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Gender and the Boundaries of International Refugee Law: Beyond the Category of ‘Gender-Related Asylum Claims’

1. Introduction

There are growing calls in the field of international refugee law to adopt a gender-sensitive interpretation of the refugee definition contained in the United Nations Refugee Convention.¹ A refugee is defined in the Refugee Convention as a person who “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 nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country”.² However, there has been no authoritative international adjudication on the source and scope of a gender-sensitive interpretation because the jurisdiction of the International Court of Justice to determine any dispute regarding the interpretation of the Refugee Convention has never been invoked.³ In practice therefore, the act of interpreting the refugee definition has been undertaken by

¹ Executive Committee UN High Commissioner for Refugees (‘ExCom’), General Conclusion No. 73 (XLIV) – 1993 Refugee Protection and Sexual Violence, para. (d) and (j); ExCom General Conclusion on International Protection No. 77 (XLVI) – 1995, para. (g); ExCom General Conclusion on International Protection No. 79 (XLVII) – 1996, para. (o); ExCom General Conclusion on International Protection No. 81 (XLVIII) – 1997, para. (t); ExCom General Conclusion on International Protection No. 87 (L) – 1999, para. (n); Alice Edwards, ‘Transitioning Gender: Feminist Engagement with International Refugee Law and Policy 1950-2010’ (2010) 29 *Refugee Survey Quarterly* 21; Jane Freedman, ‘Mainstreaming Gender in Refugee Protection’ (2010) 23 *Cambridge Review of International Affairs* 589.

² Article 1A(2) Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (‘Refugee Convention’) (hereinafter the ‘refugee definition’).

³ Article 38 Refugee Convention; although regional courts and international human rights monitoring bodies increasingly determine *non-refoulement* cases under their respective treaty provisions and thus play an indirect role in the development of international refugee law, none have the jurisdiction to interpret the Refugee Convention, see María-Teresa Gil-Bazo, ‘Refugee Protection under International Human Rights Law: From Non-Refoulement to Residence and Citizenship’ (2015) 34 *Refugee Survey Quarterly* 11. The Court of Justice of the European Union is the regional court most likely to provide direct guidance on the interpretation of the refugee definition because the definition of a refugee in EU Law is almost identical.

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national administrative⁴ and judicial authorities and has led to inconsistent practice. In this context and with the aim to ensure consistency in gender-sensitive interpretation of the refugee definition, guidelines have been issued by the United Nations High Commissioner for Refugees (‘UNHCR’)⁵ and States alike.⁶

Although the adoption of gender guidelines demonstrates a general acceptance that gender is relevant to the question of who is a refugee, there is evidence that States have failed to adequately undertake the process of gender-sensitive interpretation.⁷ The impact of failing to implement gender guidelines comprehensively is potentially far reaching as existing guidelines include both substantive matters of legal interpretation and procedural concerns. Thus, guidelines serve to explain the role of gender/sex in the interpretation of the elements of the refugee definition, including having a well-founded fear, the concept of persecution and the absence of State protection, encourage the use of same-sex interviews or appeal hearings and enhance the giving of evidence. The failure by national administrative and judicial authorities to follow international or

⁴ Although the UN High Commissioner for Refugees (‘UNHCR’) conducts refugee status determination in some countries, States have the primary responsibility to conduct refugee status determination; UNHCR is the UN agency whose duty it is of supervising the application of the provisions of the Refugee Convention by providing interpretative guidance in accordance with the Statute of the Office of the UNHCR adopted by the UNGA Res 428 (V) (14 December 1950) UN Doc A/RES/428(V) in conjunction with Article 35 Refugee Convention.

⁵ United Nations High Commissioner for Refugees, *Guidelines on International Protection No. 1: 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* (HCR/GIP/02/01, 2002) (‘Gender Guidelines’).

⁶ See for example Immigration and Refugee Board of Canada, Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution 1996; US Guidelines, Office of International Affairs, Immigration and Naturalization Service, regarding adjudicating asylum cases on the basis of gender 26 May 1996; UK Visas and Immigration, Gender Issues in the Asylum Claim 2010.

⁷ Valerie L. Oosterveld, ‘The Canadian Guidelines on Gender-Related Persecution: An Evaluation’ (1996)

⁸ *International Journal of Refugee Law* 569, 582-583; Heaven Crawley and Trine Lester, *Comparative Analysis of Gender-Related Persecution in National Asylum Legislation and Practice in Europe* (EPAU/2004/05, May 2004); Hana Cheikh Ali, Christel Querton and Elodie Soulard, *Gender Related Asylum Claims in Europe: A Comparative Analysis of Law, Policies and Practice focusing on Women in Nine EU Member States* (European Parliament 2012).

national gender guidelines is partly due to their non-binding nature.⁸ In practice, this means that there are limited individual remedies for the resulting lack of gender-sensitive interpretation of the refugee definition.⁹ Furthermore, as policy instruments gender guidelines may be withdrawn at any time. In 2006, for example, the Asylum and Immigration Tribunal in the UK withdrew its Asylum Gender Guidelines. The current Tribunal Guidance Note on Child, Vulnerable Adults and Sensitive Appellants has been criticised because it is limited to procedural issues to ensure a fair hearing for vulnerable appellants and does not address the specific role of gender and sex in the assessment of a well-founded fear of persecution for a Refugee Convention reason.¹⁰ In the current climate of domestic attempts to restrict the refugee definition,¹¹ it is essential to consider whether the law of treaties may provide support for a gender-sensitive interpretation of the refugee definition.

Existing literature has contributed greatly to the field of gender and refugee law by empirically demonstrating how the refugee definition is not interpreted in a manner which takes due account of gender in general and gender-based violence in particular.¹² This failure has led some scholars to suggest that gender should be included as an

⁸ Efrat Arbel, Catherine Dauvergne and Jenni Millbank, 'Introduction: Gender in Refugee Law - from the Margins to the Centre' in Efrat Arbel, Catherine Dauvergne and Jenni Millbank (eds), *Gender in Refugee Law: from the Margins to the Centre* (Routledge 2014) 4.

⁹ Some higher courts have found that the failure to follow their national gender guidelines renders a decision by the lower court unreasonable, see for example *Elezi v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 210.

¹⁰ Christel Querton, “‘I feel like as a woman I’m not welcome’”: A Gender Analysis of UK Asylum Law, Policy and Practice’ (Asylum Aid 2012) 26-27.

¹¹ See for example former U.S. Attorney General Jeff Sessions’ decision in June 2018 to deny asylum claims based on domestic violence on the basis this constituted ‘private violence’, *Matter of A-B-* 27 I&N Dec. 316 (A.G. 2018).

¹² See for example Arbel, Dauvergne and Millbank (n 8); Jane Freedman, *Gendering the International Asylum and Refugee Debate* (2nd edn, Palgrave Macmillan 2015); Heaven Crawley, '[En]gendering International Refugee Protection: Are We There Yet?' in Bruce Burson and David Cantor (eds), *Human Rights and the Refugee Definition: Comparative Legal Practice and Theory* (Brill Nijhoff 2016).

