

THE HUMAN RIGHTS IMPACT OF INTERPRETING WOMEN AND FEMALE CHILDREN REFUGEE CLAIMS THROUGH GENDER

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European Union member States, particularly those in the Mediterranean, must contend with refugee and asylum claims that impact female refugees and asylum seekers. In order to give justice to human rights protection, the author argues that claims by women and female children refugees must be viewed through the lens of gender. Although this is a debated issue, arguments on the side of gender are not only stronger, but are more in line with human rights protection. The current situation in the Mediterranean region necessitates looking at refugee claims with a critical eye to 'culture', 'religion' and 'political opinion', as well as 'membership of particular group', of female refugees. These categories almost always impact women negatively and are used as a basis of persecution of women and female children. To turn a blind eye on issues related to gender persecution is to deny human rights wholesale. This issue must be faced by any State serious about its human rights agenda, particularly if it wishes to serve as an exemplary example to states which do use culture, religion, politics and group membership to persecute the female members of their respective societies. This is particularly relevant to the Mediterranean.

1. Introduction

The question of gender based claims is a debated issue in the area of Refugee Law.

There are currently two schools of thought regarding gender based claims.¹ According to one School, advocates attempt to make gender or women as a social group or to base persecution on gender alone, with claims that inscribing it on one of the Convention grounds is insufficient. The other school advocates expanding the definition of the Convention grounds and other human rights instruments to the particular concerns affecting female refugees. Although the author believes that both routes are valid ways to achieve sufficient human rights protection for women, the argument is put forth herein that the second school will be more effective because it is more likely to be accepted and upheld in the conservative practice of Refugee Law. Additionally, Mahmoud claims that the two schools are contradictory and cannot be combined, however the author argues that this is an inaccurate claim.² It is possible to institute reforms to current Refugee Law using two methods. Firstly by reinterpreting the Convention grounds to include issues faced particularly by refugee women, and secondly to consider gender based persecution as a ground as well. In fact, the author submits that the two schools have more common than they do differences. The final outcome of both would be the same; human rights protection for female claimants which would normally be lacking in the event of denying the very real gender based persecution that women and female children face. Re-interpreting the Convention grounds with a realistic vision to the valid concerns that female claimants face because they are female would yield the same outcome as that of decisions based on the consideration of persecution based on gender. It is only a fine line of semantics that distinguishes

¹ Mahmoud, N. Crimes Against Honor: Women in International Refugee Law. *Journal of Refugee Studies*, (Vol. 9, no. 4, Oxford University Press, Oxford, 1996.)Pages 368-382.

² N. Mahmoud. Crimes Against Honor: Women in International Refugee Law. *Journal of Refugee Studies*, (Vol. 9, no. 4, Oxford University Press, Oxford, 1996).

the two schools. This will be demonstrated by applying Refugee law and the Canadian guidelines to a hypothetical case found forthwith, as well as by citing examples of gender related persecution. Three of the 1951 Convention grounds lend themselves to particular relevance to gender based claims: political opinion (imputed), religious belief, and membership of a social group. Their implications shall be analysed here as well.

2. The Facts of the Case

In order to apply the principles of the 1951 Convention and the Canadian Guidelines, it is important to apply them to a hypothetical case. The facts of the case are as follows: Xiao Ming, a Chinese woman, at the age of nineteen was sold to Chen. Xiao Ming lived in Fujian Province where it was a cultural custom to sell girls and women in marriage in exchange for large sums of money. Her parents took 18,000 RMB and promised her to a man named Chen when she became twenty one. Xiao Ming had no say in any of this. Chen was known to be a violent and abusive man. After Xiao Ming's parents used up the money, she changed her mind. Chen threatened her that his uncle would arrest her. Chen's uncle in fact, was well-known to arrest people for his own personal reasons and gain. Xiao Ming escaped from her parents home to protect them as well as herself. Chen vandalized their house when they refused to reveal her whereabouts. Chen eventually found her, so she fled to the United States. Chen continues to harass the family, and they must repeatedly hide.³

³ This case was given as an assignment, University of Malta Faculty of Laws, International Human Rights and Democratization in the Mediterranean Master's Course, for the Refugee Law Elective, by Anna Marie Gallagher. February, 2006, Malta.

