore given the option of limiting their obligations to those displaced because of events occurring before this time *in Europe*. This clearly demonstrates that the Convention was greatly influenced by the post-World War context it was adopted within (Barnett, 2002: 246), and constructed primarily with a certain type of displaced people in mind, namely the political refugee fleeing an oppressive state in the post-World War II context (Olivius, 2010: 3; UNHCR, 2005: 9).

In the time after the establishment of the 1951 Convention, however, the UNHCR was involved in several events taking place outside of Europe, such as the refugee crises arising from the Chinese Communist revolution, Decolonization in Africa and Asia (Johnson, 2011: 1022), and the Algerian war for independence (UNHCR, 2005: 9). Recognizing that "new refugee situations have arisen since the Convention was adopted and that the refugees concerned may therefore not fall within the scope of the Convention" (UNHCR, 2010: 46), a modifying protocol to the Convention was implemented in 1967. The protocol lifted the temporal and geographical limitations contained in the refugee definition, making its ambition truly universal in scope.

1.B. The Universal Refugee Concept: Two Exigencies

As the idea of universal human rights was developed in post-war Europe, the international community sought to extend such rights to fleeing and displaced persons by delineating the universal rights and conditions of "the refugee." The characteristics and entitlements of the refugee, as well as the responsibilities of nation states, were

subsequently established in the 1951 Convention and its 1967 Protocol. The appearance of such guiding principles of refugee protection within the landscape of international law and politics has, however, produced two exigencies. Firstly, the establishment of one universal refugee concept carries with it implications for the idea of state sovereignty and the principle of territorial supremacy vis-à-vis the international community. Secondly, the notion that the refugee concept, as set forth in the Convention, is universal and all encompassing in scope poses challenges in terms of the room left for interpretation of the refugee definition. The remainder of this chapter will explore these exigencies and their components. Drawing on feminist critique of how the "neutral" and "universal" Convention language in reality was used to favor the male perspective and experience, I argue that the room left for interpretation within the refugee law created leeway for states in deciding which refugees to accept and which to exclude, as certain assumptions and notions in the language could remain unaddressed. This argument highlights the relationship between language and power, ultimately asserting that the two exigencies of interpretation and state power are not in fact separate, but rather intertwined dilemmas.

1.B.1. The Space Between Citizenship and Humanity: The Refugee Concept and State Sovereignty

As the 1951 Convention was established within the context of the newly founded United Nations, it involved balancing principles of state autonomy on the one side, and inter-state cooperation and obligations towards the international community on the other. This project necessitated the identification of key concepts such as "state sovereignty," "independence," and "non-interference within the reserved domain of domestic jurisdiction" (Goodwin-Gill, the UN Office of Legal Affairs website). Understanding the

significance conferred to these concepts helps illuminate certain aspects of the Convention itself. As the acknowledgment of universal human rights within the domain of international law was still in its initial phases, the Convention was primarily understood as an agreement between states regarding the treatment of refugees (Goodwin-Gill, the UN Office of Legal Affairs website); it was created "first and foremost in the interests of national and international security, not humanity" (Haddad, 2003:11). This also meant that the Convention was primarily reactive in nature, in that "the system [was] triggered by a cross-border movement, so that neither prevention, nor the protection of internally displaced persons come within its range" (Goodwin-Gill, the UN Office of Legal Affairs website). Refugees were, in this sense, constructed primarily as a problem of territorial sovereignty, not of humanitarian principles.

This focus on state relations within the refugee regime highlights the way that two distinct movements were happening at the same time within post-war Europe. While the atrocities of World War II had led to a growing commitment to universal human rights upheld by international law, the norms of state sovereignty and citizenship were simultaneously emphasized as key components in establishing and maintaining a stable world-order after the war. The paradox of this development is articulated in the following claim: "[w]hile the first commitment appeals to a common *human* identity as the basis for multilateral humanitarian action, the second directs our concern toward maintaining a world order which insists upon *citizenship* as the authentic ethico-political identity" (Nyers, 1999: 3).

The notion of individual rights as understood within post-war Europe was anchored in belonging to a state, and tied to the ideas of citizenry and national territorial supremacy,

because “rights only became real when taken up and protected in the positive law of states” (Haddad, 2003: 3). The citizen was, in turn, the state’s *raison d’être* (Nyers, 1999: 23), locating the citizen concept at the heart of defining the boundary and identity of the nation. The refugee definition within international law, however, promises a legal standing through which individuals gain access to rights and benefits vis-à-vis states in which he or she is not a member. The refugee concept was therefore situated at the crux of this contradictory development, and it “brings to the fore the very tension between the state prerogative to exclude and the human rights imperative to include” (Haddad, 2003: 1). It is in this sense Peter Nyers approaches the “refugee” as a “limit-concept;” in that it “occupies the ambiguous divide between the binary citizenry/humanity” (1999: 4). The refugee challenges the orderly appearances of the categories of “citizenship” and “humanity” because it makes visible the liminal space outside, or beyond, the ontological and grammatical place that these two categories delineate. The refugee makes visible “the competing commitments to refugees-as-humans and a world order ideally populated by citizens” (Nyers, 1999: 4).

In other words, the refugee concept demonstrates limits insofar as it carves out a legal space that is characterized by state sovereignty citizenry on one side, but simultaneously by humanitarian norms derived from universal and cosmopolitan principles on the other. The limit that the refugee concept demarcates is therefore that of “the political,” claims Nyers (1999: 4), insofar as it demonstrates that the notion of the “proper political subjectivity” begins and ends with the concept of citizenship (20-21). The right to political identity and voice vis-à-vis the state, as typically understood, rests in our roles

and entitlement as citizens, and "[c]onsequently, refugees […] represent a problem not of geographical, but of political space" (Nyers, 1999: 21).

This emphasis on citizenry, statehood, and rights in post-war Europe meant that a certain type of refugee became highly visible: the political dissident, fleeing the oppressive powers of his own state. For the Convention drafters, refugee movements were initially seen as caused by oppressive states, and thus "the refugee" was essentially someone deprived of (usually) his political rights (Binder, 2001: 170; Nyers, 1999: 2-3). Thus, a dichotomy rose between the "proper" political refugee and those with claims based on other (illegitimate) grounds, such as economic deprivation (Foster, 2007: 1). Alice Edwards points to a hierarchy of rights within refugee law, which "posits violations of absolute civil and political rights as the most acceptable (and most serious) basis for asylum, followed by the derogable list of other civil and political rights, thus leaving deprivations of economic, social, and cultural rights at the bottom of the hierarchy, with only exceptional violations of these later rights justifying an asylum claim" (Edwards, 2010: 26). This emphasis on the civil and political as somehow more fundamental to the human spirit was mirrored in the initial preference given to civil and political rights within human rights instruments in general, over those of social and economic character, which where originally thought of as "second generation rights" (Charlesworth, 1994: 58).

This dichotomy between the "political refugee" and the "economic migrant" was, according to Foster (2007) recast as a gulf between "genuine" and "false" claims to asylum. This distinction, in turn, grants states the right to deny refugee protection to applicants they deem unfit, for instance those who "in reality" are "just" economic

migrants (Foster, 2007: 2-3). Within international law, the prevailing perception was, and to large degree still is, that "economic refugees" fall outside the scope of international refugee protection (Foster 2007: 2; Barnett, 2002: 250; Goodwin-Gill, 1996: 3), while being an issue more relevant, perhaps, to the fields of development and aid (Goodwin-Gill, 1996: 3). Foster notes, however, that a clear distinction between "economic migrants" and "authentic refugees" breaks down in practice: "[i]s a Roma man from the Czech Republic, who suffers extensive discrimination in education and employment, an 'economic migrant' or a refugee? What about the street child in the Democratic Republic of Congo whose government fails to provide him with the basic tools of survival, such as food or shelter?" (Foster, 2006: 4).

The demarcation between "refugees" and "economic migrants" was further solidified as the characteristics of the refugee population slowly changed from the 70s onwards, with increasing numbers of asylum seekers originating from the developing world (Barnett, 2002: 247). This marked the beginning of the refugee regime's change from an East-West to a North-South focus (Barnett, 2002: 250). This changing composition of refugees further complicated the picture as "the line between refugees and migrants began to blur" (Barnett, 2002: 247). In this context, the differentiation between the "worthy" political refugees and the "unworthy" economic migrants arguably took on racial undertones, as states used this distinction to justify the inclusion of some displaced persons and the exclusions of others; or as Barnett observes: "once the North-South flows began, rather than recognizing real persecution, receiving nations often labeled such refugees from the South as economic migrants, a fact which has earned Western governments harsh criticisms of racism" (Barnett, 2002: 254). The construction of a clear demarcation

between the economic and the political has, in other words, served as means for governments to reduce the number of refugees they are responsible for (Hathaway and Neve, 1997), which in reality means that "Western" states were able to reject "needy" individuals from the "Global South." Hathaway and Neve (1997) therefore spoke of what they saw as a refugee crisis, due to the fact that "[w]hile governments proclaim a willingness to assist refugees as a matter of political discretion or humanitarian goodwill, they appear committed to a pattern of defensive strategies designed to avoid international legal responsibility toward involuntary migrants" (115-16).

The denial of economic depravation as a ground for asylum demonstrates that states have significant leeway to use their power to decide who is seen as "worthy" of refugee status. As Barnett notes:

> even as UNHCR tries to widen the scope of the refugee regime, states narrow it again by increasing domestic restrictions. In Western Europe the rate of recognition of refugees has decreased significantly; in 1983 these countries recognized 42 per cent of applicants but by 1996 the number had fallen to 16 per cent (Barnett, 2002: 253).

States, then, have the power to regulate the size and composition of the refugee population it receives, to a certain degree, despite the "universal" commitments and goals outlined by the international community.

1.B.2. Reading law: Power and interpretation

The ways in which the political and the economic refugee are made into the genuine and the bogus asylum seeker alerts us to the real power that is embedded within the reading and interpretation of refugee law. The point that nation-states maintain a certain autonomy through employing restrictive interpretations of the refugee definition, leads to the second exigency borne from the introduction of the 1951 Convention; namely that of

the ambiguity of the refugee definition itself and the terms under which refugee status might be granted. The problem of the confusion between economic and political grounds for asylum can be seen an issue of *interpretation*, in this case of the concept of "persecution" and whether it covers economic deprivation. Despite being a key concept to the Convention, there is no exact definition of what constitutes "persecution," neither in the Convention itself, nor in any of the other international instruments of refugee protection (Goodwin-Gill, 1996: 66). The same is true for the five enumerated grounds for persecution, and there has been much debate on the true meaning of concepts such as "particular social group," or "political opinion." This leaves, as demonstrated above, room for governments and institutions involved in determining refugee status to interpret how the refugee definition should be applied in each case (Goodwin-Gill, 1996: 67). Interpretive differences, therefore, have potentially massive impacts "on the ground," as definitions of key terms may work to exclude different groups from the scope of the law. In the example of the racialized exclusion of economic refugees, for instance, it has been noted that the problem does not arise from the refugee law itself, but rather from the interpretation of that law (Barnett, 2002: 254).

The types of persons and experiences are seen to fall under the scope of the refugee Convention, then, depends on the ways that one reads the refugee definition and its components. It is in this sense that the problem of forced migration and asylum within the international domain can be understood as politics of perception (Barnett, 2002: 255): with a refugee concept that allows for various interpretations, those understandings that are seen as authoritative enable the perception and visibility of some refugees, while others are rendered invisible. As the refugee term was initially read and interpreted within

the post-war European context, the norms and perceptions of that era and continent shaped the ways in which both the dilemma of forced displacement and the language of the 1951 Convention was interpreted. An individualistic conception of persecution (Goodwin-Gill, 1995: 8), and the privileging of the political asylum (Binder, 2001: 170), informed a certain understanding of what it meant to be a refugee, which worked to delegitimize experiences that did not conform to this idea. Anjana Bahl argues that the interpretation of the refugee definition "operates against the claims of refugees from the Third World who may not be fleeing their countries because they are deprived of their individual rights, but rather are fleeing social violence or general policies that affect large sections of their society" (1997: 36, footnote 23). Refugee movements caused for instance by "economic disasters" or the "break down of state machinery" (Edwards, 2010: 30) may similarly fall outside interpretations of the Convention definition.

While the Convention used a language of "universality" and "objectivity," the geo-political context it was constructed within meant that it was the European perceptions of the "neutral" and the "normal" that prevailed and that subsequently was being read into such categories. There was therefore a tension between the language and ambition of universality, and the way that this language was in fact interpreted and applied so that a "Western" point of view was furthered, in turn influenced by specific economic and ideological assumptions (Barnett, 2002: 249). The problem arises, in other words, because the ambiguity of the refugee definition allows certain presumptions and prejudices to go unaddressed. The international regime of human rights, and the 1948 Universal Declaration of Human Rights in particular, assumed a certain "Universal Man," (Palmary, 2008: 129) without realizing that this subject was being interpreted and

understood within a "Western" framework.

This "Universal Man" of human rights in general, and refugee law in particular, was not only essentially a European figure – he was also an inherently *male* figure. At its adoption in 1951, not a single woman was present at the Geneva conference where the refugee Convention was drafted (Edwards, 2010: 23), and ultimately, neither the Convention nor the Protocol incorporates sex or gender either as grounds for persecution, or as prohibited bases of discrimination.[3] The question of gender-related persecution came up only once, and it was decided that asylum claims arising from persecution on account of sex was unlikely to occur (Edwards, 2010: 22-23). Although the majority of the refugees were (Chan, 2011: 177) and still are female, women typically lack the financial means, resources, and freedom to leave their country of origin, and the international community was therefore, at the time the Convention was adopted, faced with a population of asylum-seekers who were predominately male (Chan, 2011: 177). In addition, the majority of adjudicators responsible for interpreting the law and deciding on refugee status were, then as now, male (Bosi, 2004: 795). These circumstances contributed to the fact that within all aspects of the refugee regime, it was the male perspective that became the norm: "from the process of defining a refugee to the final phase of resettlement, both the overall discourse, practice, and research concerning refugees […] remains primarily a male paradigm, even if in a superficial way it appears to be a universal and general one" (Indra, 1987: 2).

[3] For instance, article 3 of the 1951 Convention, on Non-Discrimination, reads that: "The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin."

The refugee was from the beginning *imagined and envisioned as male* (Indra, 1987: 3), more specifically, as "someone heroically seeking to assert his (typically male) individuality against an oppressive state" (Nyers, 1999: 25); or as a "male dissident fleeing political persecution behind the iron curtain" (Olivius, 2010: 3). The power of such cultural images are, as Indra notes, significant because "public images constitute one of the most profound constraints on social action, for through the power to form societal images and symbols comes the power to set the stage for formal responses to social issues" (Indra, 1987: 3). The same way that the ambiguity of the Convention language allowed interpretations of the term "persecution" that excluded the experiences of displacement in the "Global South," the interpretive exclusion of economic and social claims also contributes to the disadvantage of women. The devaluation of social and economic forms of harm "play[s] into a gendered refugee discourse, by disadvantaging women claimants who are more likely to be adversely affected by poverty and social and cultural marginalization than by direct political targeting" (Edwards, 2010: 26). This means that forms of harm specific to women, such as female genital cutting (FGC), rape, or domestic abuse may be understood as falling outside the definition of "persecution" (Fletcher, 2006: 112-113). Women also frequently fail the "nexus test," or the requirement to establish a connection between the enumerated Convention grounds and the motive for persecution – the link that corresponds to the "for reasons of" part of the definition, so to speak – as it is understood within gender-biased interpretations of the refugee definition. Because women's persecutors more frequently involve non-state actors, the link between the persecution and the Convention ground is increasingly

difficult to establish, as there rarely any exists documentation of the perpetrator's motive in such cases (Fletcher, 2006: 113).

An androcentric reading of the refugee law therefore worked to exclude women in a number of ways. Applications of the law frequently ignored that men and women might experience each of the five nexuses – race, religion, nationality, membership in a particular social group, or political opinion – differently. A narrow understanding of the term "political opinion," for instance, might only recognize as "political" those acts and domains that are predominately male, and perceived as "public." At the same time, interpretations of the other aspects of the refugee definition, such as the "persecution" term and the nexus requirement, meant that women-specific forms of harm were seen as falling outside the scope of the refugee protection regime. The consequence has been that women's claims to refugee status have long been delegitimized (Edwards, 2010: 23), and forms of persecution specific to women, such as sexual violence, are only now being recognized as such (Neacsu, 2003: 193). It is therefore, ironically, the very gender-*neutral* formulations and ambition of the refugee Convention that rendered women invisible. This leads one scholar to hypothesize whether, at the time the Convention was drafted, "a choice of a gender-sensitive formula instead of gender-neutral terms may have prevented the unsettled and unpredictable case law that has followed" (Binder, 2001: 7-8).