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additional ground in the refugee definition,¹³ and others to claim that ensuring a gender-sensitive interpretation of the terms of the refugee definition is sufficient to address the failure.¹⁴ The approach which propounds a ‘gender-sensitive interpretation’ of the refugee definition is the most favoured in this scholarship,¹⁵ particularly as there is little political interest in renegotiating an international treaty and the subsequent risk of States explicitly narrowing existing terms of the Refugee Convention.¹⁶ However as Arbel, Dauvergne and Millbank noted in 2014, “the work of integrating considerations of gender into the centre of refugee law is incomplete”.¹⁷

Thus, although it is generally accepted that a gender-sensitive approach is required in the interpretation of the Refugee Convention, the claim that there is a duty in international law to take gender into account when interpreting the refugee definition provides an original contribution to this field. The claim is particularly relevant in light of the non-binding nature of existing gender guidelines and scholarship emphasising the discretionary powers of asylum decision-makers.¹⁸ This assertion does not seek to overlook advances in international refugee law brought about by feminist engagements since the 1980s. On the contrary, it aims to entrench existing gender-sensitive

¹³ Mattie L. Stevens, 'Recognizing Gender-Specific Persecution: A Proposal to Add Gender as a Sixth Refugee Category' (1993) 3 *Cornell Journal of Law and Public Policy* 179; Todd Stewart Schenk, 'A Proposal to Improve the Treatment of Women in Asylum Law: Adding a Gender Category to the International Definition of Refugee' (1994) 2 *Indiana Journal of Global Legal Studies* 301; Joanna J. Kallinos, 'Refugee Roulette: A Comparative Analysis of Gender-Related Persecution in Asylum Law' (2016) 6 *DePaul Journal of Women, Gender and the Law* 93; see also discussion in Thomas Spijkerboer, *Gender and Refugee Status* (Ashgate 2000) 164.

¹⁴ Heaven Crawley, 'Gender, Persecution and the Concept of Politics in the Asylum Determination Process' (2000) *Forced Migration Review* 17; Deborah Anker, 'Refugee Law, Gender, and the Human Rights Paradigm' (2002) 15 *Harvard Human Rights Journal* 133, 139.

¹⁵ This approach is also preferred by UNHCR, UNHCR Gender Guidelines, para. 6.

¹⁶ Binder Andrea, 'Gender and the Membership in a Particular Social Group Category of the 1951 Refugee Convention' (2001) 10 *Columbia Journal of Gender and Law* 167, 193.

¹⁷ Arbel, Dauvergne and Millbank (n 8) 14.

¹⁸ Birthe Ankenbrand, 'Refugee Women under German Asylum Law' (2002) 14 *International Journal of Refugee Law* 45, 56; Jane Freedman, 'Women Seeking Asylum: The Politics of Gender in the Asylum Determination Process in France' (2008) 10 *International Feminist Journal of Politics* 154.

approaches into the conventional boundaries of this field. Accordingly, this article seeks to locate the need to ensure a gender-sensitive interpretation of the Refugee Convention in the legal obligation of States in light of the general rule of treaty interpretation.¹⁹ The article suggests that an approach to interpretation focused on the purpose and effectiveness of the Refugee Convention is warranted in international law and addresses some of the main concerns regarding the interpretation of the refugee definition from a feminist perspective. The precise scope and nature of the duty of States to take gender into account is identified through a dynamic approach to the interpretation of the refugee definition in international law by reference to international human rights norms. Overall, this article claims that the conceptualisation of a legal obligation in international law to interpret the refugee definition in a way that takes gender into account is inhibited by the development of a distinct category of ‘gender-related asylum claims’ within gender and refugee law scholarship. Consequently, this article presents a challenge to the borders implicit in the category of ‘gender-related asylum claims’ by revisiting the boundaries of international refugee law.

The article starts by providing a brief overview of existing feminist scholarship in international refugee law and discusses the concepts of gender and sex and the creation of asylum categories in international refugee law. This is followed by the article’s main proposition, namely that the general rule of treaty interpretation in international law enables the identification of a legal obligation of State parties to the Refugee Convention to take gender into account when interpreting the refugee definition. A dynamic approach to the interpretation of the refugee definition is thus proposed which focuses on the purpose and the effectiveness of the Refugee Convention rather than its text and historical context. The scope of this duty in light of recent developments in international human rights law is then set out. To conclude, it is suggested to replace the

¹⁹ Articles 31-32 Vienna Convention on the Law of Treaties (adopted on 22 May 1969, entered into force on 27 January 1980) 1155 UNTS 331 (‘VCLT’).

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conceptualisation of a category of ‘gender-related asylum claims’ with a wider legal duty of States to take gender into account when interpreting the refugee definition in most, if not all, asylum claims.

2. Gender, Sex/Women and Asylum Categories in International Refugee Law

This section will briefly review existing feminist critiques of international refugee law which centre principally on the text of the Refugee Convention, its historical context and the intentions of its drafters. An evaluation of feminist approaches is then provided and the case is made for moving beyond the category of ‘gender-related asylum claims’ in international refugee law. This leads to an exploration of the potential of a purposive and dynamic interpretation of the refugee definition in the following section.

The 1980s saw an increasing focus on women and gender-related persecution to challenge the apparent neutrality and universality of international (refugee) legal norms.²⁰ Early feminist critiques claimed that international refugee law developed through a male standard as “the male refugee was in the mind of the drafters”.²¹ In addition, scholarship often highlighted the absence of women from the plenipotentiaries²² and the use of the male pronoun in the text of the Refugee Convention.²³ Scholars also pointed to the lack of reference to sex or gender in the

²⁰ Doreen Indra, 'Gender: A Key Dimension of the Refugee Experience' (1987) 6 *Refugee* 3, 3; Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613, 644.

²¹ Anders B. Johnsson, 'The International Protection of Women Refugees: A Summary of Principal Problems and Issues' (1989) 1 *International Journal of Refugee Law* 221, 222.

²² It may be relevant to note that a number of non-governmental organisations whose objective was to advocate for women’s human rights and gender equality attended the Conference of Plenipotentiaries and were represented by women including the International Council of Women, the Universal Alliance of Young Women Christian Unions, the International Federation of the Friends of Young Women and the International Union of Catholic Women’s Leagues.

²³ Johnsson (n 21) 222; Criticisms based on the use of the male pronoun generally ignore the principle of treaty interpretation that all authentic texts of the Refugee Convention have equal authority and that the

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grounds for persecution in the refugee definition²⁴ and in the non-discrimination provision²⁵ as evidence of interpretation of the Refugee Convention through a male standard.²⁶

Refugee law scholars have examined the Refugee Convention *travaux préparatoires* as it may shed light on what the drafters intended the terms of the treaty to mean and place the treaty in its historical context. Scholars have claimed that there was strong international resistance to the inclusion of sex or gender as an additional ground for persecution.²⁷ In addition, it has been suggested that the relevance of sex was rejected by the drafters of the Refugee Convention, both in relation to the refugee definition²⁸ and the non-discrimination provision.²⁹ This initial stage in international refugee law and policy has been described as one of “complete blindness to women, gender, and issues of sexual inequality”.³⁰

Feminist critiques of international refugee law led to strategic efforts necessary to make women seeking asylum more visible within refugee law. Nevertheless, most scholars rejected calls for including gender as an additional ground for persecution in the refugee

French text of the Refugee Convention defines a refugee using the female pronoun, Article 33(1) VCLT; see also the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 19 July 1951, para. I.

²⁴ Article 1A(2) Refugee Convention requires that a well-founded fear of being persecuted arises “for reasons of race, religion, nationality, membership of a particular social group or political opinion”.

²⁵ Article 3 Refugee Convention requires State parties to apply the provisions of the Refugee Convention “to refugees without discrimination as to race, religion or country of origin”.