3. Analysis of the case

When Xao Ming left Chen, persecution of not only Xao Ming, but her parent's began, at the hands of Chen himself, and with the threat of government persecution, in the hands of Chen's uncle who is a government official intent on upholding the cultural customs of his land.

Though she initially 'agreed', the prevailing cultural customs at the time were taken as a matter of fact and to disagree is not done. This is therefore a forced marriage, based on Xao Ming's gender, as a female, and on prevailing cultural customs, thus establishing a well-founded fear of persecution based on being a member of a social group in which the uniting factor is inherent, that of gender. The reasoning behind establishing forced marriage as a form of persecution based on gender is that it is females of traditionally patriarchal cultures that are forced into marriage, and not men. Additionally, this so called 'marriage', is not a marriage but a business transaction in which the female was sold as a good for funds to a third party. This type of business transaction is slavery. As she was also taken from her home to a place where she did not wish to be, this constitutes trafficking. Moreover, the nature of the relationship between this female and Chen is not a marriage but something akin to prostitution and due to the lack of consent on the girls' part, she is subjected to emotional, physical, and sexual violence and rape as well as domestic servitude and exploitation. This forced marriage violates a number of human rights and in this case, all of them are based on gender. If Xao Ming were a male, she would not be subjected to a single one of these atrocities and human rights violations.

Moreover, since these are the prevailing 'cultural customs', there is no availability of any form of government protection against these human rights violations. In fact, follows forthwith, the opposite is the case. It is difficult for gender based violence to be punished for a number of reasons:

“First, gender based violence is so prevalent in most societies that it is accepted as natural or as part of the status quo. Second, since gender based violence is seen as commonplace it is quantitatively different from torture of men or from ‘traditional human rights violations’. Third, gender based violence is inevitable and too prevalent to change. Fourth, often gender based violence is viewed as trivial, individual and a private matter. It is not ‘political’, and it is usually addressed after ‘universal’ rights (i.e. of concern to men) have been secured. Finally, within the separation of public and private spheres, gender violence is considered personal conflict not needing to be addressed at the human rights level.”⁴

These reasons demonstrate the severe difficulty in achieving Human Rights protection for female refugees who face gender based persecution for going against the cultural norms of patriarchal societies, and are members of social groups who are persecuted for either imputed ‘political’ opinion; that is to say because they are perceived as having acted against the society precisely because of their gender.

In the hypothetical case, Chen’s track record has well-established that he uses his government position for personal reasons, so why wouldn’t he do the same with Xoa Ming? Hence, the local government does not protect against this cultural practice and the local government official will contribute to ensure that this forced marriage will take place. The well-founded fear of persecution is supported by the fact pattern in this case.

Realizing all this, Xao Ming fled. The well-founded fear of persecution hitherto based on past persecution (Chen attacking her parents’ house) and these existing persecutions can only attest to further and future persecution(s). The

⁴ N. Mahmoud. *Crimes Against Honor: Women in International Refugee Law*. *Journal of Refugee Studies*, (Vol. 9, no. 4, Oxford University Press, Oxford, 1996.) p. 374.

important Convention ground of the well-founded fear of persecution is thus established, and her family is also already being persecuted. A discussion of several Convention grounds on which the well-founded fear of persecution is based shall ensue.

4. Application of Refugee Law to Gender Based Claims 1951 Convention Grounds

According to the 1951 Convention, the grounds for refugee status refer to the legal term 'refugee' as the definition of a person who has a well-founded fear of persecution based on race, religion, nationality, political opinion and membership of a particular social group.

Using the case of Xao Ming to illustrate the applicability of current Refugee Law, particularly the 1951 Convention, to gender based claims, it is clear that she has fulfilled two of the Convention grounds; membership of a particular social group and political opinion. Indeed, arguments can also be made for her on the basis of religion.

5. Political Opinion

In order to understand more clearly why Xao Ming's case fulfils the Convention ground of political opinion it is necessary to provide a clearer understanding of what political opinion implies,

“Political opinion’ should be understood in the broad sense, to incorporate within substantive limitation now developing generally in the field of human rights, any opinion on any matter in which the machinery of the State, government, and policy may be engaged. This would include the concept of a political act.”⁵

⁵ The Refugee in International Law, Second Edition. Guy S. Goodwin-Gill. Oxford University Press, 1996. P. 49.