With the growing importance of feminist thought throughout the 60s and 70s, and impelled by the United Nations World Conferences on Women in 1975, 1980 and 1985 (Olivius, 2010: 3), the Convention text was increasingly read through a gender sensitive lens. In their critique of the presumed legal subject of refugee law as male, scholars and activists also began to question the heteronormativity with which the refugee subject was

constructed. During the 80s and 90s, key receiving nations, such as Germany and the U.S., began to accept that homosexuals might form a "particular social group," whereas the U.K. acknowledged this stance as late as in 1999 (Millibank, 2003: 71-72). Within this development, it became increasingly apparent how the refugee categories were frequently interpreted in ways that excluded the experiences of homosexuals and bisexuals. One example is the category of "political opinion," where homosexuals, much in the same way as women, struggle to have their experiences recognized as such. Millibank (2003) writes that despite most of the applicants not necessarily being "politically active around sexuality issues," it is the way that their sexuality is perceived as a threat to "the state, the family, or the natural order" that often put them at risk (106). "Sexuality [is], in that sense, a political experience, but this is not the sense in which political opinion is traditionally understood in refugee law. It is remarkable that sexuality claims are rarely articulated, and almost never received, as political claims" (106-107). Also when it comes to the "particular social group" nexus, homosexuals, and in particular bisexuals, face barriers in terms of the ways sexuality is linked to questions of *choice*. Judiciaries are found to frequently lean on essentialist conceptions of sexual identity as immutable and innate (Rehaag, 2008: 61), instead of fluid and complex, and are thus only willing to accept the claims of those who appear unable to "choose" their sexual orientation. Thus, writes Millibank, "[r]efugee protection routinely attaches to sexuality only where it is or where is it perceived as a result of necessity and not choice" (2003: 92.) She explains:

> You are protected because you cannot help being gay, and cannot help being persecuted for being gay because you cannot help expressing your gayness somehow. In situations where the applicant was seen as having some choice, or their sexuality in any way fluid or temporary – if they could be seen as bisexual,

> young, sexually inexperienced generally, or having had only limited same-sex sexual experiences, the Australian tribunal, in particular, was very reluctant to accept them as actually gay and therefore eligible under the social group category (Millibank, 2003: 92-93, footnotes omitted).

Assumptions about what lesbians or gay men, and their lifestyles, look like may lead adjudicators to dismiss the stories of individuals who do not conform to this stereotype (Rehaag, 2008: 71-72; Millibank, 2002: 177). This shows that heterosexuality is very much taken as the norm; the standard against which other forms of sexuality is measured and judged. Individual presumptions on the part of decision-makers about what it means to be "gay" affects the ways he or she interprets and applies the refugee category: "[t]he decision-makers' understanding of what (homo)sexuality is and how it is and ought to be expressed is therefore vital in the decision making process," writes Millibank (2002: 145).

1.C. Concluding Remarks

What this introductory chapter has demonstrated is that the establishment of the universal definition of the "refugee" carried with it two exigencies, one related to the power of states in vis-à-vis the international community, and one to the power of language and interpretation. In short, the first exigency stems from the tension arising from the existence of international refugee law, between universal and international principles on the one side, and domestic state authority on the other. While nation-states are bound by international principles and laws, they are nonetheless able to exercise power through the ways in which these laws and principles are transferred to, and applied within, the domestic context. The second exigency concerns the ambiguity of the language with which the refugee definition is formulated. This ambiguity enables certain assumptions and prejudices to be presented as "neutral" within authoritative interpretations of the law,

and therefore remain unaddressed. More specifically, because the refugee definition was originally drafted and interpreted with the popular image of the male, European, heterosexual refugee fleeing political persecution in mind, other experiences of persecution and harm were rendered invisible and outside the scope of the Convention.

What the feminist critique of the refugee law has demonstrated, then, is that these two exigencies are not, in fact, different problems that can be separated and analyzed on their own, but rather two intertwined issues. Because of the ways that power may be exercised through the act of interpreting text, nation-states retain much authority vis-à-vis the international community in deciding how the refugee definition should be understood, and thus, which individuals qualify for the refugee standing that entitles them to protection. The insight offered by feminist readings of the law is therefore that a significant part of the challenges female asylum seekers face are in fact located in the fields of *language* and *interpretation*, because the refugee law tends to be read both within a male-centered framework, and by men. Because it historically was, and continues to be, women who have their specific experiences excluded from authoritative readings of the refugee definition, it remains an important practice to analyze the ways that the refugee definition is interpreted and understood, and how the categories of "gender" or "women" are understood within these interpretations.

The ways in which states and decision-makers may apply understandings of key concepts and terms within universal laws – which in turn allows them to regulate which individuals are included as "legitimate" refugees and which are excluded from this legal standing – represents a very real and important problem for scholars of international

relations. Despite increasing sensitivity to gender issues, interpretations of the refugee definition continue to differ between and within states, and Courts keep making irreconcilable decisions in asylum claims. A 2004 study of 41 European states show, for instance, that

> less than half had recognized sexual violence as a form of persecution (41.5 per cent); over a third of countries (33 per cent) do not accept persecution at the hands of non-state actors as falling within the definition of a refugee in the 1951 Convention; and nearly two-thirds of countries do not acknowledge failure to conform to social and cultural mores as a basis for a claim to asylum (61 per cent). Moreover, just over one-third of countries had recognized women or particular women as members of [particular social groups] PSG (36.5 per cent). Likewise, jurisprudence in the United States has been at best muddled (Edwards, 2010: 30).

What is at stake here is in a sense the very nature and ambition of human rights and international law, which seeks to extend to all individuals the same rights and protection. The problem of the refugee concept points to certain issues at the very heart of international law in general, which has the contradictory task to draft universal standards and formulations, while simultaneously remaining relevant and inclusive of all individuals - across cultures, classes, genders and so forth. Edwards describes "the value of international human rights law as a common language reflecting universal values, and as a shared legal system that articulates basic standards of a life with dignity," (2011: xii). Yet the feminist critique asserted by her and others highlight the fundamental importance of analyzing and questioning this "common language" of universal values, and the concepts and definitions that may be taken for granted within it.

In the next chapter, I investigate this broader scholarly conversation about gender within the international refugee regime, and the ways that gender is constructed and presented as a category within it. I address not only the feminist critique of the Convention, but also

the differing approaches between feminist scholars as to how gender can and should be reconciled within refugee law. Thus, I try to show the multifaceted and diverse nature of the feminist conversation. I also seek to make the point that there is no simple process of "discovering" and subsequently including women within the refugee definition. What this inclusion should look like and how it should happen continue to be contested questions, and Courts continue to treat gender-related issues in irreconcilable ways. From this overview of feminist engagement with the "problem" of gender within refugee law, I then situate my own question about the relationship between gender and the refugee definition as it is constructed, and set up a research plan for the analysis to come.

Chapter Two – Literature Review

Accounting for Gender:
Feminist Engagement with Refugee Law

In the previous chapter I outlined the exigencies brought forth by the introduction of a universal definition of refugee status, to illuminate the power embedded in interpretation and representation within international law. Using feminist critique of the refugee Convention, I argued that the silencing of women's points of view could be reframed as a question of language and interpretation; or the terms with which one is able represents oneself to the law. The literature review further examines the complexities of this problem by exploring the controversy presented in and through scholarly literature. I primarily focus the literature review on feminist engagements with international law, paying particular attention to how feminist scholars address refugee law. Specifically, I investigate how feminist approaches construct and theorize gender as a category of law and policy. Within this focus, the literature outlined in this chapter centers on questions of inclusion and exclusion of gender within international law and policy, and on the question of how the legal category "women" is, and should be, "read."

I organize this chapter around three separate, but related, questions. Firstly, I start more broadly by looking at literature on how, to borrow Olivius' words, "gender inequality has been constructed and reconstructed as a policy problem within the UNHCR" (2010: 2), as well as within international institutions, policies and programs generally. The question central to this debate is "whether women's rights are best protected through general norms or through specific norms applicable only to women," a dilemma Olympe de Gouges identified as early as the eighteenth century as a paradox of feminism

(Charlesworth, 2005: 1). This section looks closer at strategies of including women within both feminist debate and UNHCR policy, from the initial addition of women's concerns within separate programs, policies, and institutions, to the diffusion of a gender focus through "gender mainstreaming." The second question around which I organize this literature review is how gender is discursively constructed and represented as a category within the language and ideologies of the international refugee regime. I look closer at how the idea of a gendered binary between "private" and "public" spheres and acts has worked to exclude women's experiences of harm from the protection of the refugee Convention. I address the representation of masculinity and femininity within refugee law and policy, and how these concepts intersect with those of race, and sexual orientation. Lastly, the literature review turns to the more specific conversation about the language of the refugee Convention, and the issue of *how* the refugee definition should or can be amended in order to rectify the gender deficiency. I organize this section around the question of whether women's experiences are best included through gender-sensitive *interpretation* of the existing definition, or by *modifying* the language of the Convention by adding "gender" as a sixth enumerated ground for persecution. I look closer at the rationale and arguments presented by proponents of each of these positions.

The literature reviewed in this thesis is significant, I argue, because it invites a study of texts that address the relationship between refugee status and gender. In the final section of this chapter, then, I define and justify the question that will be the centerpiece of this thesis. Based on this overview of the feminist engagement with gender within refugee law, I contextualize the rationale for the study to be carried out, and introduce the text that makes up the material for the main analysis, the 2002 UNHCR "Gender-Related

Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees," situating this text within the larger conversation it is a part of.

2.A. Including Women: From "Sidestreaming" to "Mainstreaming" of Gender

The reading of international law through a gender-lens has revealed much about how gender is constructed and represented within seemingly "neutral" policy. As Olivius (2010) points out, "[d]efining political problems is never a neutral activity; how a problem is constructed determines the boundaries of different social categories; which categories are cast as vulnerable, needy, or in positions of privilege. Different problem constructions constitute different relations of power" (4). Investigating how the international community constructs the problem of forced displacement, and thus shapes what policy and legal responses that are seen as appropriate, will therefore reveal how gender is constructed as a category and subject of knowledge. Edwards (2011) demonstrates that the feminist critique of international human rights law can be divided into four major themes or categories (Edwards, 2011). Her organization of scholarship on gender and human rights into a few main categories, or themes, helps structure the literature overview in the following section, and demonstrates both the similarities and differences between the various approaches within the literature. The first category of critique focuses on the absence of women and women's voices throughout the human rights field; the second addresses the ways in which the male experience is privileged and constructed as the norm, whereas the realities of women's lives are discounted and marginalized; the third directs attention to the dichotomy between private and public spheres, in which the private/female is seen as subordinate to the public/male; and the last

set of criticism focuses on the ways in which women have been treated and conceptualized as a homogenous group "with a single gender identity" (Edwards, 2011: 37). These different nodes around which feminist criticism centers are parallel to the ways feminist approaches has developed over time, from a focus on women as a specific group with special needs, through gender mainstreaming and later modifications such as "age, gender and diversity mainstreaming" (Edwards, 2010: 22).

The initial critique of international law and policy from a gender perspective focus on the absence of women's points of view from such documents and programs. In the early 70s, Esther Boserup and other feminist scholars changed the conversation about development programs by arguing that these projects were biased towards men. Boserup's main criticism was that women were excluded and neglected within development projects, which on the outset appeared "gender neutral," but in reality focused on providing aid and modernization to men (Boserup, 2001: 40). Development practitioners and researchers argued that major institutions, such as the UN, were male-biased, "resulting in women being ignored and/or disadvantaged by the development process" (Koczberski, 1998: 396). This criticism sparked much debate on the relevance of gender within the field of development and its institutions, a question central to what is now known as the Women in Development (WID) model. WID scholars and practitioners seek to ensure that also "Third World" women receive what is seen as the benefits of modernization. The WID strategy thus focuses on "integrating" women into the scope of the development process, while increasing their participation within formal economic and political structures (Koczberski, 1998: 399). Within the WID framework, then,

"integration" mean, in the words of Koczberski, that "women would be incorporated into existing development practice under orthodox notions of development" (1998: 396).

Spurred on by this focus on women within development and aid, the UN Decade for women (1975-1985), and the UN World Conferences on Women, feminist scholars and activists extended the criticism to the field of refugee protection (Olivius, 2010: 3). A transnational movement for the rights of refugee women grew throughout the 80s, (Olivius, 2010: 3), calling for the equal inclusion of women within the scope of refugee protection. Gender had been "discovered" within the refugee regime – and subsequently constructed as a subject of knowledge – which gave rise to questions about how women and men might experience flight and exile differently, and how gender should be taken into account to improve refugee protection. Such inquiries lead to the creation of new field manuals, training programs, and policy documents such as the 1989 UNHCR *Policy on Refugee Women* (Olivius, 2010: 3), in which women's concerns were added to the (otherwise unchanged) refugee programs. In 1985, the Executive Committee of the UNHCR's Programme (EXCOM) – the governing body of the UNHCR – established that "women asylum seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society" fell within the interpretation of the refugee definition, although it was left up to the sovereign nation-states to choose whether or not to do so (Edwards, 2010: 24).

The initial feminist critique of the refugee protection regime, in other words, constructs gender inequality as a problem that is ameliorated through adding specific women's programs and policies to existing structures – a so-called "add-women-and-stir" approach

(Olivius, 2010: 7). Seeking to "integrate women into the development process of becoming more western and more modern," however, "WID never challenged the dominant modernization paradigm, or the idea of essential femininity and masculinity" (Olivius, 2010: 7). That is, early feminist criticism focused on the exclusion of women from development structures, without challenging the ways that the structures themselves were biased (Charlesworth, 2005: 2). Women were treated as a separate group in need of "particular accommodation," and initial policy responses were criticized for resulting in the "compartmentalization" (Charlesworth, 1994: 63), or "ghettoization," of the concerns of women, relegating them to peripheral "sidestream" projects (Edwards, 2010: 307-308). Since the overarching framework was left unchallenged, the male experience and point of view continued to be the norm, while women's concerns were represented as the exception to, or deviation from, this male standard. A further concern is that the compartmentalization of women's concerns into separate institutions means that they must compete with the mainstream programs and policies for finances and resources. This has resulted in women-specific programs generally enjoying less power, priority, and resources than the mainstream ones (Charlesworth, 2005: 1).

The "adding on" approach to the relationship between gender and the refugee status was challenged by scholars claiming that gender should be viewed as "an organizing principle, not a simple variable," within migration and refugee movements (Fitzpatrick, 1997: 24), and that "the protection of women and girls is 'a core activity' and 'an organizational priority'" (Edwards, 2010: 32). Doreen Indra (1987) pointed to the tendency of decision-makers involved in refugee determination to view people as "refugees first and women or men second" (4) – which relegates gender-identities and gender-concerns to secondary

status – and pointed out the necessity in placing gender "at the centre of the analysis" (4). Out of such criticism grew a different approach termed "gender mainstreaming." This strategy seeks not to separate, but to integrate, women's concerns "within every corner of the humanitarian and human rights system" (Edwards, 2010: 35). Acknowledging that seemingly gender-neutral policies may affect women and men differently, this approach seeks to assess "the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels" (UN General Assembly, 1997: 27). Although many women-specific policies were continued, the UNHCR incorporated strategies of gender mainstreaming, developing what was called their "two-pronged approach" of combining specific programs aimed at refugee women with a focus on integrating their concerns into the "mainstream" projects (Edwards, 2010: 35). "Gender", for instance, replaced "refugee women" as focal points within UNHCR policies (Edwards, 2010: 37). Aiming to establishing an inclusive refugee regime, the gender mainstreaming strategy after a while developed into an "age, gender and diversity mainstreaming" (AGDM) approach, as new social groups were added as focal points (Edwards, 2010: 38).

The gender mainstreaming strategy has, however, been criticized for achieving the opposite of its intentions. Edwards argues that "the […] consequence of working within the mainstream is the reality that being held to the same standards as men *de jure* results in women's subjection to additional (and therefore unequal) legal burdens *de facto*. Female litigants must 'fit' their experiences of violence into male-defined criteria" (2011: 106). Another point has been that the strategy loses its "critical edge" by "allow[ing] the mainstream to tame and deradicalize claims to equality," and by making issues of gender

inequality "harder to identify and to deal with" – in effect "drowning out" the project of gender equality (Charlesworth, 2005: 2). When a focus on the exclusion of women is merely "blended" with concerns for all refugees generally, the emphasis on inequality and power imbalances between men and women may be lost. Edwards further adds that the strategy is problematic in its conflation of the two concepts "sex" and "gender," and in its failure to address the roots of sexual inequality (2010: 36). In the words of Edwards, gender mainstreaming has in some ways "become a neutralising [sic] philosophy, rather than an empowering one for refugee women" (Edwards, 2010: 37), and she asks: "[w]hose interests will be prioritized, if all interests are equal? Will such a strategy be meaningful if it includes everyone in equal measure, almost regardless of disadvantage, patriarchy, or hierarchy?" (Edwards, 2010: 39).