²⁶ Jacqueline Greatbatch, 'The Gender Difference: Feminist Critiques of Refugee Discourse' (1989) 1 *International Journal of Refugee Law* 518; Heaven Crawley, 'Gender, Persecution and the Concept of Politics in the Asylum Determination Process' (2000) 9 *Forced Migration Review* 17; Freedman, *Gendering the International Asylum and Refugee Debate* (n 8) 74-75.

²⁷ C. E. J. de Neef and S. J. de Ruiter, *Sexual Violence Against Women Refugees: Report on the Nature and Consequences of Sexual Violence Suffered Elsewhere* (Ministry of Social Affairs and Labour 1984) 61; Indra (n 20) 3.

²⁸ Edwards, 'Transitioning Gender' (n 1) 23.

²⁹ Nora Honkala, 'She, of Course, Holds No Political Opinions': Gendered Political Opinion Ground in Women's Forced Marriage Asylum Claims' (2017) 26 *Social & Legal Studies* 166.

³⁰ Edwards, 'Transitioning Gender' (n 1) 22.

definition. They warned that creating a particular category of gender-related persecution claims may contribute to essentialising women’s experiences as apolitical and further excluding women’s asylum claims from “traditional” refugee claims.³¹ It is suggested here that although refugees are frequently persecuted for more than one Refugee Convention ground,³² advances in gender-sensitive interpretation of the refugee definition as a whole may be threatened as a result of conceptualising persecution as either gender-related or not. Advocating for an additional Refugee Convention ground ignores that gender is not just relevant to the reasons for persecution but also for all other elements of the definition, including the well-founded fear of being persecuted, the concept of persecution, state protection, internal relocation and country of origin information.

Therefore, just as scholars warned of risks associated with adding gender as an additional ground for persecution, there have been unintended consequences arising from the consolidation of a category of ‘gender-related asylum claims’ through feminist advocacy and scholarship in the last forty years. The category of ‘gender-related asylum claims’ is generally equated with asylum claims based on a risk of gender-based violence such as rape, domestic violence, forced marriage, ‘honour’ crimes, female genital mutilation and trafficking³³ for reason of membership of a particular social group.³⁴ This conceptualisation reinforces the borders separating a seemingly homogenous category of asylum claims with explicit relevance to gender from other ‘conventional’ refugee claims in international refugee law. This approach fails to

³¹ Ankenbrand (n 18) 55-56.

³² United Nations High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (UNHCR 2019 (re-issue)) para. 66.

³³ See for example UNHCR Gender Guidelines, para. 3.

³⁴ Michelle Foster, 'Why We Are Not There Yet: The Particular Challenge of "Particular Social Group" in Efrat Arbel, Catherine Dauvergne and Jenni Millbank (eds), *Gender in Refugee Law: From the Margins to the Centre* (Routledge 2014) 17.

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encompass the wider range of asylum claims involving race, religion, nationality or political opinion where gender also plays a significant role. Moreover, it renders ‘gender-related asylum claims’ more complex in light of the lack of clarity and consistency with respect to the ground of particular social group.³⁵ Accordingly, framing women’s asylum claims as a sub-set of asylum claims separate from the more ‘conventional’ depictions of male political refugees has contributed to the prevalent narrative in feminist refugee law literature that asylum decision-makers fail to ‘fit’ the bounded category of ‘gender-related asylum claims’ into the refugee definition. Equally, this categorisation depicts ‘gender-related asylum claims’ as ‘special cases’ which require the boundaries of international refugee law to be pushed beyond its conventional framework.

Thus, defining certain asylum claims as ‘gender-related’ obscures the role that gender may play in the risk of persecution in asylum claims not generally considered to be ‘gender-related’. For example, the risks faced by many young men and boys of forcible recruitment by armed groups are generally perceived as political opinion asylum claims because objection to recruitment may amount to or be perceived as an expression of political opinion in the context of armed conflicts.³⁶ However, it is also a highly gendered phenomenon.³⁷ Similarly, asylum claims based on a risk of torture in State prisons are viewed as archetypal political opinion claims yet there is increasing

³⁵ Andreas Zimmermann and Claudia Mahler, 'Article 1A, para. 2 (Definition of the Term Refugee)' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2010) 417.

³⁶ UNHCR, *Guidelines on International Protection No. 10: Claims to Refugee Status related to Military Service within the context of Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees* (HCR/GIP/13/10/Corr. 1 2014) para. 53.

³⁷ See statistics in EASO, *Country of Origin Information Report – Afghanistan: Recruitment by Armed Groups*, September 2016.

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evidence of the use of rape and sexual violence against men.³⁸ The categorisation of ‘gender-related asylum claims’ reproduces the notion that gender is only relevant to a sub-set of asylum claims as opposed to a relevant matter across a continuum which requires consideration in most, if not all asylum claims. Finally, and most significantly, it inhibits the conceptualisation of a legal duty of States to take gender into account when interpreting the refugee definition as a whole.

Further, the scholarly focus of empirical studies on women’s asylum claims has led to the blurring of the distinct concepts of sex and gender as ‘gender-related asylum claims’ are often equated with women’s asylum claims. As a result, the terms gender and sex/women have been used interchangeably.³⁹ This approach is problematic in several respects. Firstly, although the relevance of sex and gender is complementary,⁴⁰ retaining sex as a category in international refugee law in itself is valuable and necessary.⁴¹ As sex discrimination and structural inequality remain relevant in understanding violence,⁴² using the terms gender and sex interchangeably obscures the relevance of sex as a distinguishing characteristic and a basis for discrimination, violence and ultimately persecution in international refugee law.

Although regard should be had to both sex and gender to analyse international refugee law, the concepts are substantively and analytically distinct. Equating ‘women’s asylum

³⁸ See for example Oosterveld, Valerie, "Sexual Violence Directed Against Men and Boys in Armed Conflict or Mass Atrocity: Addressing a Gendered Harm in International Criminal Tribunals" (2014) *Law Publications* 109.

³⁹ Alice Edwards, *Violence Against Women under International Human Rights Law* (Cambridge University Press 2011) 15.

⁴⁰ Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press 2000) 4.

⁴¹ Edwards, *Violence Against Women* (n 39); see also Joan Wallach Scott, 'Gender: Still a Useful Category of Analysis?' (2010) 57 *Diogenes* 7, 12.

⁴² CEDAW Committee ‘General Recommendation No 19’ (29 July 1994) UN Doc HRI/GEN/1/Rev.1, para. 6; *Opuz v. Turkey* (33401/02) [2009] ECHR 870, para. 200; *Mudric v. the Republic of Moldova* (74839/10) [2013] ECHR 685, para. 63; *T.M. and C.M. v. the Republic of Moldova* (26608/11) [2014] ECHR 26608/11, para. 59.

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claims' with 'gender-related asylum claims' limits a comprehensive understanding of gender as a relational concept requiring analysis beyond biological differences.⁴³ Hence, it is possible to conceptualise gender as more than the differences between men and women whilst still acknowledging that gender-based violence affects women disproportionately. Finally, it conceals the experiences of men who may also have a well-founded fear of gender-based violence.⁴⁴

Rather than equating gender with women and/or sex, gender is more usefully understood as a social phenomenon in which identities are socially constructed.⁴⁵ Thus, taking gender into account when interpreting the refugee definition involves an enquiry into "a set of cultural institutions and practices that constitute the norms and standards of masculinity and femininity".⁴⁶ In this frame, gender subordination is the valorisation of characteristics associated with masculinity, such as domination, strength, protection, aggression, public life, leadership and rationality, over characteristics associated with femininity such as submission, weakness, vulnerability, passivity, private life, care and emotion.⁴⁷ Although MacKinnon suggests that this process of subordination may happen to anyone, we generally assume that it is natural for it to happen to those who identify as women.⁴⁸ Importantly however, men who do not conform to expected standards of masculinity in a given society are also devalorised.⁴⁹ In this sense, where violence against individuals is motivated and condoned for their failure to abide by gender norms in a given society, the concept of gender subordination is relevant to the

⁴³ Nira Yuval-Davis, *Gender & Nation* (Thousand Oaks 1997) 8.

⁴⁴ See for example R. C. Carpenter, 'Recognizing Gender-Based Violence against Civilian Men and Boys in Conflict Situations' (2006) 37 *Security Dialogue* 83.

⁴⁵ Sally Engle Merry, *Gender Violence: A Cultural Perspective* (Wiley-Blackwell 2009) 180.

⁴⁶ Christine Chinkin and Mary Kaldor, 'Gender and New Wars' (2013) 67 *Journal of International Affairs* 167, 167.

⁴⁷ V. Spike Peterson and Anne Sisson Runyan, *Global Gender Issues* (Westview Press 1993) 5-8.

⁴⁸ Catharine A. MacKinnon, *Only Words* (Harper Collins 1994).

⁴⁹ R. W. Connell and James W. Messerschmidt, 'Hegemonic Masculinity: Rethinking the Concept' (2005) 19 *Gender & Society* 829, 832.

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interpretation of the refugee definition also in asylum claims based on sexual orientation and gender identity. According to Yuval-Davis, gender is thus comprised of relational categories and a proper understanding of gender thus requires examination of both masculinity and femininity.⁵⁰

The relational aspect of gender is also emphasised by Conaghan as a notion which is “not located in individual subjects but in the patterns and practices which gendered social relations produce”.⁵¹ Gender is thus not a static notion insulated from context and although each political and societal context is likely to ascribe different meanings to femininity and masculinity, most are characterised by the subordination of the former to the latter.⁵² Gender subordination however does not have homogenous effects because the content of categories of masculinity and femininity is constructed over time and place, and intersects with culture, religion, race, ethnicity, politics, class, sexuality, ability and age as multiple inequalities influence the exercise of subordination.⁵³

This section has demonstrated how the focus on the text of the Refugee Convention, its historical context and the intentions of its drafters and the use of the terms sex and gender interchangeably in feminist refugee law scholarship have implicitly contributed to a less obvious border separating ‘gender-related asylum claims’ from ‘conventional’ claims. Generally, current scholarship fails to more fully explore the capacity for dynamic interpretation of the refugee definition in light of the general rule of treaty interpretation in international law. Thus, the next section explores an approach to interpretation of the refugee definition focused on the purpose and effectiveness of the

⁵⁰ Yuval-Davis (n 43) 1; although Yuval-Davis uses the terms masculinity and femininity in the singular, the terms are endorsed throughout this article on the understanding that these concepts are imbued with different meanings and characteristics in different societies.

⁵¹ Joanne Conaghan, *Law and Gender* (Oxford University Press 2013) 23-24.

⁵² Carol Cohn, ‘Wars, Wimps, and Women: Talking Gender and Thinking War’ in Miriam Cooke and Angela Woollacott (eds), *Gendering War Talk* (Princeton University Press 1993) 229.

⁵³ Sylvia Walby, Jo Armstrong and Sofia Strid, ‘Intersectionality: Multiple Inequalities in Social Theory’ (2012) 46 *Sociology* 224, 224-225.

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Refugee Convention in light of recent developments in international human rights law. This enables the claim that there is a legal duty of States to take gender into account when interpreting the refugee definition.

3. A Duty to Take Gender into Account in the Interpretation of the Refugee Definition

When national administrative and judicial authorities interpret the refugee definition, they are effectively seeking to establish its “true meaning”.⁵⁴ In the absence of supranational jurisprudence regarding the definition of a refugee, the law of treaties is particularly relevant in ensuring consistency amongst States. The task of interpretation must thus be undertaken in accordance with the general rule of treaty interpretation in international law, as codified in the Vienna Convention on the Law of Treaties.⁵⁵ The rule stipulates that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".⁵⁶

Whereas some commentators have emphasised that having regard to the ordinary meaning of the terms in their context is the starting point in interpreting a treaty, this is nonetheless determined in light of the object and purpose of the relevant treaty.⁵⁷ Moreover, many scholars also emphasise the primacy of the requirement to interpret the

⁵⁴ Guy Goodwin-Gill, 'The Search for the One, True Meaning' in Guy Goodwin-Gill and Helene Lambert (eds), *The Limits of Transnational Law: Refugee Law, Policy Harmonisation and Judicial Dialogue in the European Union* (Cambridge University Press 2010) 216.

⁵⁵ Although the VCLT was adopted in 1969 and entered into force in 1980, after the Refugee Convention was adopted, its terms reflect customary international law, *Reservations to the Convention on Genocide* (Advisory Opinion) [1951] ICJ Reports 15, pp. 21-23.

⁵⁶ Article 31(1) VCLT.

⁵⁷ I. M. Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn, Manchester University Press 1984) 130; Rebecca M. M. Wallace and Olga Martin-Ortega, *International Law* (7th edn, Sweet & Maxwell/Thomson Reuters 2013) 280.

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treaty in ‘good faith’ as a fundamental principle of international law, meaning that States have to act in a manner which honours the spirit and letter of the law.⁵⁸ The basic principle regarding observance of treaties thus explicitly requires State parties to perform their obligations in good faith.⁵⁹ Overall, the approach to interpretation mandated by the VCLT has been viewed as a holistic assessment combining an analysis of the ordinary meaning of the terms of the refugee definition in their context and in the light of the Refugee Convention’s object and purpose.⁶⁰

In interpreting the terms of the refugee definition, regard may also be had to supplementary means of interpretation but only insofar as they support rather than replace interpretation based on the general rule.⁶¹ Thus, supplementary means of interpretation may be used solely to confirm the meaning resulting from the application of the general rule of treaty interpretation or if the application of the general rule leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable.⁶² Such supplementary means include the preparatory work of the treaty and the circumstances of its conclusion which includes the historical context.⁶³

As set out in the previous section, feminist scholarship in international refugee law emphasises the absence of sex and/or gender from the terms of the refugee definition. However, concerns regarding the absence of explicit reference to sex or gender in the text of the Refugee Convention, are partly answered by the proposition that a purely literal, or “objective” approach to interpretation, is not in accordance with the general

⁵⁸ Mark W. Janis, *International Law* (6th edn, Wolters Kluwer 2012) 28; James Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, Cambridge University Press 2014) 5; Eirik Bjørge, *The Evolutionary Interpretation of Treaties* (Oxford University Press 2014) 70.

⁵⁹ Article 26 VCLT states that “every treaty in force is binding upon the parties to it and must be performed by them in good faith”.

⁶⁰ Hathaway and Foster (n 58) 7.

⁶¹ Oliver Dörr and Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) 571-572.

⁶² Article 32 VCLT.

⁶³ Wallace and Martin-Ortega (n 57) 281.