A final approach to how gender should be understood and incorporated within policy, which in some ways overlaps with the insight of the AGDM strategy (Edwards, 2010: 39), is *intersectionality* theory. Although more broadly applicable as a general theory of gender and identity, the approach of intersectionality is of particular interests in terms of how gender should be thought of within policy. The intersectionality approach focuses on the "multiple forms of discrimination which affect women's lives" (Edwards, 2010: 39), an approach in which gender is not seen as the only organizing (hierarchical) principle within the lives of women (or men, for that matter). Yuval-Davis explains how intersectionality theory focuses on the inter-relationships between various "social divisions," (2006: 194) such as gender, class, sexual orientation, race, and physical ability. Intersectionality refers to how such categories constitute axes of identity that intersect and combine in creating unique experiences and identities. This insight is a

criticism of reductionist and essentialist conceptualization of various categories as being inherently tied to certain traits and characteristics. Whereas the initial WID response was additive in that it sought to "add" the experiences of the singular group "women" to existing institutions and programs, intersectionality is constitutive; social divisions are not simply added to one another in constituting identities (Yuval-Davis, 2006: 195), but rather combined to make unique experiences. Social categories are seen as changeable and dynamic, and they cannot be separated and analyzed "outside" of each other. International theorists argue, then, that policy and institutions should incorporate more nuanced understanding of gender, and depart from seeing "women" as a pre-existing entity or group of inherently oppressed individuals.

2.B. (Re)presenting Gender: Producing Femininities and Masculinities

As this brief overview of feminist engagement with refugee policies, laws, and programs has demonstrated, "gender" is far from a natural, given concept that can easily be incorporated into policy and law. Ideas of gender both underpin, and are produced within, the policies and practices of the UNHCR and other refugee institutions (Olivius, 2010: 5). This following section, therefore, looks closer at various attempts to understand and represent "gender" within the field of international refugee protection. One such gendered assumption is the idea of the (gendered and Western) dichotomy between "public" and "private" spheres (Millibank, 2002: 157). Criticism of the constructed public/private binary – in and through which women's activities are relegated to the undervalued private sphere, and men's to the privileged public – is at the heart of much feminist criticism. As this section demonstrates, this inherently gendered notion of the private and the public affects the reading of all aspects of the refugee definition; from what harms are codified

as “persecution” and the locations where such harms are thought to take place, to the understanding of what constitutes a “political opinion” as a ground for persecution, and who the agents of persecution are.

Interpretations of the refugee Convention have, to begin with, typically privileged “persecution occurring within the (usually male dominated) ‘public’ sphere,” while “de-emphasising” or “disregarding the legitimacy of persecution arising from activities which are considered somehow ‘private’” (Nyers, 1999: 7). Interpretations of the term “persecution,” have in other words granted this status to the acts and forms of harm that are seen as taking place in specific (public) places, and involving specific actors and motives: “the accepted understanding under international law of ‘persecution’ remained mostly confined to instances of torture and inhuman treatment carried out against political dissidents by public authorities in state custody, and not to victims of rape that took place in their homes” (Edwards, 2011: x). An individual who experiences persecution based on *his* political opinion is thus seen as deserving of refugee status and protection, whereas someone who experiences systematic domestic abuse is thought of outside international refugee law. At the conference where the 1951 Convention was drafted, it was for instance, altogether decided that “the equality of the sexes was a matter for national legislation” (Edwards, 2010: 23). States have thus had much leeway within the refugee language to disregard the disadvantages usually suffered by women, dismissing them as “private matters” outside the scope of international law (Bahl, 1997: 35). Persecution in the forms of rape, domestic abuse, female genital cutting, and trafficking are amongst forms of persecutions that are only recently beginning to be recognized as such (Neacsu, 2003: 193).

This conceptualization of private versus public is also significant in terms of interpreting the enumerated grounds for persecution, in particular "political opinion." This term has generally been understood within refugee law as "opinions contrary to or critical of the policies of the government or ruling party" (Edwards, 2003: 68), a definition that reflects a certain taken-for-granted association between the "political" and those acts and spheres that involves the state machinery. Or put another way, the silence of women within the refugee regime is partly "compounded by an unconscious calculus that assigns the critical quality "political" to many public activities but few private ones" (Indra, 1987: 3). The labeling of women's experiences as "private" and "non-political" both denies them any systematic or societal meanings and importance, and sends the message that gendered violence is "[women's] problem, that they are to blame for it, and that they are alone in resolving it" (Edwards, 2011: 318). The inherently gendered interpretations of the refugee experience, as coded in a language of "private" or "public," make it difficult for decision-makers to recognize women as deserving of refugee protection. As Edwards asks:

> Why is it so difficult to recognize the acts of a woman in transgressing social customs as political? (…) Why are young girls who refuse to undergo female genital mutilation not political dissidents, breaking one of the fundamental customs of their society? (2003: 68 – footnotes omitted)

The ways in which the "public" and the "private" are coded as gendered becomes particularly apparent in asylum claims based on sexual orientation, where Millibank finds "stark gender differences in the experiences of lesbians and gay men and the subsequent translation of these experiences into legal categories" (2002: 157). While the violence lesbians face is generally codified as happening in the "private" spheres, such as within the home and the family, violence against homosexual men is thought of as happening in

the "public," for instance in parks or areas around gay bars and clubs (Rehaag, 2008: 73). This assigning of the labels "public" and "private" to the harms experienced by gay men and lesbians respectively, constructs different barriers for men and women who seek asylum on the grounds of sexual orientation. While male claimants are often rejected because their sexuality is seen as "too public," i.e. that they knowingly "flaunt" their sexuality and thereby transgress social mores, lesbian claimants are frequently rejected because the violence against them is seen as a private matter, "too private" to fall within the scope of international law (Rehaag, 2008: 73; Millibank, 2002: 157).

The privileging of the public lastly becomes evident in the way the refugee convention conceptualizes the agents of persecution. Within human rights law in general, the focus is on state responsibility (Edwards, 2011: 37), while the refugee definition was constructed with state persecution in mind. When direct state involvement becomes prerequisite for recognizing an act as persecution, the outcome is gendered. While women are frequently victims of state-sanctioned abuse and persecution at the hands of state officials, (Schenk, 1994: 304), women are also the predominant targets of certain forms of harm that are labeled "intimate" or "private," such as such as for instance domestic abuse, FGC, forced marriage, or "honor" killings. In such instances, their persecutor may not be a state official, but rather family or community members (Schenk, 1994: 306). Because certain forms of harm are codified as "private" or "personal," and somehow disconnected from public life and the society at large, they have long been excluded from the refugee definition. Gendered assumptions about "public" and "private" spheres, and the "proper" arenas for the feminine and the masculine, have in other words had great implications for asylum-seekers "on the ground." This illustrates that taken-for-granted notions of

categories and stereotypes shape the reading of law, and in turn, become reproduced through it. It is therefore important to investigate closer how notions of femininity and masculinity, and the associated power relations, become (re)produced within the institutions, practices and language of global governance (Olivius, 2010: 4).

In order to address these topics, the works of Michel Foucault on *discourses* and power make a helpful backdrop. For Foucault, discourse can be seen as the structured ways in which we think and talk about things (1972: 76). Within discourse, we use and construct categories and labels attached to certain groups, such as for instance "women," "homosexuals," or "refugees," and Foucault was interested in how power operates through the way we represent, categorize, and in general speak about such groups. A key point here is that discourses does not merely use or identify such categories, they also "form the objects of which they speak" (Foucault, 1972: 49). In the words of Olivius, "discourses are practises [sic] which delimit what can be said, thought or done; when, how and by whom. Discourses set the limits for what is perceived as possible, reasonable or natural" (2010: 5).

The works of Foucault became highly influential during the 70s and 80s, and with the new insight and perspectives, feminist criticism took up the question of how women were represented within the international refugee regime. The argument, generally stated, was that the policy discourse contributed to a victimization of refugee women, by constructing the female refugee as weak and vulnerable through "protective discourses," which "often depicted women collectively as 'vulnerable' and in need of protection" (Edwards, 2010: 32). In analyzing the representation of refugees within the UNHCR,

Johnson (2011) argues that the collective imagination of the refugee has gone through three overlapping and concurrent shifts: from racialization, through victimization, and feminization (1016). In other words, the "heroic, political individual" fleeing the oppressive state as the central visualization during the cold war era was gradually replaced by the image of a "nameless flood of poverty-stricken women and children" (1016). In this process, and as the refugee concept becomes racialized and feminized, the refugee is also deprived of the (political) agency that was at the center of the post-war refugee concept. It is significant, as Johnson points out, that "as the refugee has been racialised and victimised, she has also been feminised" [sic] (Johnson, 2011: 1016). Interestingly, Fitzpatrick (1997) notes that "adjudicators are more receptive to arguments premised on the physical vulnerability of women (for example, to the risk of female genital mutilation) than to the enhanced dangers women face as a result of prescribed social roles or gender-based constraints on mobility" (44). This might show that stereotypical notions of what it means to be a woman shapes legal practice, and how policy approaches are built on different understandings of gender as a category.

One way the essentialist and protective discourse on women as refugees has played out, is through the "womenandchildren" approach, in which the phrase "women and children" is used so often that the distinction between the two collapses (Johnson, 2011: 1032). This in turn infantilizes a woman by implying that she, like a child, is in need of protection. It thus serves to portray women as passive subjects who need to be saved, inherently "dependent upon their male counterparts for survival and salvation" (Johnson, 2011: 1032). It furthermore reaffirms men as the normal, while women are depicted primarily in and through their roles as mothers or family members (Johnson, 2011: 1032).

As late as 2002, notes Edwards, the UNHCR included the goal to "[meet] the protection needs of refugee women and refugee children" in its Agenda for Protection (Edwards, 2010: 32). "This conflation of 'women and children' in UN documentation as late as 2002" notes Edwards, "harks back to earlier days in which women and children were consistently treated as one and the same" (2010: 32).

Criticism, however, was also directed towards how "women" has been constructed as a category of analysis within feminist works. Mohanty (1984) argues that within Western scholarship on development and aid, the discourse of empowerment is both gendered and racialized. She argues that "Third World Women," in particular, are constituted as a singular, homogenous group, bound together by their shared status as oppressed and disadvantaged (1984: 56). They are labeled "powerless," "exploited," and "sexually harassed," paralleling sexist discourse that frames women as weak and emotional (56). In writing on the emergence of the WID framework, Koczberski similarly argues that "Third World women have been presented in a particular way, with their problems and needs identified by WID 'experts', and their control over the development process firmly restricted" (Koczberski, 1998: 395). This reveals two underlying ideas of scholarship on development: both the idea of the "developed" West that uses technology to save the "backwards" South; and the parallel narrative of the weak woman in need of saving, oppressed by her "savage" culture. "By constructing such essentialized categories of analysis, holds Mohanty, both Western scholarship, and the literature of the WID framework, (re)estabslish binaries, such as between men and women, black and white, modern and traditional. Mohanty thus illustrates why a study of representation within the development discourse is crucial. While WID scholars and practitioners talk about the

empowerment of "women" generally, a closer reading of the policies and strategies of this framework reveals that such ambitions mean something different altogether for "Western women" than for the women of the "Global South." Drawing on the insights of Mohanty, Ingrid Palmary's study of the place of culture within refugee law finds within UNHCR policy documents "an ambivalent treatment of culture as both protective of women as well as the source of women's oppression in societies that are loosely identified as 'traditional'" (2008: 125). She finds that the categories of tradition, culture, and gender are conflated, and that culture is treated in the "static and uncontested way now so thoroughly critiqued" by Mohanty and other feminist researchers (2008: 125). When categories of culture, race and gender is utilized in this way, the "source of women's oppression is located in her culture and her men rather than in a global system of inequality perpetuated through universal humanisms" (Palmary, 2008: 132). This illustrates the ways in which discourse shapes how a problem is understood, and in turn, which policy options are seen as effective and appropriate responses.

As this section has established, the feminist engagement with international law and the refugee concept draws our attention to the ways in which gender is constructed and understood as a (legal) category, and how meaning is created through our interpretation of language and definitions. When looking at feminist engagement with international law generally, and refugee law specifically, however, it is important to remember that feminist critique is not one unison voice. Rather, feminist engagement is multifaceted and dynamic – where they might "agree on the goal of equality, they disagree about its meaning and how to achieve it" (Edwards, 2011: 37). This is also true within the feminist engagement with refugee law. While the overarching goal is generally the same – to

analyze and/or amend the historic exclusion of women's point of view within refugee law – there is significant disagreement in terms of *how* this is best achieved. Within the literature on this topic, at least two main diverging approaches emerge. On the one side, scholars and activists argue that the refugee definition, as it appears in the Convention, can and should be interpreted in new and creative ways in order to ensure proper gender sensitivity in the ways we understand the conditions of an asylum claim. On the other hand, scholars also hold that women's point of view can (only) be sufficiently incorporated through modification of the language and definition itself, mainly in the form of adding gender as an additional sixth enumerated ground for persecution. In the next section of the literature review, I look closer at this specific part of the discussion on gender and the refugee law, which concerns the Convention definition in particular, and how it can become gender-inclusive.

2.C. Textual Addition or Interpretive Inclusion?

Considering that second article of the Universal Declaration of Human Rights specifically prohibits discrimination on the grounds of "sex" or "gender," scholars and practitioners have questioned why gender is not added to the refugee Convention as a sixth enumerated ground of persecution. One argument used in supporting a textual addition of gender is that the male bias built into the law can only be redressed by the addition of a gender nexus, because only this will "send a definitive message to asylum adjudicators that they must treat gender-based persecution as they do other forms of persecution" (Bosi, 2004: 812). In other words, this argument holds that despite the existence of guidelines providing legal interpretive guidance, inconsistencies continue to occur, with unfavorable outcomes for women (Chan, 2011: 172; Bosi, 2004: 812).

Scholars furthermore argue that the lack of such a category subjects women claimants to a higher burden of proof (Chan, 2011: 185), as their gender-related claims must be brought and formulated "through" one of the other five grounds – even in cases where the claimants were abused "solely on the basis of their gender" (Bosi: 804). In the U.S. context, Chan (2011) and Bosi (2004) argue that despite the existence of guidelines, decision makers frequently struggle to find a consistent way to reconcile or incorporate gender-based claims within one of the other five enumerated categories (Chan, 2011: 173; Bosi, 2004: 795). In this regards, Bosi notes that the majority of adjudicators evaluating asylum applications are male, in a society which continues to privilege the male "public" sphere over the female "private" one (2004: 795).

Drawing on feminist critique of the "adding on" approach to women's concerns, Schenk (1994) argues that the creation of a separate gender nexus, as opposed to a language of "women's rights," avoids "treating gender as difference," and thus avoids an essentialist approach to gender identity (339). With the aim to improve "protection for women without acknowledging the existence of gender differences" (339), an additional gender nexus would be preferable, according to Schenk, as it does not "require any radical reconstruction of the definition of 'persecution' or 'human rights' in light of women's unique experiences. It simply asks for the even and consistent application of the law with respect to all types of persecution, including gender persecution" (1994: 339).

Chan (2011) further asserts that the addition of a free-standing, although restricted, gender nexus within U.S. refugee law will affect the framework, or vocabulary, available for women in formulating their claims to asylum based on gender-related persecution. As

"the forced classification of gender-based claims into one of three categories [religion, particular social group, or political opinion] frequently misrepresents the critical gender component of many claims," (Chan, 2011: 186) the addition of a gender nexus would serve to highlight the gendered aspects of the claim, while providing a more accurate language with which to express gendered experiences. Adding a gender category would, then, be a "way of acknowledging the legitimacy of certain gender-based asylum claims" (Chan, 2011: 177). Similarly, Bosi contends that "[g]ender persecution should not veil itself behind the classification of a 'social group.' Rather gender should and can be a category in its own right" (2004: 798, footnotes omitted).

Within the existing jurisprudence, the "particular social group" (PSG) nexus is the ground most frequently invoked to frame asylum claims in which gender is the ground of persecution (Edwards, 2010: 28; Neacsu, 2003: 194). Proponents of adding a gender nexus therefore argue that the conditions that this category provides for women claimants should be taken into consideration. The argument is that the absence of any clear academic or legal definition of what constitutes a PSG makes it a "theoretically and empirically vexing category" (Bosi, 2004: 791), whose definition is "ambiguous, narrow, and contrived" (Chan, 2011: 180). Bosi furthermore argues that the strategy of evoking a PSG in order to frame gender-related claims has "created an often mechanistic and reductive classification problem by creating artificial sub-categories that are arbitrarily either denied or granted asylum" (2004: 792). This unpredictability, in turn, leaves intolerable room to for adjudicators to apply interpretations that excludes women's experiences, and the arbitrariness of Courts in accepting various gender-related groups as PSGs makes this strategy an unpredictable one. Schenk further argues that the PSG

definition is problematic in that it runs the risk of either excluding gender-related groups through a too narrow definition on the one hand, or "subsuming the entire framework of asylum law" on the other, rendering the remaining grounds superfluous (Schenk, 1994: 336). Similarly, Edwards finds that "[i]n many jurisdictions, PSG has now become the default ground for women's claims, even when one or more of the other grounds may be equally or more applicable" (2010: 28).