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rule of treaty interpretation.⁶⁴ The “ordinary meaning” of the terms of the refugee definition is but one of the factors to be considered in the interpretation of the refugee definition, it is neither determinative nor the primary mean of interpretation.⁶⁵ Accordingly, the absence of the terms sex or gender from the refugee definition does not necessarily entail that these concepts are neither relevant nor essential when determining who is a refugee. This claim is supported by the generally agreed view that recourse to the “ordinary meaning” of the terms of the refugee definition in their context is insufficient to elucidate its meaning due to the “minimalist provisions” of the refugee definition as a whole.⁶⁶ Thus, any initial conclusion as to the meaning of the refugee definition and whether it applies to a particular asylum case would require confirmation or modification in light of the Refugee Convention’s object and purpose.⁶⁷

Moreover, feminist scholarship in international refugee law also appears to take the terms of the refugee definition and the intention of the Refugee Convention drafters as a starting point to interpretation contrary to the relationship between the general rule⁶⁸ and the supplementary means of interpretation⁶⁹ in international law. Reliance on the historical context and preparatory works should only occur in selected circumstances after the general rule of treaty interpretation has been applied and should not be considered as an alternative isolated from it.⁷⁰ Overall, the use of the *travaux*

⁶⁴ Malcolm N. Shaw, *International Law* (8th edn, Cambridge University Press 2017) 707.

⁶⁵ Hathaway and Foster (n 58) 8.

⁶⁶ Hugo Storey, 'Persecution: Towards a Working Definition' in Vincent Chetail and Céline Bauloz (eds), *Research Handbook on International Law and Migration* (Edward Elgar 2014) 459; see also Terje Einarsen, 'Drafting History of the 1951 Convention and the 1967 Protocol' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) 49.

⁶⁷ Sinclair (n 57) 130.

⁶⁸ Article 31 VCLT.

⁶⁹ Article 32 VCLT.

⁷⁰ Sinclair (n 57) 116.

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préparatoires to shed light on the meaning of the Refugee Convention can be “rather mixed”,⁷¹ not least where they are misinterpreted.

For the reasons set out above, the next sections advance a purposive and dynamic approach to interpretation supporting the proposition that taking gender into account in the process of interpretation of the refugee definition is required in international law.

3.1. A Purposive Interpretation of the Refugee Definition in light of the Context, Object and Purpose of the Refugee Convention

A purposive approach to interpretation requires that the ordinary meaning of the refugee definition’s terms in their context be determined in light of the Refugee Convention’s object and purpose.⁷² In the absence of any reference to gender or sex in the Refugee Convention and the unsatisfactory results of a literal approach to the interpretation of the refugee definition, the requirement in international law to interpret the terms of the refugee definition in their context and in light of the object and purpose of the treaty is essential in identifying the existence of a duty of States to take gender into account when deciding asylum claims. It is thus necessary to move beyond a focus on the terms of the refugee definition and instead adopt a holistic approach which gives credence to the context, object and purpose of the Refugee Convention. Although all of these elements must be considered as part of a single assessment in accordance with the principle of good faith, Cassese argues that the purpose of the treaty, in this case the Refugee Convention, is the dominant lens through which to interpret its terms.⁷³

⁷¹ Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, Oxford University Press 2007) 9.

⁷² Also described as the ‘teleological’ approach, Jane McAdam, ‘Interpretation of the 1951 Convention’ in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) 82.

⁷³ Antonio Cassese, *International Law* (2nd edn, Oxford University Press 2005) 179.

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Accordingly, it will be argued below that a purposive approach to interpretation of the treaty requires gender to be taken into account when interpreting the refugee definition, even in the absence of explicit references to sex or gender in the Refugee Convention.

The context of the Refugee Convention as set out in its preamble and annexes⁷⁴ asserts its human rights orientation.⁷⁵ The preamble of the Refugee Convention places emphasis on the “principle that human beings shall enjoy fundamental rights and freedoms without discrimination”⁷⁶ by explicitly referring to the Charter of the United Nations⁷⁷ and the Universal Declaration of Human Rights.⁷⁸ Both of these instruments explicitly protect the human rights and fundamental freedoms of all human beings without distinction of any kind, including on the basis of sex.⁷⁹ In addition, the preamble reiterates that the United Nations has on several occasions expressed serious concerns for refugees and worked towards assuring “refugees the widest possible exercise of these fundamental rights and freedoms”.⁸⁰

The preamble also serves as the starting point for determining the Refugee Convention’s object and purpose, which is to extend the protection of the international community to refugees⁸¹ and “to ensure the protection of the specific rights of refugees”.⁸² Overall, the humanitarian purpose of the Refugee Convention is to shift protection to the international community and ensure the basic human rights of

⁷⁴ Article 31(2) VCLT.

⁷⁵ Hathaway and Foster (n 58) 9.

⁷⁶ Preamble Refugee Convention.

⁷⁷ United Nations, Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (‘UN Charter’).

⁷⁸ Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (‘UDHR’).

⁷⁹ Articles 1-2 UDHR; Article 1(3) UN Charter.

⁸⁰ Preamble Refugee Convention.

⁸¹ Goodwin-Gill and McAdam (n 71) 8.

⁸² UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, April 2001, para. 3.

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refugees.⁸³ Hathaway and Foster consider that a purposive construction of the Refugee Convention is consistent with its aim to strengthen the protection of refugees.⁸⁴ Giving effect to the humanitarian purpose of the Refugee Convention thus requires a dynamic interpretation of its terms, in particular the refugee definition.⁸⁵ This is explored in the next section.

3.2. *A Dynamic Interpretation of the Refugee Definition*

The general rule of treaty interpretation justifies a dynamic approach to the interpretation of the refugee definition. This entails a focus on the purpose of the Refugee Convention to ensure its effectiveness in light of present-day realities. The principle of effectiveness requires treaty provisions to be “effective and useful”, in other words the manner in which they are interpreted must ensure the appropriate effect.⁸⁶ Thus, if the refugee definition is open to two different interpretations, only one of which enables the Refugee Convention to have appropriate effects, good faith and the object and purpose of the treaty require that this latter interpretation be adopted.⁸⁷ Reliance on the principle of effectiveness, described by Cassese as “plainly intended to expand the normative scope of treaties”,⁸⁸ together with the purposive approach has led to a particularly dynamic approach to interpretation.⁸⁹ By analogy with international human rights treaties,⁹⁰ the Refugee Convention is a treaty containing objective obligations of

⁸³ McAdam, 'Interpretation of the 1951 Convention' (n 72) 90.

⁸⁴ Hathaway and Foster (n 58) 8.

⁸⁵ See for example *Sepet & Anor, R (on the application of) v Secretary of State for the Home Department* [2003] UKHL 15, para. 6; as endorsed in Hathaway and Foster (n 58) 11.

⁸⁶ Cassese (n 73) 179.

⁸⁷ International Law Commission, 'Draft Articles on the Law of Treaties with Commentaries' (1966) II Yearbook of the International Law Commission 219.

⁸⁸ Cassese (n 73) 179.

⁸⁹ Shaw (n 64) 710.

⁹⁰ *Austria v Italy* (1961) 7 CD 23; *Artico v Italy* (1981) 3 EHRR. 1, para. 33; Inter-American Court of Human Rights *Advisory Opinion on the Effect of Reservations on the Entry Into Force of the American*

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States to protect refugees from severe human rights violations in their country of origin rather than a treaty establishing reciprocal rights between States.⁹¹ The particular character of human rights treaties and the objective nature of States’ obligations thus influence the means by which the Refugee Convention must be interpreted.⁹²

In this context, a purposive and evolutive method of interpretation is justified, approaching the treaty as a living instrument to be interpreted in the light of present-day conditions⁹³ and to ensure that the Refugee Convention can continue to function within its “present social reality and contemporary legal context”.⁹⁴ It is arguable that the parties to the Refugee Convention may have intended to give an evolving, rather than fixed, meaning to the refugee definition to make allowances for developments in international law.⁹⁵ The Final Act of the Conference of Plenipotentiaries includes the recommendation that the Refugee Convention should “have value as an example exceeding its contractual scope”.⁹⁶ Historically, the refugee regime has been sufficiently flexible since its adoption to address new forms of persecution taking into account

Convention on Human Rights (1983) 22 ILM 1, para. 27-30; *Soering v the United Kingdom* (1989) 11 EHRR 439, para. 87; *Loizidou v Turkey* (Preliminary Objections) (1995) 20 EHRR 99, para. 72.

⁹¹ Einarsen (n 66) 40; McAdam describes the Refugee Convention as a “specialist human rights treaty”, Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press 2007) 14.

⁹² *Ireland v the United Kingdom* (1978) 2 EHRR 25, para. 239; CCPR ‘General Comment No 24(52) on Issues relating to Reservations made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in relation to Declarations under Article 41 of the Covenant’ (11 November 1994) UN Doc CCPR/C/21/Rev.1/Add.6, para. 17; Shaw (n 64) 710.

⁹³ *Wemhoff v Germany* (1968) 1 EHRR 55, para. 8; *Tyrer v the United Kingdom* (1978) 80 EHRR 1, para. 31; *Marckx v Belgium* (1979) 2 EHRR 330, para. 41; *Loizidou v Turkey* (Preliminary Objections) (1995) 20 EHRR 99, para. 71; McAdam, ‘Interpretation of the 1951 Convention’ (n 72) 103-104.

⁹⁴ Hathaway and Foster (n 58) 6; see also Goodwin-Gill (n 54) 207, 220.

⁹⁵ *Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)* (Judgment) ICJ Reports [2009] 242, para. 64; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgment) ICJ Reports [2010] 14, para. 204.

⁹⁶ Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, 19 July 1951, Recommendation E.

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gender such as domestic violence, forced marriage and rape for example.⁹⁷ A dynamic approach to interpretation has also been applied to the Refugee Convention ground of particular social group for example to take account of changes in society.⁹⁸ The particular nature of the Refugee Convention thus requires a dynamic approach to interpretation in order to ensure the effective protection of refugees in need of protection from human rights violations. A dynamic approach to the interpretation of the refugee definition suggesting the existence of a duty to take gender into account is possible in light of recent developments in international human rights law, which must be taken into account according to the VCLT. This is discussed in the following section.

3.3 Relevant Rules of International Human Rights Law: Bringing Gender within the Boundaries of International Refugee Law

Under the general rule of treaty interpretation, States are also required to take into account, together with the context, “any relevant rules of international law applicable in the relations between the parties” in interpreting the Refugee Convention.⁹⁹ International human rights law comprises “relevant rules” applicable between the parties to the Refugee Convention for the purpose of treaty interpretation. The norms of international human rights law must therefore be taken into account as an aid to interpretation of the Refugee Convention because the object and aim of both is the international protection of the fundamental human rights of individuals. As set out above, the preamble of the Refugee Convention reiterates the importance of the universal protection of human rights. The Refugee Convention itself is often described

⁹⁷ ‘New’ in the sense that these serious human rights violations had not traditionally been considered to amount to persecution; Susan F. Martin, ‘Gender and the Evolving Refugee Regime’ (2010) 29 *Refugee Survey Quarterly* 104, 107.

⁹⁸ McAdam, ‘Interpretation of the 1951 Convention’ (n 72) 104.

⁹⁹ Article 31(3)(c) VCLT; *Loizidou v Turkey* (1996) 23 EHRR 513, para. 43; see also *Nada v. Switzerland* (2013) 56 EHRR 18, para. 169.

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as a human rights instrument¹⁰⁰ and although this is debated,¹⁰¹ the near universal acceptance of the human rights paradigm for the interpretation of the refugee definition¹⁰² supports the proposition that international human rights norms are “relevant rules” of international law for the purpose of interpreting the terms of the refugee definition together with the context.

The use of the human rights paradigm in international refugee law has not always been uncontroversial. Some feminist scholars were critical of the use of international human rights law as an aid to the interpretation of the refugee definition. Crawley and Freedman highlighted the androcentric nature of international human rights law which brought the male perspective into the interpretation of the refugee definition.¹⁰³ It has also been argued that the human rights framework privileges the public sphere generally occupied by men to the detriment of women’s activities occurring in the private sphere.¹⁰⁴ Feminist scholars’ reluctance to utilise international human rights norms to interpret the refugee definition is rooted in the public/private divide whereby persecution or serious harm is considered to occur either in the public or private sphere¹⁰⁵ and as a result, only the former is interpreted as coming within the ambit of the refugee definition.

¹⁰⁰ Erika Feller, 'Foreword' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press 2011) vii; McAdam, *Complementary Protection in International Refugee Law* (n 91) 14.

¹⁰¹ Vincent Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (Oxford University Press 2014).

¹⁰² As first set out in James C. Hathaway, *The Law of Refugee Status* (1st edn, Butterworths 1991).

¹⁰³ Heaven Crawley, *Refugees and Gender: Law and Process* (Jordans 2001); Freedman, *Gendering the International Asylum and Refugee Debate* (n 12) 74-75.

¹⁰⁴ See for example Jacqueline Bhabha, 'Legal Problems of Women Refugees' (1993) 4 *Women: A Cultural Review* 240.

¹⁰⁵ Catherine Moore, 'Women and Domestic Violence: the Public/ Private Dichotomy in International Law' (2003) 7 *The International Journal of Human Rights* 93.

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However, Hathaway and Foster note that there has been a “sophisticated evolution” in how international human rights law conceptualises gender issues.¹⁰⁶ Acts originating at the hands of non-State actors are now considered to come within the legal responsibility of States to exercise due diligence.¹⁰⁷ Accordingly, in the absence of state protection in the country of origin, non-state actors may now be conceived of as actors of persecution for the purpose of the refugee definition.¹⁰⁸ The principle of due diligence as a positive obligation of States has now acquired the status of customary international law and has served to gradually erode the traditional conception of the public/private divide.¹⁰⁹ Consequently, many feminist scholars now support a human rights framework to interpret the Refugee Convention and as a benchmark to critique the manner in which asylum decision-makers interpret and apply international refugee law.¹¹⁰

International refugee law is thus non-static, as it must be interpreted in light of any relevant rules of international law applicable in the relations between the parties. This approach stresses the requirement of taking into account developments in the international community’s understanding of concepts such as sex and gender which were not traditionally considered to be part of legal enquiry. More specifically, international human rights norms have evolved significantly to reflect a better understanding of the role of gender in determining relations of power. Hence, international human rights norms enable a reframing of the interpretation of international refugee law by defining gender as a socially constructed concept situated

¹⁰⁶ Hathaway and Foster (n 58) 423.

¹⁰⁷ UN Commission on Human Rights, 'Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences on the Due Diligence Standard as a Tool for the Elimination of Violence against Women' (20 January 2006) E/CN.4/2006/61.