Contrary to this approach, other scholars and practitioners hold that gender-sensitive interpretation of the already existing definition will be a preferable way to include women's point of view. Rodger Haines states, for instance, that

> [n]either the refugee definition nor the 1951 Convention in general refers to sex or gender. This omission is, however, without significance. The ordinary meaning of Article 1A(2) of the 1951 Convention in its context and in the light of the object and purpose of the Convention requires the conclusion that the Convention protects both women and men and that it must therefore be given a gender-inclusive and gender-sensitive interpretation (2003: 323-4).

This argument holds that there is room within the existing legal structures to incorporate gender-based claims (Greatbatch, 1989; Bahl 1997). Argumentation frequently refer to the object and purpose of the Convention to provide protection based on universal standards, and that gender is therefore integral parts of the refugee inquiry: "[s]ince men, women, and children can be persecuted in different ways and since Article 1A(2) demands an inquiry into the specific characteristics and circumstances of the individual claimant, the sex and/or age of the refugee claimant are integral elements of the refugee inquiry" (Haines, 2003: 325). Greatbatch also argues that greater gender-sensitivity can in fact be achieved within the existing structure of the Convention:

> [a] human rights based approach to defining persecution, the recognition of women as a particular social group, documentation of discriminatory and repressive measures aimed at or particularly affecting women, access to full and fair determination procedures, and a liberal reading of the Convention definition, would provide the basis for the development of a profile of gender-based refugee claims, and for recognition of the difference gender makes" (1989: 526).

Similarly, Anjana Bahl holds that a an interpretation of persecution that recognizes violence against women in addition to an understanding that women can constitute a PSG, are necessary in order to include women claimants, establishing that "[t]he present legislation, both in the United States and internationally, can accommodate these claims within the existing infrastructure" (1997:73). Greatbatch furthermore holds that "simply" adding on gender as a separate nexus will not amend the interpretive challenges involved in determining refugee status (Greatbacth, 1989: 518). This strategy, she argues, "assumes consensus on the nature of gender-based persecution" (Greatbatch, 1989: 518). In other words, an additional gender category, and related concepts such as "gender-based persecution," will also require interpretive practice, and does therefore not avoid the potential ambiguity and inconsistency that results from interpretation.

Haines lastly argues that not only is there "no realistic prospects" of an addition of a sixth category to the Convention; such an expansion of the definition may even have a negative impact for women claimants: "the argument in favour of a sixth ground may have the unintended effect of further marginalizing women if misinterpreted as an implicit concession that sex and gender have no place in refugee law at the present" (2003: 326-7). This echoes the intentions of gender mainstreaming as a method, that gender should be understood as an all-encompassing concept, present within all aspect of policy and law, and not addressed separately. The approach of gender-sensitive interpretation seems to place a greater emphasis on the intentions of the Convention in extending protection

indiscriminately, and that insight in these intentions should guide its reading and interpretation. This locates the problem not as an issue of the formulation of the law itself, but rather of it being read from a partial perspective (Haines, 2003: 327).

2.D. Concluding Remarks: Outlining the Question and the Research Plan

Drawing on the Foucauldian idea that policy problems are discoursively constructed, the feminist critique has demonstrated the ways that international policy and law is shaped by assumptions about gender and the categories of "women" and "men." Whereas the WID scholars assume that women's concerns can be added to the existing structures without questioning the ways such structures themselves are inherently gendered, the proponents of gender mainstreaming rather hold that a gender-focus should be diffused throughout international institutions. The differences between such feminist strategies demonstrate that distinctive notions of gender always underpin such approaches, and shapes how the problem of gender inequality is understood and what policy responses are seen as appropriate. But the insight brought by feminist scholars is not only that notions of gender shapes policy and law in these ways; it is also that policy and law in turn manage and construct different understandings of "men" and "women." From gendered and racialized depictions of the male, white refugee, as an individual who heroically flees state oppression, imagery has shifted towards unnamed masses of "women-and-children" from the Global South, inherently constructed and seen as victims. These ways of (re)presenting "the refugee" not only draw on prejudices of the male and the female, and of blacks and whites, but also perpetuate and construct such stereotypes.

Because the issue of gender inequality within the refugee law is so complex, there is no simple solution, no quick fix, by which the refugee definition can become gender-

inclusive. Scholars and practitioners disagree on whether gendered experiences of persecution should be incorporated into the scope of refugee law through adding gender as a sixth protected ground within the Convention, or by employing gender-sensitive interpretations of the already existing definition. It is noteworthy, however, that both these stances seem to point to language and interpretation as part of the issue. Proponents of a freestanding gender nexus argue that without gender as a separate category, women are forced to classify and formulate their claims as based on "political opinions," or "particular social groups" and so on, which in turn downplays or misrepresents the gender component of their claims. Proponents of conducting gender-sensitive interpretation, on their part, argue that adding gender as a category will not bypass interpretive challenges, because the term "gender" (and other terms associated with it), must also be interpreted. Bridging these two "sides" is the common presumption that what creates barriers for women claimants is the very way (legal) language is *read* and *interpreted.* What this point demonstrates, I argue, is that in the debate on textual amendment versus interpretive inclusion, one loses sight of the greater question of how gender *itself* is discursively constructed as a category within legal language, and how this category is subsequently read and made intelligible to the law. Whether added as a nexus to the Convention definition, or employed as a guide on how to interpret the existing definition, "gender" is a term that will itself be subject to differing legal understandings and readings. I therefore argue that there is a need within this debate to address how the category of "gender" is itself read and made intelligible to the law. The issue of gender within refugee law is ultimately a question of what it means to be recognized by law, to be able to speak to the law and have one's claims heard. This problem necessitates an

investigation of the terms in and through which victims of gender-related persecution may appear before the law and seek rights. This thesis addresses this need.

In order to take up such a project, I will turn in the next chapters to the UNHCR publication "Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees" (in the following referred to as the *Guidelines*). This text enters the debate on how to achieve a refugee law that is gender inclusive, as it seeks to provide guidance to decision-makers on how to conduct a gender-sensitive interpretation of the refugee definition. In terms of the need identified above – to identify how gender as a category might be read within law – it is important to look at how the *Guidelines* itself construct the category of "gender." This endeavor will contribute to inquiries into how gender is constituted vis-à-vis the refugee concept. It is interesting to look at the UNHCR's stance on how a person's gender may interrelate with their refugee status, as this may tell us something more general about how gender is seen and constructed as a form of identity. Thus, I will in this thesis do a close reading of the UNHCR 2002 *Guidelines* in order to answer the following question:

How does the UNHCR Guidelines on Gender-Related Persecution define the relationship between refugee status and gender?

Based on this close reading of the UNHCR *Gender Guidelines*, I argue that the relationship between gender and the refugee status is one in which gender becomes a *ground*, or base, for the refugee status. Gender is treated as stable, confined, and easily recognized as separate to other identity markers, such as race or nationality. Based on this

argument, I assert that the *Guidelines* ultimately entails a performative contradiction. In attempting to make gender intelligible to the law by constructing it as a coherent ground, the *Guidelines* struggle to pin down the words with which gender-claims may be expressed within law, as their meaning becomes conflated and confused throughout the document. That is, the *Guidelines* ultimately cannot establish gender as a ground in this way, as the word with which to express gender slips. In attempting to define gender as a ground, the *Guidelines* do not account for the ways that gender identity is not experienced, nor articulated, in the same way for all individuals.

I develop my analysis in three parts. Firstly, I address how the *Guidelines* constructs the problem of gender within refugee law and sets up the best-fitted solution. Here, I argue that the issue is defined as a lack of *recognition* of women's claims, in that it is the biased *reading* of the law that has produced gender-disparity within the refugee regime. Promotion more gender-sensitive interpretations of the Convention thus becomes the most appropriate solution. Secondly, as my question concerns how gender is discursively constructed, I look closer at the vocabulary, terms, and concepts the *Guidelines* offers in describing and constructing gender. I find that the *Guidelines* clearly defines and distinguishes key concepts in describing gender as an identity – such as "sex" "gender," "sexuality," "women," and "men" – but that the definition of such terms break down in practice, as they are conflated and used interchangeably throughout the document. The third inquiry concerns how the *Guidelines* establishes the relationships between the gender category and the various elements of the refugee definition. I argue that the *Guidelines* treats gender as an enclosed and confined entity, separate from the other definition elements, such as notably race, and nationality. The *Guidelines* does not

address gender identity as it may *intersect* with the other convention grounds to make up unique experiences that may be expressed within law. The next chapter outlines the components and techniques of close reading as a method, and explores how this methodology is suitable in reading for the ways gender is discursively constructed within the *Guidelines*.

Chapter Three - Method

The Methodology of Close Reading: Language and Power

My research question concerns how the UNHCR *Gender Guidelines* defines the relationship between the refugee status and gender. To investigate such a relationship, it is necessary to employ a methodology that will allow me to address how language constructs meaning. This chapter explores the way such a study may be carried out.

There are many ways to approach topics relating to gender and the refugee status. My question, however, is specifically concerned with the ways in which texts themselves illuminate how international organizations create the possibilities and limits for establishing refugee status. Thus, this thesis is concerned with the discursive construction of the gender category within the *Guidelines*, and how this category might be read. To better understand the relationship between gender and refugee status, then, I turn to the methodology of *close reading* to analyze how language constructs meaning. I argue that close reading is best suited to investigate the question at hand, because of the attentiveness of close reading to the ways text is socially situated, and how power may be embedded in language.

As a method, close reading is more that just a set of techniques, it is also built on several theoretical insights about how language is socially situated. Close reading presumes that words and concepts are never neutral or given, but that their meaning is always context-bound and socially constructed. This, in turn, means that close attention should be paid not only to what is said in the text "at the outset" in terms of the claims and statements asserted in the text, but also how these claims are argued and structurally constituted

within the text, and the meanings conveyed by each of these elements. In other words, a close textual reading allows us to understand how meaning is created through the relation between *what* is said and *how* it is said. An understanding of these theoretical aspects of close reading, particularly in terms of the social function of language, is crucial in order to grasp both how the method works, but also why this form of analysis is important within the field of social sciences. In the following section, I will therefore look closer at what a close reading is, before I articulate the more specific tools and techniques of analysis that this method offers.

3.A. Theoretical Background: The Social Function of Language

Close reading is defined, in Barry Brummett's book *Techniques of Close Reading*, as "the mindful, disciplined reading of an object with a view to deeper understanding of its meanings" (2010: 3). This phrase gives several pointers as to what separates a *close reading* from simply *reading* a text, the first an academic exercise, and the last something most of us do on a daily basis. Close reading is *disciplined* in that it is an attentive, rigorous, and purposeful reading, often guided by techniques and theories, which in turn enables the reader to go deeper into the text beyond what is on the surface (Brummett, 2010: 28). The vocabulary of "surface" and "going deeper" indicates the conceptualization of linguistic exchange as taking place on several levels at the same time, or alternatively, as containing multiple layers. This idea that language and text have multiple layers of meaning indicates that this meaning can be created –and located – on various "places" in a text, depending on the angle and attention of the reader. The methodology of close reading is attentive to the ways meaning exists within the various levels and components of a text, at the intersection between what is being said and how

this is expressed, and that one word can be understood in different ways depending on the "level" on which the reading is done and the context in which one does that reading. There is more to discover in a text than what is directly expressed on the surface, and meanings may shift as we shift the focus.

The insight that the meaning derived from a text depends on the angle and context of the reader is precisely what the feminist critique of the refugee law has demonstrated, as the seemingly neutral Convention text engendered biased understandings and interpretations of what it means to be a refugee. When the concept "persecution," for example, is read within the context of a society in which the "private" and "public" spheres are coded as gendered – and where the individuals doing the reading are predominately male – what appears to be a gender-neutral concept may in fact be read in male-biased ways. A close reading questions and analyzes such meanings and ideas that might be "read into" a text by investigating each single word, concept, and argument and how these textual components might purvey certain assumptions. Thus, the close reading is fit to answer questions about how rhetoric and language manages meaning, which is a crucial exercise when it comes to the field of law.

When doing a close reading, then, the goal is to uncover *meaning*, which Brummett describes as "the thoughts, feelings, and associations that are suggested by words, images, objects, actions, and messages" (2010: 6). In the words of Nealon and Giroux, "[i]t is this examining or questioning of meaning that is the corner stone of social theory" (2003: 23). However, the concept of meaning is a tricky one, as it is neither entirely subjective (in which case there would be no point in studying it) nor entirely objective

(which would mean we had to reject the idea of different points of view altogether). The idea of language as a social activity – as an inherently social, not natural, phenomenon (Nealon and Giroux, 2003: 24) – is what turns us towards meaning as situated *between* the subjective and objective, as a socially (and collectively) constructed phenomenon. In other words, when we conduct a close reading we are looking for *socially shared meanings*. These are ideas that are reasonable or plausible within a certain context, in the sense of a historical, cultural and social framework that makes concepts and language meaningful: "[w]ords and events have a *history* of meanings and usages; like the texts in which they are sometimes contained, they only mean something within a specific *context*" (Nealon and Giroux, 2003: 24). Meaning is only conceivable in a socially specific framework, which is why "[t]he rhetorician questions the […] faith that ideas represented by words can be grasped irrespective of their utterance in particular times and places" (Constable, 2005: 16). The premise that meaning is socially situated makes the study of text and language not only conceivable, but also crucial in order to uncover the ways social relations are forged and perpetuated through text. This notion is the basis for asking the question of how gender is represented and constituted within the UNHCR *Guidelines*, and how this relationship, in turn, may be read. The method of close reading is well suited to investigate such questions because it allows the reader to go beyond what is explicitly stated in the text, to the more subtle nuances and concealed meanings and implications.

The emergence of this insight represents what is called the linguistic turn in the social sciences (Fairclough, 1989: 3), highlighting language and its social role, and where, among others, Michel Foucault have made valuable contributions. In his book

Archeology of Knowledge (1972), Foucault used the term "discourse" to describe systematic ways in which we think and talk about things (76), or "a certain 'way of speaking' […] invested […] in a system of prohibitions and values" (193). These discourses have certain sets of "laws" and values that govern what can be said and how it can be said within that particular discursive field; rules that authorize some statements and preclude others (Foucault, 1972: 27-28). Discourses draw this sense of authority and normativity from systems of knowledge. In the discursive formation (or field) of medicine, for instance, certain types of knowledge serve to justify and legitimate the statements that can be made and *how* they can be made, within this particular discourse.

According to Foucault, then, discursive formations are constructed around orderly systems knowledge. Through the collection and authorization of certain forms of knowledge, discourses are productive; they are: "practices that systematically form the objects of which they speak" (49). Discourses form objects by constructing and utilizing essentialized categories of people, such as the "homosexual," the "woman," or the "refugee" for that matter – categories or labels people are predisposed to take for granted and accept as "natural" entities. For example, Nyers (1999) has uncovered "the way in which the category of the 'refugee' has been invented and naturalized as being a 'problem' for the international system of states" (4). Invoking a vocabulary of "problem, crisis, challenge, and control," in turn, shapes our understanding of the phenomenon in a profound way:

> if we think of discourse as Foucault does – that is, as a (violent) practice through which the objects and practices that constitute the world are regulated and controlled, categorized and evaluated – then we will recognize that like any other discourse, a discourse of the 'emergency' works to enable some questions while

> disabling others; it attempts to control which objects, propositions, and forms of analysis are 'normal' and acceptable, and which are not (Nyers, 1999: 11).

Both the discourse analysis and the rhetoric analysis focus on how people are affected and influenced by language, how the words we choose do not merely reflect, but also profoundly *shape*, our understanding of the subject being discussed. The example above illustrates that the ways in which we talk about things not merely expresses but also structures how we think about and understand them. This insight that language also constitutes – that it sets limits and affects the ways in which we understand the world – draws our attention to how language is tied to *power*. Foucault therefore turns our attention towards what can be termed the "politics of representation," in which some have the power to represent others and to be represented, while others are silenced.

In these ways, close reading is a valuable exercise as it uncovers how power structures may be embedded in texts. One of the ways in which power can operate through language, writes Foucault, is therefore by predisposing the readers to take certain assumptions for granted; to accept them as "truth," or as self-evident. "We must question those ready-made syntheses, those grouping that we normally accept before any examination, those links whose validity is recognized from the outset" (1972: 22), he argues. Such ideas are hard to challenge, precisely because we do not normally critique what we take for granted. The close reading differs from the everyday reading in that it looks for and pays attention to such power structures contained within a text. The close reader looks for silences and omission, asks who is empowered and disempowered, and questions that which appears self-evident, and how the text establishes authority.