¹⁰⁸ See for example *Islam v. Secretary of State for the Home Department Immigration Appeal Tribunal and Another, Ex Parte Shah, R v.* [1999] UKHL 20, per Lord Hoffmann.

¹⁰⁹ Ronagh J. A. McQuigg, 'The European Court of Human Rights and Domestic Violence: Valiulienė v. Lithuania' (2014) 18 *International Journal of Human Rights* 756, 761.

¹¹⁰ See for example individual contributions in Efrat Arbel, Catherine Dauvergne and Jenni Millbank (eds), *Gender in Refugee Law: From the Margins to the Centre* (Routledge 2014) (n 8).

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in the relational rather than in the personal characteristics of refugees. Although understanding gender as a social construct may be perceived as irrelevant because it does not fall within the “boundaries of the strictly legal”,¹¹¹ it does find support in recent developments in international refugee law and human rights law. The following passages provide a brief and non-exhaustive analysis of how international and regional human rights norms link the process of gender subordination to the nature, causes and responses to violence.

In international human rights law, the Convention on the Elimination of All Forms of Discrimination against Women (‘CEDAW’) Committee has explicitly recognised the differences in constructed notions of masculinities and feminities and has consequently highlighted the prevalence of unequal power relations between men and women.¹¹² The more recent Council of Europe Convention on Preventing and Combatting Violence against Women and Domestic Violence (‘Istanbul Convention’) similarly codifies the notion of gender as a social construct defined as “the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men” into a regional human rights treaty.¹¹³ An intersectional approach to gender-based violence has been explicitly endorsed by the CEDAW Committee¹¹⁴ and the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.¹¹⁵ Thus, those who are subordinated by gender dynamics do not all

¹¹¹ Conaghan (n 51) 27; see also Charlesworth and Chinkin (n 40).

¹¹² Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW); CEDAW Committee ‘General Recommendation No 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures’ (2004) UN Doc HRI/GEN/1/Rev.7, note 2.

¹¹³ Convention on Preventing and Combatting Violence Against Women and Domestic Violence (adopted 11 May 2011, entered into force 1 August 2014) CETS 210 (the ‘Istanbul Convention’), Article 3(c).

¹¹⁴ CEDAW Committee ‘General Recommendation No 35 on Gender-Based Violence against Women, updating General Recommendation No. 19’ (2017) UN Doc CEDAW/C/GC/35, para. 12.

¹¹⁵ UN Human Rights Council ‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez’ (5 January 2016) UN Doc A/HRC/31/57, para. 5.

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experience it in the same manner or to the same extent.¹¹⁶ The process of gender subordination therefore does not lend itself to fixing into a seemingly homogenous category of ‘gender-related asylum claims’.

International human rights norms however are particularly significant for international refugee law as they identify unequal gender relations as a cause and continuation of violence. This in turn is relevant for the refugee definition and in particular for determining whether there is a well-founded fear of being persecuted. The CEDAW Committee has identified the relation between gender subordination and violence in the following terms:

Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women.¹¹⁷

The CEDAW Committee more recently clarified that gender-based violence against women was rooted in “gender-related factors”, including “the ideology of men’s entitlement and privilege over women, social norms regarding masculinity, the need to assert male control or power, enforce gender roles, or prevent, discourage or punish what is considered to be unacceptable female behaviour”.¹¹⁸ Accordingly gender-based violence is implicitly or explicitly socially accepted and impunity is widespread.¹¹⁹ The text of the Istanbul Convention itself also attributes the reasons for violence against women to the “manifestation of historically unequal power relations between women

¹¹⁶ Yuval-Davis (n 43) 8; see also CEDAW Committee ‘General Recommendation No 35’ (n 114), para. 12.

¹¹⁷ CEDAW Committee ‘General Recommendation No 19’ (n 42), para. 11; see also CEDAW Committee ‘General Recommendation No 35’ (n 114), para. 10.

¹¹⁸ CEDAW Committee ‘General Recommendation No 35’ (n 114), para. 19.

¹¹⁹ *Ibid.*

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and men”.¹²⁰ The Special Rapporteur on Torture suggests that an act may be defined as ‘gender-specific violence’ where the nature or purpose of the act is “aimed at ‘correcting’ behaviour perceived as non-consonant with gender roles and stereotypes or at asserting or perpetuating male domination over women”.¹²¹ Accordingly, gender understood as a hierarchy of social power is an essential consideration to explain and understand the nature, causes of and responses to violence.

These gender relations and the resulting personal experiences of dominance and oppression are further influenced by distinguishing characteristics such as sex, race, ethnicity, religion, class, sexuality and ability. This is because if gender differences are a product of social relations these differences vary in magnitude depending on the particular context. In this manner, unequal power relations and injustices become apparent by considering gender differences within a given society. Consequently, gender norms also constrain men to particular identities, statuses, roles and responsibilities.¹²² In practice, thus, asylum claims are rarely, if not ever, solely ‘gender-related’ or entirely isolated from gender.

The general rule of treaty interpretation in international law thus requires State parties to the Refugee Convention to take into account international human rights norms and how these norms conceptualise the relationship between gender subordination, the exercise of violence and human rights violations in asylum applicants’ country of origin. The existence of such a legal obligation is supported by the Explanatory Report to the Istanbul Convention which clarifies that the obligations to recognise gender-based

¹²⁰ Istanbul Convention, preamble and Article 3(a).

¹²¹ UN Human Rights Council ‘Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak’ (15 January 2008) UN Doc A/HRC/7/3, para. 30, footnote 7; see also UN Human Rights Council ‘Report of the Special Rapporteur on torture’ (n 115) para. 6.

¹²² Edwards, ‘Transitioning Gender’ (n 1) 41.

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violence against women as persecution¹²³ and ensure a gender-sensitive interpretation of the Refugee Convention grounds¹²⁴ “do not go beyond the scope of application” of the Refugee Convention.¹²⁵

These recent developments in international human rights law have contributed to bridging the borders which excluded what was traditionally considered ‘private’ harm from the realm of international law. Thus, it is now accepted that gender-based violence may amount to torture or cruel, inhuman or degrading treatment in international human rights law,¹²⁶ international crimes in international criminal law,¹²⁷ or a breach of the laws and customs of war in international humanitarian law.¹²⁸ In the light of these legal developments, taking gender into account is perhaps most straightforward when interpreting the concept of persecution as contained in the refugee definition. Accordingly, it is now generally accepted that violence such as rape, female genital mutilation, serious domestic violence or trafficking may amount to persecution.¹²⁹

However, gender relations equally play an important role in determining the other elements of the refugee definition such as the availability of State protection and the Refugee Convention grounds. This is reflected in international human rights norms which highlight that gender dynamics impact on a person’s ability to seek protection from the State against violence. In addition, gender may intersect with other factors and identities to make it more difficult to seek accountability from perpetrators and obtain

¹²³ Article 60(1) Istanbul Convention.

¹²⁴ Article 60(2) Istanbul Convention.

¹²⁵ Explanatory Report to the Council of Europe Convention on Preventing and Combatting Violence Against Women and Domestic Violence, Istanbul 11.V.2001 (‘Istanbul Convention Explanatory Report’), para. 300.

¹²⁶ CEDAW Committee ‘General Recommendation No 35’ (n 114) para. 19.

¹²⁷ Articles 7(1)(g), 8(2)(b)(xxii) and 8(2)(e)(vi) Rome Statute of the International Criminal Court.