The theoretical insights which underpin the methodology of close reading are that ideologies and evaluations are coded in language, which in turn has the power to shape our outlook and understanding of the topics discussed. These notions of power and language will make up the framework of the analysis conducted in this paper. Although the approach taken in this thesis is more inductive in nature (in terms of not applying a specific theory), it is still necessary to use certain "habits, tricks, and knacks (…) 'on the ground' once inside a text" (Brummett, 2010: 29), as pointers to what to look for and where to look. I will draw on the works of Doxtader (1995) and Constable (2005) to establish more precisely what a close reading looks for in analyzing *institutionally* produced text and *legal* language, respectively. They both point to the importance of looking closer at the arguments offered within institutional and legal texts, and how such texts convince the reader of how the problem at hand should be understood and responded to. Thus, I argue that the techniques related to ideology and argument will be of particular interest for this analysis. The next part of this section will look more generally at what it means to do a close reading, *how* to look for the taken-for granted and uncover assumptions, and where to direct the focus.

3.B. Techniques of Close Reading

Brummett points to the fact that ways of thinking tend to be systematic, as in that certain values tend to be connected to others (2010: 97). One can say that values and attitudes are often part of a broader *worldview*, a net of ideas and perceptions about how the world is and should be. Brummett holds that it is these webs of interlinked convictions and commitments that can be called *ideology*, and offers the following generic definition: "Ideology is a systematic network of beliefs, commitments, values, and assumptions that

influence how power is maintained, struggled over and resisted" (99). Such worldviews will not only shape what the actor says, but also the ways in which he or she asserts the claim, and how it is justified or argued. Looking closely at the various forms of definition and justifications asserted in a text is therefore a way to access the underlying nets of assumptions and beliefs, which may not be expressed directly.

Drawing on the insight of Habermas regarding the relationship between communication and democratic participation, Erik Doxtader (1995) establishes the importance of analyzing argumentation – particularly as it appears within the context of *institutions* claiming legitimacy and justifying their mission vis-à-vis citizens (189). Through argumentation, institutions within specific social contexts may claim to represent (and simultaneously define) concepts, such as for instance that of the "public good" (185). Real power is embedded in institutional arguments and reasoning, as these discursive acts allow institutions to establish the rules and norms framing the public debate on the topic. Thus, institutions "prescrib[e] 'acceptable' modes of interaction," (185) which in turn works to "screen out" the claims of interests that do not conform to these norms (185), such as for instance criticism of the assumptions the institution assert. Doxtader calls for the investigation of such institutional "moments of definitional and justificatory argument" (190), as they reveal how certain perspectives are validated and naturalized, while others are disabled. Therefore, "the study of institutional argument investigates how institutions enter into, structure, and perhaps take over public debate" (190). The analysis of institutional arguments, then, provides a view into the tools everyday citizens have to make demands of institutions. Furthermore, when it comes to policy, institutions use argumentation to define what problems comes under its scope, the significance of

such problems, and which solutions are the best available to respond to these issues (197). Or to say it in the words of Olivius:

> As feminist policy scholars have convincingly argued, dominant discourses in a given issue area will determine how an issue or a 'policy problem' is interpreted, if it is perceived as problematic at all, and consequently what kind of policy response (if any) that will be considered reasonable and legitimate. When something is considered to be a problem that should be addressed by policy, it is of crucial importance what kind of problem it is constructed to be, for whom, and caused by what (Olivius, 2010: 3).

By defining whether an issue is to be understood as a problem, institutional argumentation works to limit the ability of the individual to partake in the formulation of social problems and their solutions, and in this way, institutional argumentation is tied to authority. A close reading should look critically at the definitions and justifications offered in constructing policy problems and solutions, because such definitions ultimately have to be interpreted from the texts of institutional arguments themselves.

Marianne Constable builds on this insight by suggesting that the close reader should not only pay attention to specific arguments and definitions in the text, but also the manner in which they are offered – from the entire structure of the text to the choice of words. In short, a close reading should look for "what is revealed in the use of particular language in particular texts" (Constable, 2005: 14). In writing about the rhetorical analysis of legal texts, Constable describes various aspects and functions of the legal text, and the sentral notion of "*how* law tells the one *whom* it tells *what* to do" (2005: 19). This points to several questions to ask when doing a close reading, including who the audience is, what the message is, and how the audience is compelled to accept this message. Similarly, Brummett reminds the close reader to ask what claims or conclusions the text leads it audience to accept, and what evidence is offered to support such claims (Brummett, 101-

103). Constable shows some specific ways legal text may convey "what needs to be done," such as for instance "via example, by cognizing statements of rules, by threats and coercion, through revelation, through moral knowledge, through legal reasoning, through deliberation or strategy" (2005: 19). When doing a close reading, it can be useful to look for such rhetorical techniques, or ways of conveying a message.

In so far as the worldviews or fundamental ideas that makes the basis for an argument or a text are often taken for self-evident truth by the authors themselves, certain ideas will appear as taken for granted, or just assumed in the text. When reading closely, one should be alert to such statements that appear obvious or 'natural.' As Foucault reminds us,

> [t]hese pre-existing forms of continuity, all these syntheses that are accepted without question, must remain in suspense. They must not be rejected definitely, of course, but the tranquility with which they are accepted must be disturbed; we must show that they do not come about of themselves, but are always the result of a construction the rules of which must be known, and the justification of which must be scrutinized (1972: 25).

More specifically, in looking closer at the argumentation offered in a text, attention should also focus on what the text asks the reader to assume in order to "make the arguments work" (Brummett, 2010), or ideas that are taken for granted within the text itself. Drawing on the insight of Doxtader that the definitions and concepts used in institutional argumentation may have the power to shape the public opinion (1995: 185), it becomes particularly important to look for that which appears "natural," and how it works to empower some points of view, while disempowering others.

3.C. Concluding Remarks

Once "on the ground inside the text" of the UNHCR *Guidelines*, to borrow Brummett's words, these notions of power and language, and how components of the text convey meaning, will guide the analysis. In looking for how the relationship between gender and refugee status is constructed, I analyze the definitions and justifications, as well as the silences or presumptions in the text, while considering the audiences and the effect of the language. Specifically, I will start out more broadly by looking at how the text establishes the "problem" of gender within refugee law, and the larger justifications and argumentation that frames the approach and solutions chosen in the text, namely that of interpretative inclusion. From there, I look closer at the words and language used to describe different concept and ideas, particularly the concepts of "gender-related" persecution, as well as "gender" and "sex," and the implications of this for how gender is to be understood in the refugee context. I try to unveil the taken-for granted by questioning the statements and arguments made in the text, and by showing alternative approaches and descriptions that could have been used. Finally, I look for how the category of gender is established in relation to the various elements of the refugee definition, and how these relations work to construct gender as a discursive category.

Chapter Four – Analysis

The Discursive Construction of Gender as a Ground in the UNHCR *Guidelines*

The story of feminist engagement with refugee law has not been one of a linear development. There has not been a simple transition through neatly separated phases; no stable movement from the initial exclusion of gender in general – and women in particular – as a concern for refugee law, through the "discovery" of gender and women as new subjects of knowledge, culminating in the amendment of the lacuna through the final stage of gender inclusion. Rather, the previous chapters have demonstrated that the relationship between refugee law and the concept of gender has been one of struggle and contestation, as practitioners, scholars and adjudicators grapple with the gender concept, and the question of how to reconcile it within a legal framework that speaks in a male language. We have also seen that this struggle, and its implications, is of particular interest for scholars interested women's and LGBT rights; not because questions of gender are not of concern for heterosexual men, of course, but because it is the male heterosexual experience, as stereotypically understood, that forms the foundation from which refugee law and its language has sprung. Heterosexual men "escape" the challenges involved in expressing their gender and sexuality before the law, because their gender and sexuality is already there, in the language of the law, and in the interpretation and application of its terms. It is only when individuals who do not conform to this constructed norm stand before the law that the problem of gender becomes visible, because it becomes apparent that they do not have the language with which to (re)present themselves and their experiences. It is within these moments that we see that the law

struggles, in a sense, in its confusion between different terms and their application. We have also seen that this struggle, then, is, in its deepest sense, a question of language, because the trouble appears as individuals are trying to *formulate* or *express* their identities and experiences before the law, but struggle to find the words.

The contested history of how gender has been understood within international refugee law demonstrates the importance of continued critical engagement with the ways gender is understood within human rights instruments and publications. The analysis undertaken in this thesis therefore seeks to contribute to the ongoing discussion of how gender is constructed and articulated within refugee law. In order to do so, I analyze the notion of gender as it appears within UNHCR's guidelines on how to conduct gender-sensitive interpretation of the Convention language, titled "Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees" (in the following referred to as the *Guidelines*). I have chosen this publication because it represents a direct response to the confusion and unpredictability surrounding gender-related cases, and attempts to define the problem and provide redress to the issue. I employ the methodology of close reading, and conduct a line for line reading of the UNHCR *Guidelines* in order to answer the question of how the relationship between refugee status and gender is defined.

I ultimately argue that in its attempt to make gender intelligible to the law, the *Guidelines* constructs the relationship between gender and the refugee status as one in which gender is a ground from which action or violence emerges. This, in turn, presupposes gender as a stable and fixed category or part of identity. I build this argument in three stages. First, I explore how the *Guidelines* frames the issue of gender within refugee law, arguing that

gender inequality within case law is understood as a problem of language, in that interpretations of the refugee Convention fails to recognize claims asserted by women. Secondly, then, I turn to the language and terms that the *Guidelines* itself offers the reader in speaking of gender, how gender-related terms are defined and used throughout the document, and how such terms are properly interpreted and applied according to the Guidelines. I argue that even as the *Guidelines* seeks to provide directives on how to interpret language in a gender-sensitive way, this document too struggles to find a vocabulary through which one can express gender within refugee law in a comprehensive way. Lastly, I look at how the various relationships between gender and the different elements of the refugee definition are constructed and defined, specifically how gender is though to relate to the persecution concept and each of the five enumerated Convention grounds. I argue here that the relationship between gender and the persecution concept is problematic within the *Guidelines*, as the document fails to distinguish between gender-related and gender-specific persecution – that is, between gender as the *cause* of persecution, and as shaping the *form* of the violence. I assert that the document ultimately offers a definition of gender identity in which gender is treated as a separate and confined category, in the sense that it can be analyzed and addressed "outside of" the other definition elements, particularly race and nationality. This is because the Guidelines fails to acknowledge how gender may stand in a causal relationship to persecution, also when it *intersects* with race and nationality as grounds for persecution. I argue that the *Guidelines*, in other words, lacks a sense of intersectionality, and therefore cannot adequately correspond to lived experiences "on the ground".

Thus, I assert that there exists a performative contradiction within the *Guidelines*. That is,

the document constructs and treats gender as a fixed and separate ground, but the text itself is ultimately unable to pin down the language and terms needed to represent gender in this way. The very language and terms the *Guidelines* employs in defining and articulating gender is conflated and confused throughout the text; the seemingly clear definitions of, and distinctions between, various gender-related terms the *Guidelines* offers the reader, slip away or break down throughout the text. Therefore, the performative contradiction arises from the way the *Guidelines* constructs gender as a fixed and separate ground, while the language used by the text itself betrays and points to the ways gender is in fact not stable or fixed, nor enclosed and separate from other aspects of identity, and not experienced the same way by everyone.

4.A. Framing the Issue of Gender Within Refugee Law

The *Guidelines* should be read against the backdrop of a still developing academic and legal debate that addresses how the refugee category is gendered. Although the exclusion of women's experiences is generally identified as a wrong that should be rectified, there are differences in terms of what is seen as the reasons for this exclusion, and the ways amendments should be made. This first section of the analysis looks closer at the way the *Guidelines* defines the problem of how gender relates to the refugee status, how they arrive at this understanding, and how this formulation of the problematic is used to justify their chosen response. I argue that the *Guidelines* establish gender inequality within refugee law as a problem of interpretation and recognition, rather than the refugee Convention text, or the human rights system in itself.

The very first sentence of the *Guidelines* states that "'[g]ender-related persecution' is a term that has no legal meaning *per se*" (article 1). This is an interesting opening of the text, because it both establishes the framework for the discussion that is to come as one of legal terms and their meanings, while also pointing towards the problem inherent in the relationship between gender and refugee law: that law does not have the terms to describe gendered persecution. The statement can be read as creating a framework in which the approach of gender-sensitive interpretation is favored over that of altering the text of the refugee definition. It does so because it implies that even if the concepts of gender and gender-based persecution are formally introduced into the language of the law, their meaning would still be unclear and subject to interpretation and differing definitions in any case. The term "gender-related persecution" has no clear meaning within law, and therefore remains a problematic point of departure within law that necessitates guidelines on how to understand it. The *Guidelines* chooses to "specifically focus on the interpretation of the refugee definition […] from a gender perspective as well as propose some procedural practices" (article 1). It does this in order to "ensure that […] the range of gender-related claims are recognized as such" (article 1). Gender inequality within refugee law is in other words a question of *recognition*; of how to recognize gender-elements within a legal language where such terms have no meaning "*per se*."

From the introduction of the problem, the *Guidelines* proceeds to provide the background of the issue. The reader is informed that "[h]istorically, the refugee definition has been interpreted through a framework of male experiences, which has meant that many claims of women and of homosexuals, have gone unrecognized" (article 5). Again, interpretation (and interpretive frameworks) is identified as the source of the issues

concerning gender and the refugee definition; it is the historic *reading* of the law that constitutes the problem, rather than other aspects of the law itself. In other words, the refugee law cannot speak of gender because the male experience has historically constituted its framework.

The articulation of gender inequality within refugee law as rooted in interpretation works to enable certain perspectives, while excluding others. The *Guidelines* does not, for instance, make a point of questioning the identity and position of the interpreter, in asserting that the interpreters themselves have typically been male. Alternatively, the problem of women's (lack of) access to refugee protection could be framed by pointing to the creation and formulation of the law itself, and the fact that it was drafted only by men. Or, one could point out that decision- and lawmakers were, and continue to be, predominately male (Edwards, 2011: 302), which might mean that their personal points of view and prejudices are just as important in the (continued) exclusion of women, regardless of whether the legal definitions are modified or whether guidelines are published. This alternative emphasis would establish the problem of gender and the refugee definition more as a structural and institutional problem, where people have unequal access to positions of power where they can define, construct and interpret the legal terms within the institutions of international law. The problem, then, would also be an issue of participation, not only recognition, within law. Al Attar, for instance, seeks to "conceptualize and structure more representative participatory transnational lawmaking processes, the kind that would promote both parity of participation and actor subjectivity, and possibly further the cause of global justice" (2013: 95). One example could be to recommend gender quotas, or other methods of promoting equal gender representation

and -participation, in important decision-making and international institutions. The *Guidelines* does not consider any such approaches, and in defining the problem of the relationship between gender and the refugee category as one of legal interpretations and recognition, alternative approaches are left outside of the scope of the text. The fact that the *Guidelines* chooses to describe the historic exclusion of women as caused by (mis)interpretation and (mis)recognition makes up the framework and discourse of the text, and something the reader is asked to assume to make the rest of the argument work.

Upon establishing the problem in these ways, the *Guidelines* addresses the question of whether to add gender as a sixth enumerated ground for persecution specifically:

> [e]ven though gender is not specifically referenced in the refugee definition, it is widely accepted that it can influence or dictate, the type of persecution or harm suffered and the reasons for this treatment. The refugee definition, properly interpreted, therefore covers gender-related claims. As such, there is no need to add an additional ground to the 1951 Convention definition (article 6).

The argument seems to be that a freestanding gender category would in fact be redundant, assuming that a gender-sensitive interpretation will achieve the same results as the addition of a gender category. The *Guidelines* does not evoke arguments that a gender category may have unintended implications, or that it would go against the original intentions of the convention, but simply that there is no need for such an amendment. This, in turn, reflects how the problem is understood; that sex and gender are already inherent in the scope refugee definition, as long as it is "properly" interpreted and understood.

The *Guidelines* identifies the problem of the relationship between gender and the refugee status as one of *recognizing* gendered claims within the legal framework, whose language has been interpreted within a male framework. I have shown that this is only one of several possible ways to frame the problem, and furthermore, that this specific approach makes the response of gender-sensitive interpretation appear "natural," or best fitted to amend the problem.

4.B. Language: Articulating Gender within Law

Upon establishing the nature of the problem, the *Guidelines* seeks to provide guidance on how to navigate gender-related claims to the refugee status. The next section of this analysis explores this attempt. I argue that the *Guidelines* tries to amend the issue by constructing gender as a kind of *ground* – an intelligible space from which the violence springs out, and which law can refer back to. In other words, gender itself is a seen as a stable and confined place, in and through which one speaks the self to the law. This attempt falters, however, as the document struggles to pin down words and terms expressing gender in such a way.

The *Guidelines* notes that "in order to understand the nature of gender-related persecution, it is essential to define and distinguish between the terms 'gender' and 'sex'" (article 3). The text proceeds to make the following distinction:

> Gender refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another, while sex is a biological determination. Gender is not static or innate but acquires socially and culturally constructed meaning over time (article 3).

The *Guidelines* operates with a relatively clear separation between the two. On one hand, "gender" does not refer to some innate or static quality in people, but is rather given meanings that are culturally and socially specific, and therefore subject to change. "Sex," on the other hand, is given a much briefer description, signaling that this term is comparatively unproblematic and straightforward; that is, the meaning of sex is expected to be somewhat more obvious to the reader. Whereas the *Guidelines* operates with a gender concept that is fluid, socially constructed, and tied to meaning, sex on the other hand appears as comparably innate and determined, as the text refers to "biological determinations" in its definition. Such understandings and definitions of sex and gender may not, however, be accepted by everyone, as it differs from an approach that also the meanings of the biological sex may in some ways be socially constructed and subject to cultural and social interpretations. Feminists have, for instance, questioned the immutability of the category (Edwards, 2010: 37) and its acceptance as natural and uncontentious (Charlesworth, 2005: 14).

When looking closer at how "sex" and "gender" appear throughout the rest of the text, the clear-cut separation between the two terms delineated in article 3 seems to slip away. While "gender" is used most frequently, the word "sex" also appears several times, but the reader is not offered any reason or explanation why one is chosen over the other in each specific context. The *Guidelines* states, for instance, that "[e]ven though gender is not specifically referenced in the refugee definition, it is widely accepted that it can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment" (article 6). In this sentence, it is unclear why "gender," but not "sex," is specified. Only a few paragraphs later, in comparison, the text states that "[w]hile female

and male applicants may be subjected to the same forms of harm, they may also face forms of persecution specific to their sex" (article 9). Given the distinction given in article 3, it might seem that using "sex" in this specific case may be a deliberate attempt to point to how men and women are persecuted differently because of their different biology and physique. The *Guidelines* does, for instance, refer to sexual violence as a form of violence specific to, and aimed at women in particular.

However, such a distinction between violence aimed at the biological sex versus on the socially constructed gender, may be overly simplistic. The guidelines construct sexual violence as a form of violence aimed at women. In discussing trafficking and forced prostitution as forms of persecution, for instance, the Guidelines only discuss "trafficked women and minors" (article 18) – not only excluding men as victims of trafficking, but arguably using a form of "womenandchildren" approach. In the example of racialized violence, the *Guidelines* assert that men may be targets for "maiming or incarceration," while women may be persecuted through "sexual violence or control of reproduction" (article 24). However, the *Guidelines* does not specify that persecution may take on a different character for men or women, not only because their different physique facilitates this, but also because certain forms of harm, such as sexual violence, may have symbolic meanings in relation to the roles and statuses of the genders. Or put in another way, a man may chose to persecute a woman through sexual violence, not only because their respective physiques makes such an attack possible, but also because such an act may at the same time offend the woman's status as "pure" or "untouched," and the proscribed roles of the men in her community (a father, brother, or husband, for instance) who "failed" to protect her. Thus, the intended victim of the act is not only the woman,

but also the men close to her, or even her entire community. It is precisely the absence within the *Guidelines* of any such discussion on how gender identity is complicated, multifaceted, and "messy" – that it at the same time encompasses both notions of physical or biological markers and their meanings, and the prescription of certain roles, statuses and responsibilities – that works to reduce gender to one, stable ground. The reader is offered seemingly straightforward definitions, without ensuing discussion of how such distinctions might look a lot more complicated "on the ground," where meanings of the biological and the socially and culturally constructed may be interwoven.

In addition to this problematic distinction between gender as biological and as social, the topic of sexual orientation is also invoked within the text in ways that blurs the distinction between the concepts of sexuality and gender. Sexual orientation is absent from the entire introduction of the *Guidelines*, where it is gender that is established as the document's main focus, as its goal is to "ensure that a proper consideration is given to women claimants" (article 1). The term "homosexuals," on the other hand, appears as a group of concern to the *Guidelines* in article 5, in the sentence: "[h]istorically, the refugee definition has been interpreted through a framework of male experiences, which has meant that many claims of women and of homosexuals, have gone unrecognized" (article 5). Interestingly, it is not a framework of male and *heteronormative* experiences that is articulated as the cause of this failure to recognize claims based on sexual orientation. The exclusion of homosexuals is rather identified as the result of reading through a *male* framework. In effect, to be gay is by definition here, not to be male.

The terms "sex" and "gender" are furthermore used interchangeably with "women" in several places. This, in turn, implies that it is mainly women claimants the *Guidelines*

seeks to aid. The *Guidelines* does provide some justification for emphasizing women in stating that "[g]ender-related claims may be brought by either women or men, although due to particular types of persecution, they are more commonly brought by women" (article 3). Despite the somewhat unclear reason offered to the reader ("due to particular types of persecution"), the notion is presumably that it is mainly women who lack the terms with which to present themselves and their experiences of persecution to the law, and who have been historically excluded from the reading of it. It is, in other words, primarily women who lack a place and a voice with refugee law. However, the silence that exists when it comes to men's experiences of gender-related persecution is significant, particularly in light of the fact that the *Guidelines* does discuss homosexual men to some extent, recognizing that "[r]efugee claims based on differing sexual orientation contain a gender element" (article 16).

In terms of conflating "gender" or "sex" with "women," the *Guidelines* does at several points state that a *gender*-sensitive focus is important, subsequently using only the examples of women only to show why this is so. The case of religion is one example, where persecution arising from failure to comply with religious mores is only discussed in the case of women. For example the *Guidelines* explains that: "[i]n certain States, the religion assigns particular roles or behavioural codes to women and men respectively. Where a woman does not fulfill her assigned role or refuses to abide by the codes, and is punished as a consequence, she may have a well-founded fear of being persecuted for reasons of religion" (article 25). Similarly, in determining the category of "political opinion" it is stated that "[t]he image of a political refugee as someone who is fleeing persecution for his or her direct involvement in political activity does not always

correspond to the reality of the experiences of women in some societies" (article 33). Again, the *Guidelines* jumps from "his or her" to "women" in one sentence. This is significant because both these examples are instances where it would be highly relevant to mention men – specifically men who identify as homosexual, or in other ways do not conform to stereotypical notions of what it means to be a "man" in some societies – because they too may be perceived as breaking religious norms, or they might have a hard time framing their stances as political.

Recent domestic case law furthermore shows that articulating men's experiences of persecution as gendered may be an increasingly successful strategy. In terms of the PSG category, "[a]n example […] is the Australian High Court decision in *Applicant S.* The majority held that 'able-bodied young men' in Afghanistan who fear forced recruitment by the Taliban might constitute a PSG" (Edwards, 2010: 42). Other examples of gender-based or gender-specific violence against men that may constitute persecution are "castration, forced sterilization, military recruitment, human trafficking for prostitution or pornography, organ removal, forced labour, or punishment for transgressing social mores such as homosexuality" (Edwards, 2010: 41). The absence of any discussion of "men as gender" may have the effect of establishing for the reader that gender equals women; that for women, their gender identity is a defining, organizing and important aspect of their identity which profoundly shapes their experiences and opportunities, whereas the same is not thought of men, who are mainly portrayed as political or religious actors, involved in racial or nationality based conflict, their gender left aside. For men who do experience gender-based persecution, in turn, it might be harder to frame their claims as such.

Lastly, one could also argue that an nearly exclusive focus on women under the heading

"gender-related claims to asylum" assumes that gender concerns have been absent in previous readings of the law, when an alternative approach could be that a highly politicized notion of gender has always been present. One could, for instance, argue that the law always has been read through a gendered lens, except this lens has been male-biased, making the gender element of men's concerns "invisible." The ambition of a guide to conduct gender-sensitive interpretation could, therefore, bring within its scope to reveal how men's claims may also be based on their experiences and persecution as male.

This section has established that the *Guidelines* itself struggles to find a language with which to express gender in relation to persecution. This is seen through the attempt to define and separate between gender-related concepts – such as "sex" and "gender," "gender" and "sexuality," or "gender," "women," and "men" – while these distinction break down in practice throughout the text. This failure to find an adequate vocabulary may reflect the complexities with which we might understand the gender concept, as it encompasses physical and social aspects, and interrelates with other categories, such as sexual orientation. The *Guidelines*, however, fails to treat gender as it intersects with concepts such as for instance sexuality. Building on this argument, I will in the next section analyze the ways gender is further treated as separate and enclosed ground that can be analyzed "outside" of the other definition elements, rather than in the intersection with them.

4.C. The Relationship Between Gender and the Refugee Definition

In the following, I analyze how gender is thought to relate to the other definitional terms, that is, the persecution concept and each of the five protected grounds of persecution. I argue that the relationship that is portrayed is an *additive* one, in that gender, as well as

the other identity categories relevant to the refugee concept, are seen as enclosed, stable grounds, that may be added to one another in judging experiences, but that ultimately are analyzed and conceptualized as separate entities. Within the text of the *Guidelines* there is no way to think of one's identity outside of this additive model, which disregards the experiences that arise from the *intersection* of gender with other identity markers, such as for instance race and nationality. Thus, point that gender is not experienced as stable for everyone, and that it might not be articulated the same way for different people, is disregarded.

Although the *Guidelines* establishes that the term "gender-related persecution" has "no legal meaning *per se*" (article 1), the term nonetheless appears both in the title and several times throughout the document. The question of how gender relates to, and impacts experiences of persecution, is furthermore at the heart of any inquiry into how the refugee definition should be understood through a gender lens. Literature on the relationship between gender and the refugee status outline at least two different ways that gender is thought as a relevant aspect of persecution. Or put differently, the idea that someone can be persecuted *as a woman* may be understood in at least two different ways. In short, "[t]he concept of women being persecuted as women is not the same as women being persecuted *because* they are women," writes Binder (2001: 172). Firstly, gender may stand in a causal relation to persecution as the reason or motive for the abuse. A person's gender identity may the basis or cause of the persecution, in that a person is persecuted because of her/him belonging to that gender. This is encompassed in the term "gender-related persecution" (Binder, 2001: 173), and speaks to the motive of the perpetrator. Secondly, the types and forms of persecution may be "gender-specific," in

that the violence directed at women may be of a different nature than the violence typically inflicted on men, even in cases where the perpetrators motive for persecution is the same. In an ethnic conflict, for instance, the men may be maimed or killed while the women are raped, both as acts that attempt to destroy the ethnic identity and prosperity of a racial group (*Guidelines*, article 24). These different ways that gender may be a necessary element to understand the persecution are usually captured in the terms gender-related, or gender-based, persecution and gender-specific persecution respectively.

The *Guidelines*, after establishing that gender-related persecution has "no legal meaning," does not set out to define these subtle nuances that detail how we understand persecution as gendered. The *Guidelines* seems to operate with an understanding of "gender-related persecution" as a term that encompass both meanings outlined above. In Article 6 (cited above), for instance, the *Guidelines* posits that gender can "influence" or "dictate" both "the type of persecution" and "the reasons for this treatment." This wording seems to encompass both of the ways gender may relate to persecution outlined above. The language that gender can *influence* or *dictate* (also understood as to control or decisively affect; to determine) the reason for the persecution, constructs this relationship as one in which gender is the base that action springs out from. Throughout the document, there is some conflation between the two ways that persecution may be gendered, and it is not always clear why the Guidelines refers to one meaning over the other. This may, in turn, reflect a certain lack of clarity around the terms used to describe gender, and the realities and conditions that they describe. The conflation of the two meanings becomes increasingly clear when looking at the relationship of gender to the five enumerated persecution grounds.

In terms of the nexus requirement, through which gender is tied to the ground of persecution, the *Guidelines* establishes that the fear of gendered persecution must be "for reasons of" one of the five grounds. The enumerated grounds do not have to be the sole, or even dominant, ground, however, as long as it is a "relevant contributing factor" (article 20). This could be interpreted as placing less emphasis on the motives of the perpetrator, as establishing the main cause of persecution is less important. This may facilitate the recognition of acts committed by non-state actors as persecution, as it is harder to establish motive in cases of non-state perpetrators (Fletcher, 2006, 113). Thus, in order to qualify for asylum a claimant must satisfy the nexus requirement by showing that at least one of the five protected Convention grounds is a relevant contributing factor within his or her gender-based claim. In other words, the persecution feared must be "for reason of" race, nationality, religion, membership in a particular social group (PSG), or political opinion. The relationship between gender and the five enumerated grounds has therefore significant bearing on the outcomes of gender-related claims. In the following I look closer at the relationship between gender and each of these persecution grounds.

The categories of race and nationality are discussed to a lesser degree in any of the other protected grounds, making them appear less significant to gender-related cases. The *Guidelines* notes that the nature of the persecution arising from these grounds may take on gender-specific forms. Within the few lines written about race and gender, this relationship is described in the following way: "[p]ersecution for reasons of race may be expressed in different ways against men and women" (article 24). In terms of nationality, the *Guidelines* asserts that: "[a]lthough persecution on the grounds of nationality (as with race) is not specific to women or men, in many instances the nature of the persecution

takes a gender-specific form, most commonly that of sexual violence directed against women and girls" (article 27). In other words, the *Guidelines* mentions how race- and nationality-based violence may be gender-*specific*, but not potentially simultaneously gender-*related* or -based. When it comes to the other nexuses, in comparison, the question of how gender may "inform" religious or political identities or constitute a PSG is discussed for each ensuing ground respectively, whereas the nature of the categories of race and nationality are treated more like separate, confined unities, outside that of gender. Race and nationality may, in other words, affect what the violence "looks like," but no attempt is made to question how gender may be relevant in understanding race or nationality as causes of persecution. That is, the document does not discuss how race, ethnicity and gender may *intersect* and form unique identities and experiences – which in turn may be ascribed with special social and symbolic significance in a given society, and become the basis for persecution. To take one example, it has been noted that in the case of the Mexico *femicides* –or the widespread abduction, torture and murder of Mexican women along the Mexican border - the victims fit a certain profile: they are predominately young, dark-skinned females (Livingston, 2004: 59). However, they are apparently not attacked *only* because they have darker skin, and not *only* because they are female, but because they are *women with darker skin*, in a society where this is attributed particular meaning and status (Livingston, 2004: 59). Violence occurring during an ethnic conflict can, furthermore, be both racialized and gendered insofar as both ethnic and male superiority is established simultaneously through the use of violence. Notions of nationhood (and race) may be inherently intertwined with concepts of masculinity and femininity and ideas of male dominance, in such a way that aspects of gender and

nationality may be inseparable in deciding on the cause of persecution. It can be argued that the categories of race and nationality are left somewhat un-problematized in the *Guidelines*, leaving the impression that they are somehow separable from gender identity. Gender may, in the *Guidelines*, "dictate or influence" persecution in its own right, but is not thought to intersect and inter-relate with other identity markers or aspects in producing experiences of persecution.

In terms of religion as a ground for persecution, the guidelines note that different roles may be assigned to men and women on religious grounds, and that *women* who fail to fulfill or abide by these roles may experience persecution as a result (article 25, quoted above). In other words, questions of how religion may intersect with gender *via* norms about other identity aspects, such as sexuality, are not discussed. How norms of masculinity and femininity are deeply intertwined with norms of sexuality and vice versa, and how such interconnected notions may lead to the (gendered) persecution of lesbians and homosexual men, are concerns that are left out of the *Guidelines*. The *Guidelines* specifies that it in the case of women, is sufficient that the person is *perceived* to be holding unacceptable religious beliefs, notwithstanding her actual opinions on the matter.

The *Guidelines* acknowledges that the boundaries between the grounds of religion and political opinion can become blurred: "[w]hile religious tenets require certain kinds of behaviour from a woman, contrary behaviour may be perceived as evidence of an unacceptable political opinion" (article 6). "This is particularly true," states the *Guidelines*, "in societies where there is little separation between religious and State institutions, laws and doctrines" (article 26). The *Guidelines* operates with a fairly broad understanding of the "political," in "there is not as such an inherently political or […]

non-political activity;" rather, "the context of the case should determine its nature" (article 32). The term "political opinion" should furthermore be "understood in the broad sense, to incorporate any opinion on any matter in which the machinery of State, government, society, or policy may be engaged" (article 32). Non-conformist behavior may also fall under the scope of this ground, in so far as such behavior may be taken as evidence of the person holding a political opinion. In other words, it is "the context of the case should determine its nature [as political]," and the *Guidelines* specifies that opinions on women's rights and gender roles may be understood as such (article 32). Such open definitions of the political create room for acts previously understood as private to be reframed as political, which has important implications for gender-based cases. By emphasizing context and not only State but also society in outlining the political, the *Guidelines* opens for gender-based claims to be framed as political.