¹²⁸ UN Human Rights Council ‘Report of the Special Rapporteur on torture’ (n 115) para. 52.

¹²⁹ Istanbul Convention Explanatory Report, para. 310.

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State protection.¹³⁰ The Istanbul Convention established for the first time in a regional treaty, an obligation of State parties to give a gender-sensitive interpretation to each of the Refugee Convention grounds meaning that asylum authorities must recognise and understand how gender can have an impact on the reasons behind the harm suffered.¹³¹ Having regard to how those constructed identities interact with other distinguishing factors such as sex, race, ethnicity, religion, class, sexuality, age and ability reflects the interdependent nature of the different Refugee Convention grounds which rarely operate as distinct reasons for differential, discriminatory or persecutory treatment. For example, asylum applicants having a well-founded fear of persecution due to their sexual orientation or gender identity generally have their claims determined by reference to the Refugee Convention ground of membership of a particular social group.¹³² However, the reasons for persecution may be conceptualised as relating to religion or political opinion thereby avoiding the complexities associated with this Refugee Convention ground.¹³³

On the whole, an intersectional approach enables a more accurate and comprehensive understanding of reasons for fleeing thereby leading to enhanced interpretation of the refugee definition. Thus, what amounts to political opinion in a particular society depends on the context. As illustrated by a decision of the New Zealand Refugee Status Appeals Authority, Haines QC noted that “account must also be taken of how power is distributed and exercised in the particular society. The political opinion ground must be oriented to reflect the reality of women’s experiences and the way in which gender is

¹³⁰ UN Human Rights Council ‘Report of the Special Rapporteur on torture’ (n 115) para. 9.

¹³¹ Istanbul Convention Explanatory Report, para. 312; although the Convention is addressing violence against women specifically rather than the wider duty arising from the Refugee Convention itself to take gender into account as suggested in this article.

¹³² Moira Dustin and Nina Held, ‘In or out? A Queer Intersectional Approach to ‘Particular Social Group’ Membership and Credibility in SOGI asylum claims in Germany and the UK’ (2018) 2 *GenIUS* 74, 75.

¹³³ Foster, ‘Why We Are Not There Yet’ (n 34).

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constructed in the specific geographical, historical, political and socio-cultural context of the country of origin”.¹³⁴

In certain societies, violence is exercised and justified or condoned on the basis of constructed gendered identities. In interpreting the refugee definition this context is essential in evaluating the risk of persecution on return, the availability of State protection and the reasons for the persecution. In other words, understanding violence to determine who is a refugee requires a situated analysis which recognises the effects of larger societal context on gender performance.¹³⁵ Accordingly, international law requires asylum decision-makers to extend their examination of the context and circumstances on return to the country of origin or habitual residence from the more conventional categories of women and men to the roles, assumptions and expectations of femininities and masculinities in that particular society.¹³⁶

4. Conclusion

This article has claimed firstly, that the general rule of treaty interpretation in international law discloses an obligation of State parties to the Refugee Convention to take gender into account in the interpretation of the refugee definition. Concerns regarding the absence of the terms sex or gender in the text of the Refugee Convention were addressed by a purposive approach to interpretation. Moreover, the case was made

¹³⁴ New Zealand, Refugee Status Appeals Authority, Refugee Appeal No. 76044, 11 September 2008, para. 84.

¹³⁵ Engle Merry (n 45) 3; See also Heaven Crawley, 'Engendering the State in Refugee Women's Claims for Asylum' in Susie Jacobs, Ruth Jacobson and Jennifer Marchbank (eds), *States of Conflict: Gender, Violence and Resistance* (Palgrave Macmillan 2000) 98.

¹³⁶ It was noted for example that “identification of the most appropriate Convention ground or grounds requires the decision-maker to go beyond the information relevant to risk” in New Zealand, Refugee Status Appeals Authority, Refugee Appeal No. 76044, 11 September 2008, para. 74; Note also the extensive use of academic literature in New Zealand, Refugee Status Appeals Authority, Refugee Appeal No. 71427/99, 16 August 2000, para. 86-88.

for a dynamic approach to interpretation based on the particular character of the Refugee Convention as a treaty establishing obligations of States to protect refugees and the principle of effectiveness. Secondly, the scope of the duty to take gender into account in the interpretation of the refugee definition in light of the norms of international human rights law was explored. It has thus been proposed that the scope of this duty includes the requirement to take into consideration gender as a social construct as well as the relationship between gender subordination and the exercise of violence.

The claim that interpretation of the refugee definition requires gender to be taken into account according to the law of treaties provides a novel conceptualisation of gender-sensitive interpretation as a duty of States. This proposition may provide individual remedies for the demonstrated failure of States to follow international or national gender guidelines. It is envisaged that this obligation will be informed by existing international and national gender guidelines and will continue to evolve in light of developments in international human rights law.

This approach to the interpretation of the refugee definition presents a challenge to reliance on the category of ‘gender-related asylum claims’ commonly made in international refugee law scholarship. In the literature and in practice, this approach has led to a rigid categorisation of a sub-set of asylum claims defined by the type of persecution or serious harm such as domestic violence, forced marriage, rape or sexual violence, trafficking, ‘honour crimes’ and female genital mutilation. The consequences of using the category of ‘gender-related asylum claims’ in this manner are that gender is assimilated to sex in a manner which inhibits the conceptualisation of gender as a relational concept and suggests that the gender-related element of asylum claims is fixed to the identity of refugees. It also conceals reliance on sex as a distinguishing characteristic of relevance to the exercise of discrimination, violence and ultimately, persecution.

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Moreover, labelling certain types of asylum claims as exclusively gender-related obscures the existence of a legal duty of States in international law to take gender into account in the interpretation of the refugee definition. Such categorisation perpetuates the notion that asylum claims in which persecution or the reasons for it are gender-related are outside the traditional framework of the Refugee Convention which require extending the boundaries of international refugee law to ensure their inclusion. Instead, adopting the concept of gender as located in the “patterns and practices which gendered social relations produce” rather than within individual subjects,¹³⁷ allows the reconceptualisation of gender in international refugee law not as a fixed category of asylum claims but as a process by which inequalities and discrimination are created and preserved and violence justified and condoned.

Overall, this article proposes a revision of the narrative that ‘gender-related asylum claims’ are particularly complex cases which asylum decision-makers must “wrestle with”¹³⁸ or cases which must be considered outside the traditional boundaries of international refugee law. Locating a duty of States to take gender into account in international refugee law enables an enhanced and more inclusive interpretation of the refugee definition to the benefit of all refugees. Thus, gender may be more usefully considered as a continuum in asylum claims whereby the socially constructed identities that a given society assign to femininities and masculinities may be more or less relevant in a particular asylum claim. More specifically, examination of these factors enables an enhanced understanding of the likelihood of persons being subjected to violence, how they experience violence, its consequences and how the State and society respond to that violence. Failing to take gender dynamics into account when interpreting the refugee definition does not fulfil the objective of a consistent and inclusive standard for

¹³⁷ Conaghan (n 51) 23-24.

¹³⁸ UNHCR, ‘Gender-Related Persecution: An Analysis of Recent Trends’ (1997) 9 *International Journal of Refugee Law* 79, 113.

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refugee protection as it marginalises and disregards the individual circumstances of those who are disadvantaged in the exercise of their rights and freedoms by those gender dynamics. The significance of this analysis for the interpretation of the refugee definition is potentially far reaching across a wide spectrum of asylum claims.

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