However, there is still a certain notion of the "political" as stable, and as inherently gendered, at play in the *Guidelines*. The *Guidelines* state that "[t]he image of a political refugee as someone who is fleeing persecution for his or her direct involvement in political activity does not always correspond to the reality of the experiences of women in some societies" (article 33). As discussed, it is interesting to note the use of gender-words in this sentence. From the more gender-neutral inclusion of both "his or her involvement," the *Guidelines* turns to "the experiences of *women* in some societies." The text chooses to state that it is women who fall without a narrow understanding of the political, rather than *people* more generally. The effect of this use of gender-words is arguably that the relationship of men to the political is cast as typically more direct, in that men are political in the original, "simple" sense of the word, through their "direct

involvement in political activity," while women's political involvement is more indirect. Any consideration of other identity markers that may affect the nature of one's involvement in the political *across* the groups of men and women – such as class, race, ethnicity, or sexual orientation, for example – are effectively excluded from the sentence, because it specifically asserts that it is "women" who deviate from the traditional understanding of the political.

In further describing what political activity might look like, then, for women, the *Guidelines* focuses on how women "are less likely than their male counterparts to engage in high profile political activity and are more often involved in 'low level' political activities that reflect dominant gender roles," and "frequently attributed with political opinions of their family or male relatives" (article 33). These statements seem to confirm the notion that political activity is gendered, and that women relate to the refugee standing largely by being mis-interpreted as harboring political opinions, or through engaging in "low-level" activities of a more private nature, such as nursing sick rebels. This gendered understanding of the political provides an example of how women, and women's activities and opinions, are privatized. There is a silence within the *Guidelines* when it comes to the ways that women who work to change the society they live in, who do participate in politics, and who actively state their (religious, feminist, political) opinions, may experience gender-specific forms of persecution.

This omission may solidify notions that women largely relate to the refugee status through persecution of social and cultural art, rather than political persecution in its "original" sense. It is through their roles as community- or family members that they are persecuted, as they are involved in nursing the males "properly" involved in political

action; or because they are attributed with the actual political opinions of their male family members. Or they are seen as political only insofar as they fail to conform to the norms ascribed to their gender. Interestingly, Palmary (2008) describes the existence of the notion that "violence against women is a form of violence different to the violence of war, and is rather embedded in culture […]" (128). The nature of violence that affects women is seen as different from the violence experienced by men, and it is primarily because women violate the cultural norms that establish their "proper" place and roles in society they are persecuted, not because they are targeted for opinions and behaviors that in their "truest" forms are political.

Lastly, the *Guidelines* does not discuss the question of whether violence against women may in itself be understood as inherently political acts. Structural violence aimed at women who do not conform to social norms may be understood as a response to a perceived threat to male dominance and power. The fact that violence against women is a global phenomenon points to ways that such violence is structured. Within such a framework, writes Edwards, acts of violence against women can be understood as sending a particular political message: "stay in your place or be afraid" (Edwards, 2011: 318). In the U.K. context, Querton (2012) notes that "to be recognised as refugees […], women must often demonstrate that they fear persecution on account of their membership of a particular social group (PSG) because the proposition that any violence against women is political has not yet, as such, found enough support" (4).

As noted by Querton (2012) and others (Edwards, 2010: 28; Neacsu, 2003: 194), PSG is of particular significance for gender-based claims. This "make[s] a proper understanding of this term of paramount importance" (article 28). The PSG category is furthermore

arguably the most ambiguous of the five nexuses, and it is the ground that allows claims where gender is the sole basis for persecution. The *Guidelines* define a PSG as:

> a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights (article 29).

This definition combines two distinct approaches to the PSG category, the "protected characteristics" and the "social perception" approach (Chan: 181). The first asks whether members of the proposed social group possess some innate, unchangeable or immutable characteristic, whereas the social perception approach asks whether the members of the group are *perceived* as a group in society (Chan, 2011: 181). The UNHCR definition encompasses both approaches, making the PSG ground broad in scope.

However, the PSG category is limited in that "the interpretation of this ground cannot render the other four Convention grounds superfluous" (article 28). In other words, categories such as race, nationality, and religion must fall outside of the concept of PSG as properly understood. "Sex," on the other hand "can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently than men" (Article 30). There is a certain tension between these two decisions. Whether there is some innate difference that makes a category based on sex or gender fall within the ambit of a particular social group, whereas one based on race or nationality does not, is left unaddressed. The *Guidelines* offers little justification why it reaches this conclusion at all, merely stating that "in some cases, the emphasis given to the social group ground has meant that other applicable grounds have been over-looked" and that *therefore*, "the

interpretation given to this ground cannot render the other four Convention grounds superfluous" (article 28).

Again, it is interesting to note that the word used to describe the PSG here is "sex," not "gender." This choice might mirror an inherent conflation of the two terms within the document. Alternatively, the biological "sex" may consciously be used to invoke the physical aspects of gender as opposed to relational roles and identities. When the *Guidelines* jumps from "sex" to "women" in this way, it might be reasonable to think of "women" here understood in the more biological sense. The emphasis on biological traits might reflect that they are more easily defendable as "innate and immutable" characteristics, which the claimant is unable to change. When it comes to gender-related claims of persecution based on (resisting) proscribed roles and responsibilities, it might be more complicated to establish that the claimant's refusal to conform is "fundamental to identity, conscience or the exercise of one's human rights." This problematic can be illustrated by the case of *Fatin v. I.N.S.* in which an Iranian woman claimed a fear of persecution partly based on her political opinions as a feminist. Her case was rejected, in part because she failed to establish that her "opinion on women's rights was not sufficiently fundamental to her personal beliefs so as to cause [her] to continue her advocacy in Iran," which in turn would mean that she would not raise herself to the attention of Iranian authorities (Chan, 2011: 182). She was for instance asked whether she would agree, after all, to wear the veil upon having to return to Iran.

There are, however, certain differences between a PSG based on sex, and the grounds of race or nationality as freestanding nexuses. One example of this is that the "name" of the

category would not be "gender" but "women." It is noteworthy that the *Guidelines* does not argue or mention that "men" can constitute a PSG. If case law should frequently define "women" as a PSG that may be the ground of persecution, while "men" is not treated in the same manner, this may have the effect of victimizing women, treating the gender-identity of "women" as a uniform category, identifiable by the members' inherent status as oppressed. Men are not grouped together in this way, but rather diversely constructed as political or religious actors, or as persecuted because of their race or nationality. Men are, in other words, primarily recognized as persons or individuals, not as members of a uniform, subordinate group. Naming the category "women" and not "gender" may also reiterate an image that it is men who are the perpetrators (actors), while women are the victims (acted-upon). In addition to excluding cases where men may in fact be victims of gender-based persecution, this might furthermore have the effect of silencing the differences in power and status *within* the group of "women" in a given society. The fact that gender is not the only defining characteristic in women's lives, but rather intersects with a multitude of other identity-markers, such as class or race, is downplayed within this construction of women as a stable ground. This ignores the ways that women may also be the perpetrators of persecution against other women.

In this section I have looked closer at how the *Guidelines* constructs the relationships between gender and the various elements of the refugee definition. I have argued that this relationship is based on additive principles, where each of the categories is seen as enclosed unites that the law may address and analyze separately and as clearly distinct from each other. Sexuality and gender are treated separately, for instance, and not as inherently intertwined concepts. The absence of any discussion of how other aspects of

identity, such as race, nationality, sexuality, and class may intersect with gender in forming experiences of persecution, leads to the construction of a legal subject that is seen as stable, fixed and separate from her culture, history, and community. The group of "women" is arguably pitted against that of "men," disregarding how individuals within such group may partake in the persecution of each other, for instance on the basis of sexuality or race. The question of how gender may relate to persecution is problematic within the *Guidelines* because the document fails to separate between gender-specific and gender-related persecution. Gender may be a ground that persecution emerges from in its own right – as such recognized within law as constituting a PSG – but in terms of race and nationality, gender can, within the *Guidelines*, only influence the form of the violence. This reflects an additive approach to identity categories, in which the *Guidelines* struggles to articulate the ways that gender may intersect with such categories, which, similarly to gender, are constructed as enclosed, and separate grounds.

4.D. Concluding Remarks

In reading the *Guidelines* closely to uncover the relationship between gender and the refugee concept, I have broken the refugee definition down to its smaller elements, and investigated both how gender is constructed in relation to the persecution concept, and each of the five enumerated grounds that make up the nexus requirement. I argue that gender is treated as a ground that may influence, or dictate, violence, while existing as a confined entity, clearly separate from the other elements of the refugee definition. I assert, however, that the *Guidelines* contain a performative contradiction, in that the language implemented to describe and define gender is unable to construct gender in this way. Rather, the meaning and content of gender-related terms are conflated, altered, and

confused throughout the text. Clear definitions of and distinctions between concepts break down throughout the publication. Thus, I assert that the struggle within the *Guidelines* to pin down the words with which to express gender betrays the way that gender is in fact not stable, confined and easily recognized as separable from other identity markers. Rather, feminist insight argues that gender is context-bound and flexible, understood and experienced in a myriad of ways. Olivius, for instance, writes that "gender is a social construction emerging from particular geographic and historical contexts, and as such, fluid and contingent rather than signifying two stable categories of subjects" (2010: 4-5). In her work, gender is defined as the "stories that have been told about 'men' and 'women'" (Olivius, 5). Judith Butler, on her part, argues that there is not one essential female identity that can be represented, whether within law or elsewhere. She holds that gender identity is *performative*; it is posited through our actions, rather than something we begin with as an essential ground for identity. Or in her words: "what we take to be an internal essense of gender is manufactured trough a sustained set of acts, posited through the gendered stylization of the body" (1999: xv). This thesis argues that the *Guidelines* offers a definition of gender identity that lacks and understanding of gender as intersectional with other aspects of identity, and as inherently bound up in a multitude of meanings, contexts, and symbolisms.

These points made in the analysis section have relevance for what it means for an individual to be "read" by the law; how one makes a claim that are recognizable within legal contexts. As the analysis and literature review has illustrated, the question of appearing before the law can be recast as a question of language, and the terms with which we may "speak" ourselves to the law, and how, in turn, those terms are interpreted.

As we have seen, this is furthermore a particularly problematic process for women, because they have to assert their claims within a male-biased interpretive framework, which lacks the words to express gender-related experiences. The *Guidelines* too struggles to pin down terms that describes gender in relation to law and the refugee status. In the following chapter, then, I turn to this question of what interpretations of gender as a category means for how women are read by the law "on the ground." In the concluding discussion, I therefore investigate trends within case law in order to better understand the implications of the arguments asserted in the analysis. I argue that the interpretive nature of (refugee) law both posits barriers form women claimants, in producing case law that is unpredictable and irregular, while also creating opportunities for claimants and advocates to discursively challenge and develop notions of gender within law. Drawing on the notion of human rights as narrative constructions, I argue that an investigation of the discourse of human rights institutions is of crucial importance in order to promote equality within human rights law.

Chapter Five - Conclusion

Gendered Claims to Asylum: Issues and Possibilities

In doing a close reading of the UNHCR *Gender Guidelines*, I have argued that the publication contains a performative contradiction. On one hand I assert that gender is treated as an enclosed and separate category that exists outside of other aspects of identity, particularly in the case of race and nationality. As such, the *Guidelines* lacks a sense of intersectionality in its treatment of gender, as gender is not analyzed at the places where it intersects with other aspects of identity, such as sexuality, race, or nationality. This leads to the construction of a human rights subject whose identity is fixed and stable. The contradiction contained in the *Guidelines* arises from the way that the language the document itself uses to describe gender betrays the way that gender is a complex and interrelated part of identity, bound up in socially and culturally specific meanings. That is, while the *Guidelines* treats gender as stable, fixed, and enclosed, the text is unable to pin down a language, or a vocabulary, that expresses gender in such a way. Rather, the way that words and their meanings are conflated throughout the text reveals how gender is a complex concept, encompassing a variety of lived experiences and culturally and temporally specific meanings.

The argument formulated in the previous chapter points, however, to a question of what this performative contradiction within the *Guidelines* means for asylum seekers in particular – and of the significance of language for those studying human rights in general. Thus, the discussion conducted in this concluding chapter is devoted to a question about the relationship between language on the one hand, and the field of human rights, and the various lived experiences of people "on the ground," on the other. In the

following, I look closer at what it means to make a claim to the refugee status in terms of gender – how people may articulate their claims in order to make their gendered experiences and identities intelligible to law – in light of guidelines and publications that themselves conflates various lived experiences and meanings.

Firstly, investigating case law in which gender is a component, I demonstrate the struggle of taking up a place within refugee law in terms of gender. Despite the existence of UN guidelines and scholarly literature on how to conduct gender sensitive readings of the refugee Convention, inconsistency, irregularity and a sense of arbitrariness persists within case law, as gender is read and interpreted differently from court to court. That is, the ambiguity of the gender concept and related terms create much leeway for states, courts, and judges to apply differing and arbitrary readings of the law. The considerable room that a ambiguous gender concept leaves for interpretation is significant, I argue, because in order to be "heard" by the law, women claimants in particular have to navigate different "scripts" through which to narrate their experiences of persecution, depending on the various courts' understanding of gender. I thus argue that those fleeing gender-related persecution lack a place in a double sense; both in terms of having left one's country, and in lacking a grammatical "space" within refugee law.

Secondly, and despite the challenges outlined above, I also argue that the very irregularity with which courts apply and interpret refugee guidelines and law in fact create room for resistance. That is, precisely because human rights and law are disciplines where language, narration, definition, and interpretation are central components, individual cases represent a space, or a moment, in which people may

challenge and develop understandings of gender within refugee law. Claimants and advocates have some room in compelling courts to recognize intersectionality, for instance, when it is not contained within human rights guidelines and instruments.

Finally, drawing on the notion that power operates through language and interpretation, I outline some practical implications for those seeking to advance gender equality within international refugee law. Using the insight of Slaughter (1997) and Shaffer and Smith (2004) that human rights can be productively understood in terms of narration and narrative voices, I argue that studies of language and discourse are crucial in uncovering the ability of different social groups to narrate their experiences of persecution to and within the law. When understanding human rights in terms of narratives and voices, having a claim to the law or a voice as a legal subject means that one is able to narrate one's experiences and identity in ways that are recognizable in and to law. Understanding the vocabulary available to refugees is therefore crucial in order to work for just recognition before the law. I ultimately argue that the solution to creating a more gender-inclusive refugee law does not lie in merely changing the words, terms, or language of refugee laws and instruments, because language may always be interpreted in ways that privileges certain perspectives and excludes others. Rather, the question of gender equality within refugee protection is multi-faceted and complex, and requires cross-disciplinary approach that simultaneously analyzes, challenges, and develops language used to express gender; reads for the power embedded in the process of interpreting the language of laws; works for greater consistency, transparency, and accountability throughout this process; and strives for more equitable representation within institutions,

in terms of a greater gender-balance within human rights organizations and domestic juridical structures.

5.A. Case Law

In doing a close reading of the *Guidelines* I have outlined the ways that gender is understood and constructed as a concept. In this section, I take a closer look at the more practical implications of how the concept of gender is interpreted, and at the question of what it means to make a claim to the law in terms of gender. I focus, first, on cases in which gender has been relevant in formulating a particular social group (PSG), in order to address how gender is constituted in and through the PSG category. I choose to look at the relationship between gender and the PSG concept because gender arguably comes closest to constituting a separate nexus when it is formulated as a basis for a particular social group, and as such, it is the PSG ground that provides the framework for cases where gender is framed as the sole ground for persecution. The PSG ground is increasingly becoming the default way to treat women claimants (Edwards, 2010: 28), and because a large part of gender-related claims are likely to be treated in relation to the PSG category, it is particularly important to look how this relation is understood within case law. I also address trends in decision-making in cases of domestic abuse and female genital cutting, in order to demonstrate that whether violence against women is interpreted as a human rights violation depends on gendered and racialized readings of the law.

In order to look at some trends in decision making invoking the particular social group (PSG) ground, I have chosen the cases of "Immigration Appeal Tribunal and another, exparte Shah; Islam and others v. Secretary of State for the Home Department" (hereafter

Shah and Islam), and "*In Re R-A*.-" (hereafter *R-A*-), as these have been ground-breaking cases in the U.K. and U.S. context respectively. In *Shah and Islam*, the UK House of Lords granted asylum in 1999 to two Pakistani women fleeing severe domestic abuse were granted asylum in the U.K., based on their membership in a PSG consisting of "Pakistani women." In the case of *R-A-,* Rodi Alvarado fought for asylum in the U.S. over the course of many years, after fleeing from a husband who beat and raped her on a regular basis. Ultimately, Alvarado "received asylum in a non-precedential decision based on her membership in the particular social group of 'married women in Guatemala who are unable to leave the relationship'" (Lobo: 2013: 376). In accepting the broad category of "Pakistani women" as constituting a PSG, *Shah and Islam* set precedent in allowing for the broad category of "women" in a society to be recognized as a PSG, is in line with the reasoning of the UNHCR *Guidelines*. Several similar cases have been approved in the time since (Lobo, 2013: 374). This broad approach to gender and the PSG nexus stands in contrast to the more narrow "gender-plus" approach, in which a PSG should be defined by gender *plus* some other limiting characteristics, "such as beliefs, relationships to the persecutor, or attempted escape" (Fletcher, 2006: 118). The PSG articulated in the U.S. case of *R-A-* , for example, reads as "married women in Guatemala who are unable to leave the relationship." When it comes to U.S. case law generally, courts and decision-makers have been hesitant to articulate social groups based on "women" in a given society without any additional qualifiers (Lobo, 2013: 368), making the "gender-plus" approach a strategy more likely to succeed in U.S. courts (Fletcher, 2006: 118). Depending on the court in which a claimant seeks asylum, then, the

claimant must articulate her gender identity, and the way that her gender was a contributing reason for the persecution, in different ways in order to be successful.

This difference in terms of how gender is thought to constitute a PSG has implications for women claimants, because they run into different challenges depending on the approach taken in each specific court. The approach of accepting "women" in a society as a PSG may be beneficial to women claimants in that it highlights the ways violence against women tends to be the structural and interconnected with other forms of harm, which facilitates a more holistic consideration of gender-related and gender-specific claims (Lobo, 2013: 404). However, this approach has also been interpreted in ways that places additional burden upon women claimants. Lobo (2013) describes a development where courts do not merely accept that the claimant establishes her own fear of persecution in the context of inadequate state protection, but also require her to establish that the same is true for the larger social group of "women" in a specific society, whom she claims her persecution is grounded in (373). A woman must, in other words, both establish discrimination against herself *and* against the social group of women in her society, whereas "applicants claiming racial or religious persecution (for instance) need only show an individualized well-founded fear of persecution, not harm to their entire group" (Lobo, 2013: 373). The interpretation of "women" as a PSG, then, may lead courts to subject women to a double burden of proof because they are required to demonstrate *two* failures of state protection, both in protecting her and the women in her society at large (2013: 373). In the 2003 case of *Secretary of State for the Home Department v. ZH*, for example, an Iranian woman fled to the U.K. after having suffered domestic violence, and even though the court did find that Iranian women are discriminated against "in their

personal status" (para. 75), they rejected that "Iranian women" were persecuted as a group, as they were treated better than the group of "Pakistani women" relevant in the *Shah and Islam* case (para. 79-80). This demonstrates that even where case law and practice is in agreement with the general provisions of the *Guidelines*, the application of "women" as a PSG could lead to women being read by the law primarily as group members, whose refugee status is dependent on the situation of her social group, rather than her individual situation.

As opposed to framing "women" as a PSG, a gender-plus approach rather singles out one specific manifestation of women's subordination, and treats it in isolation. While this approach may read women more like individuals than group members, it may also negate the structural and interconnected nature of gendered violence, as applicants are forced to articulate their experiences on a case-by-case basis (Lobo, 2013: 378). Because the structural nature of violence against women is lost when a "new" and specific PSG is formulated in each case, individuals may struggle to have their experiences recognized as persecution and as human rights violations. In the words of Lobo: "[s]ince adjudicators are less likely to grant asylum claims based on isolated harms, non-recognition of women as a particular social group inhibits the Convention's mandate to protect victims of gender persecution" (2013: 368). The articulation of a new PSG in each case furthermore leaves little room for any stable guidelines outlining the concrete definition of what an accepted PSG looks like. In analyzing of over 206 outcomes in domestic violence cases in the U.S., Blaine Bookey finds "contradictory and arbitrary outcomes" in how the PSG concept is interpreted and applied, despite a development towards somewhat greater consistency (2013: 147). The study illustrates this point by comparing two seemingly

similar domestic violence cases, in which "judges agreed that the women testified credibly, that the harm they suffered rose to the level of persecution, and that their governments had failed to protect them" (Bookey, 2013: 108). Yet, in one case asylum was granted on the grounds of membership in the particular social group of "Salvadorian women in domestic relationships who are unable to leave," (Bookey, 2013: 108) whereas courts decided in the second case that "a group defined by gender, nationality, and status in a domestic relationship is not cognizable under the law" (108). Based on this irregularity, Bookey argues that "the absence of binding norms remains a major impediment to fair and consistent outcomes for women who fear return to countries where they confront unimaginable harms, or worse, death" (2013: 110).

When it comes to violence against women as human rights violation, further inconsistency exists, depending on different courts' interpretation of gender and race. In comparing 645 Canadian asylum cases involving domestic violence, forced sterilization, and female genital cutting (FGC), Efrat Arbel (2013) finds that adjudicators are consistent in identifying FGC and forced sterilization as rights violations, and the women subjected to such practices as a victim of a persecutory practice (2013: 731-732). On the other hand, domestic abuse is seldom seen as rights violations in itself, and claimants in such cases rarely understood as a victims of human rights violations. "That is," argues Arbel, "adjudicators generally recognized domestic violence claimants as refugees not because they were victims of persecutory *practices* but because they were victims of persecutory *cultures*," (2013: 732). In other words, they are rather seen as victims of their own, discriminatory cultures, rather than structural human rights abuse. Arbel further hypothesizes that this both stems from and reflects what he calls "a

defensive anxiety" (2013: 732), in that practices such as FGC and forced sterilization are seen as "exotic" in the Canadian context – and therefore easier to acknowledge as human rights violations. Domestic violence, on the other hand, is common in Canada and therefore a more familiar form of violence, which makes it more problematic to label it as a rights violation, as that would be synonymous with acknowledging that human rights abuses also take place in the Canadian context. Domestic violence might in other words be more easily accepted as manifestations of the systematic subordination of women when it happens "over there," and therefore because of some cultural difference. This entails specific notions about gender, culture, and about what it means to be a "woman" in specific contexts. The approach taken in Canadian courts, argues Arbel, constructs non-western culture "as a place where domestic violence occurs because of the so-called 'inherent' vulnerability of the women located in that cultural milieu" (732). Thus, women fleeing from FGC may successfully frame their experiences as human rights violations, whereas women suffering domestic abuse are more likely to succeed if formulating their claims in terms of their inherent vulnerability and cultural subordination. This, in turn, "erects legal and conceptual barriers for women who cannot authentically narrate their experience through the script of cultural vulnerability or who cannot present as 'victims of culture'" (729).

Similarly to the point made by Arbel, Fletcher (2006) argues that adjudicators in the U.S. context hesitate to grant refugee status in cases where the gender-related violence is similar to forms of violence that are familiar. Or put another way, because of "racial and gender stereotypes," adjudicators more readily accept gender-related claims based on practices that appear "foreign" or non-Western (Fletcher, 2006: 118), such as FGC or

forced sterilization. There might be a parallel here to the point made earlier in this paper, that scholars find that adjudicators are more prone to accept arguments based on women's physical vulnerability – as in the case of FGC – than claims based on their active resistance to prescribed roles and restraints (Fitzpatrick, 1997: 44).

What this overview of some trends and tendencies within case law illustrates, then, is the difficulties women claimants face in articulating their experiences of gender-based persecution within refugee law. The lack of a coherent and binding norms mean that outcomes are inconsistent, and heavily reliant on individual courts and judges. Women claimants, in particular, have to manage different scripts, or narratives, in asserting their claims – they have to represent themselves and their experiences in and through specific terms and vocabularies – depending on the context they apply within. Such legal and conceptual barriers imply that individuals fleeing from gender-related persecution can be seen as lacking a place in a dual sense; both in having to leave their home country, and in lacking a grammatical space within law, not having a vocabulary with and through which to narrate their experiences and identities in a way that is recognized by law. The fact that approaches to, and interpretations of, gender differ from nation to nation, demonstrates the power each state has to interpret the relationship between gender and the refugee standing. This point demonstrates the continued significance of the first exigency outlined in the introduction, as individual states and courts retain autonomy in applying specific interpretation of international law.

However, this discrepancy between refugee instruments and law, on the one hand, and case law on the other, also demonstrates that there is considerable room in individual

cases to challenge dominant interpretations of gender within refugee law. Precisely because the gender concept is ambiguous, claimants and advocates may construct new and progressive formulations of the relationship between gender and the refugee definition. Additionally, the question of how gender relates to the refugee concept is part of an ongoing discussion, and scholars and practitioners continue to monitor and challenge decision made in court. This means that individuals have room to contribute to a more nuanced understanding of gender within refugee law – one that recognized intersectionality, for instance.

5.B. Concluding Remarks: Human Rights as Narratives

In the ensuing discussion, I build on this argument by looking at the benefits of viewing human rights in terms of narratives and narrative voices. Throughout this paper, focus has been on language as a tool of power and the ways that language and discourse has historically worked to exclude certain social groups from the protection of human rights instruments. I have, for instance, reviewed literature arguing that the exclusion of women's experiences stems from the ways the language of the refugee Convention has been interpreted from a male (and heteronormative) perspective. I have analyzed UNHCR's own guidelines on how to conduct gender-inclusive readings of the law, arguing that even the *Guidelines* falters in establishing the words to accurately represent and express gender-experiences and identities, and ultimately treats gender as a stable, or fixed ground. Overviewing case law has worked to demonstrate the challenges facing those asserting gender-related claims to asylum, in which the lack of clarity around concepts such as "gender" and "particular social group" leaves much leeway for courts to apply limited understandings of gender-related violence and persecution. What this last

section does, then, is to turn to the notion that human rights can be recast as personal narration and narrative voices; that "human rights function as narrative constructions" (Slaughter, 1997: 407). I assert that the focus on voice and narration within human rights law points to issues of representation, that is, of who decides and delineates what vocabulary is recognized within law. Substituting one gender-word for another is not likely to have a great impact as long as the people reading and interpreting the terms remain the same. Women's rights activists and scholars of international studies should, therefore, take a multifaceted, cross-disciplinary approach, in order to work for a more equitable representation of women and minorities within human rights instruments.

As I have argued throughout this thesis, language and the personal narrative have a central place within human rights law. After all, in order to access the refugee status and be recognized by the law, an individual must articulate her experiences of persecution as they are shaped by her identity and circumstances. Shaffer and Smith argue that the life narrative is not only a key component within law, but has become "one of the most potent vehicles" for advancing claims within the human rights regime in general (2004: 1). The norms, instruments, and discourses of human rights, argue Shaffer and Smith, are indeed dependent upon an "international commitment to narratability" (3); human rights law is committed "to the voice, as the tool to guarantee recourse to individual narration," in the words of Slaughter (1997: 429). The voice, the ability to articulate and narrate one's experiences and identity, becomes the core of human rights protection – a system which is activated when individuals "[tell] their stories to human rights advocates working for NGOs, [testify] before national inquiries and official or quasi-official tribunals, and [present] their stories to the court of world opinion" (Shaffer and Smith, 2004: 3). It is

such testimony, such personal narratives, that "brings into play, implicitly or explicitly, a rights claim" (Shaffer and Smith, 2004: 3). Thus, Slaughter asserts the human rights regime is committed to protecting the voice of a presumed self-narrating subject and its ability to articulate narratives of identity (1997).

In this sense, human rights violations can be understood as attacks on the human voice – as attempts to silence the individual. Slaughter gives the example of torture, which can be recast as an attempt to silence, or distort, the voice of the victim, in forcing her to admit to lies, while taking away her ability to coherently narrate her story or identity. By forcing the tortured to speak, and to make irrational statements, the torture also becomes a language in itself, in that the act "produces a voice that makes claims about the power of the torturer and the torturing state" (Slaughter, 1997: 427). The colonization project of Western states can similarly be understood in terms of attempting to destroy the voice of a people, and the socio-cultural context that enables their narratives. People were deprived of the right to articulate the story about their own identity and history, as it was replaced by the voice and perspective of the colonizing hegemon: "[t]he destruction of the voice that finds itself and speaks itself, the voice that offers the counter-narrative of the 'Third World' subject, is precisely the homogenizing project of colonialism" (Slaughter, 1997: 419).

The benefits of a human rights concept that focuses on the "the voice of the juridical subject and the possibility of narration," argues Slaughter, is that it "allows for a conception of human rights that does not rely upon some essential, inherent human quality" (1997: 412). Rather, the focus on narration allows for a more flexible and fluid

notion of human rights, in which the terms of narration are temporally and culturally specific and adaptable to the changing contexts of different lived experiences. Thus, argues Slaughter, "as conceptions of the speaking subject change, whether over time or across cultures, so too must conceptions of human rights that guarantee the subject's ability to narrate herself" (1997: 412). Put differently, an inquiry into various conceptions of the speaking subject and her conditions is necessary in order to judge, or evaluate, human rights responses implemented to protect her voice. In Slaughter's words, "as we better understand what a subject needs to be able to tell her story, we can evaluate entitlements and prohibitions for their effectiveness in guaranteeing the ability to self-narrate" (1997: 430).

Along the lines of such a project that investigates "what the subject needs to tell her story," I have argued that an inquiry into the discourse of human right laws, and the terms with which refugees may articulate gender-related claims, is of major importance in working for a more equitable refugee protection regime. The analysis conducted in this thesis seeks to contribute to such a discussion of the terms and conditions with which one may narrate experiences of persecution in terms of gender, and have one's claim be recognized by law. I have argued that refugees fleeing gender-related persecution find themselves in a situation of lacking a place in a double sense, both in having fled their home country, and in lacking a grammatical space within refugee law where gender is recognized in a coherent and predictable way. Grounding my research in literature on the ways language and interpretation has worked to exclude women's experiences from the protection of refugee law, I have argued that also the UNHCR *Guidelines* fails to provide an accurate vocabulary with which to articulate gender within law. Using case law, I have

illustrated that women claimants in particular have to navigate different "scripts" – that is, different vocabularies with and through which they cast and represent their identities and experiences in terms of gender. This because courts recognize certain narratives while rejecting others, depending on how concepts such as gender, race, and PSGs are constructed and interpreted. As case law illustrates, certain courts and judges enable the narrative of the victimized woman, for instance, oppressed by her culture and inherent weakness, while others recognize the articulation of violence against women as a structural form of human rights violation.

Based on the inquiry conducted in this thesis, then, I argue that in order to advance gender equality within refugee law, it is important to take a broad, cross-disciplinary approach. That is, barriers to the equal inclusion and protection of different social groups are rooted in various fields such as law, linguistics, politics, and human rights theory, amongst others. A comprehensive approach should focus on the conditions for people to narrate their experiences in terms of gender, and how such narratives are received within law. Firstly, analyzing the discourse and language of law and human rights institutions should remain an important practice for feminists and scholars of international relations. Continued attention should be paid to the ways international rights discourse enables and limits narratives of gendered persecution. Secondly, the close reading of the *Guidelines* has demonstrated that in reading internationally applicable definitions, laws, and recommendations, states and courts retain freedom and power in interpreting these formulations. This points back to the theoretical fundament of close reading, that language and reading are inherently social, and power-laden, activities. Given the impossibility of pinning down the language of gender to mean one thing within law, and

the room always left to interpretation, the position taken in this thesis is that it is not sufficient to substitute existing language with other terms and words in order to rectify the exclusion of women's point of view. Rather, scholars and practitioners should work for systematic ways to read for power and bias in the implementation of law, and to achieve transparency and accountability in this process, in order to develop a more coherent and equitable refugee law. Enabling practitioners to better read, and therefore challenge, how gender is constructed in law, would also allow them to formulate arguments that may expand and contest dominant understandings of gender. This would in turn make law more adaptable to the particularity and context-bound nature of gender-related cases. Thirdly, reframing of human rights as narratives compels us to recognize not only the words available tell such narratives, but also *who* is able to interpret and judge such narratives. In the words of Slaughter, "[t]he right to narration is not merely the right to tell one's story, it is the right to control representation" (430). Considering the power embedded in reading and interpreting language, I therefore argue that a holistic approach – that is, an approach that takes a cross-sisciplinary blabla, eller, that considers the ways exclusion of gender/women happen on multiple levels, in and through multiple interconnected fileds – also address the unequal representation of women within legal and human rights institutions. It is important to recognize the considerable power embedded in holding such positions, and steps should be taken in achieving a more equitable gender balance, both within human rights institutions, and within domestic legal structures.

What this thesis demonstrates is that inquiry into legal language is inherently tied to questions of interpretation and of who interprets, as well as about the institutional structure such interpretation happens within. This implies that the two different feminist

approaches to how we can include gender within refugee law – via gender-sensitive interpretation versus textual modification of the refugee definition – may not be as different as they might appear. What both of the sides teaches us is that the act of *reading* law, in terms of interpretation and application, should be watched closely, in order to uncover the ways such readings are in fact engaging in discursive constructions of categories such as gender. The case of international refugee law points our attention to the importance of having a conversation not only about *how* a text might be read, but also about *who* is able to interpret, and how the acts of reading or interpretation can never be "divorced" from the interpreter and the context he or she is acting within. For scholars interested in gender equality and international law, this demonstrates that we should not only ask the question of whether or how to formally include women within the scope of policy and law – we should also engage in debate on what such inclusion should look like, what it means for women to participate or be included on equal footing with men, and, most importantly, in what language and terms such inclusion might appear.

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