Her defiance of both her family and the prevailing 'cultural customs' which are also a form of political repression against women, can be broadly interpreted as a political act. Many so called 'cultural customs' are in reality political norms used to regulate a given society's mores, essentially to maintain a power dynamic giving men hegemony over women. Rules about the status of women in a society certainly have a political nature, as do the rules regarding a man's relationship with his 'wife'. In many instances what is termed a cultural tradition is a thinly veiled political position that privileges one group in a society against another, giving them hegemony. Calling it a cultural tradition rather than a political issue simply obscures the reality.

"Whether challenging prevailing norms is classified in terms of religion, or in terms of political opinion, if measures taken up to enforce the prevailing norms amount to persecution, or if the prevailing norms themselves violate core international human rights standards, there will be a basis for a refugee claim."⁶

Thus, it is clearly established by the facts in Xao Ming's case that by challenging the prevailing norms of the Fujian province, she has faced and will face further persecution, both by those who seek to uphold and enforce the prevailing norms (Chen and his uncle) and by the norms themselves (forced marriage, which it can be argued, is a form of trafficking,⁷ slavery, prostitution, domestic and sexual violence, rape and

⁶ *Ibid*

⁷ See, The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children of 2000, in M. Eriksson. *Gender-Based Persecution - The Evolution of the Refugee Definition*. (Examensarbete Med Pratik. 2003, P52) for the following definition: "The recruitment, transportation, transfer, harbouring or receipt of persons by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payment or benefits to achieve the consent

exploitation.) Let us now move on to the second basis of Xao Ming's claim, membership of a particular social group.

“A woman who opposes institutionalized discrimination of women, or who expresses views of independence from male social cultural dominance in her society, may be found to fear persecution for reasons of imputed political opinion (i.e. she is perceived by the established political and social structure as expressing politically antagonistic views.) Two considerations are of paramount importance when interpreting the notion of ‘political opinion’:

- 1) In a society where women are ‘assigned’ a subordinate status and the authority exercised by men over women results in a general oppression of women, their political protest and activism do not always manifest themselves in the same way as those of men.
- 2) The political nature of oppression of women in the context of religious laws and ritualisation should be recognized.”⁸

Thus, it can be argued that the selling of girls and women into forced marriage in the Fujian province is a political act against them simply because they happen to be female, and when these females protest by fleeing or rejecting forced

of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs. From UN/A/55/382, 2 November 2000, article 3a. The Protocol supplements the United Nations Convention against Transnational Organized Crime.’

⁸ The Refugee in International Law, Second Edition. Guy S. Goodwin-Gill. Oxford University Press, 1996. P. 49.

marriage, they too are in turn making a political statement by their actions and acting in a 'subversive' political manner.

'Feminism' can be viewed in the context of political opinion. To flee from a forced marriage can be seen as a strong feminist stance, given also the social pressure in the Fujian province to conform to such a degrading custom.

"A woman threatened because of her feminist views may be eligible for asylum due to persecution based on the ground of political opinion. The UNHCR and Canadian Immigration Board recognize women's opposition to oppressive laws and customs imposed on women as political statements."⁹

Another important aspect of political opinion has to do with the concept of imputed political opinion. This means the political opinion attributed to people, causing them to become the target of persecution for having an imputed political opinion. In many cases, these people do not have a political agenda, but are accused of having one. The concept of an imputed political opinion is relevant in Xao Ming's case. As someone fleeing a number of serious human rights abuses, she was imputed to have a political opinion in violation of the current regimes' agenda, and was punished accordingly. The fact that this is not a unique case and that in her province a number of other women suffer likewise only serves to strengthen her case. The fact also that her persecutor has relatives who are also a member of the regime is not coincidental. That Chen's uncle is a government official supporting Chen's human rights abuses of Xao Ming automatically puts her at odds with 'the government'.

⁹ See WWW.Hambastegi.org/reports/fact-sheet.html

6. Religious Belief

Continuing with this reasoning, one can also argue that her claim can be based in the Convention ground of religion; by acting against the social mores of her society and not marrying, she is defying the culture and traditions which are usually connected to religious belief.¹⁰

“In many cases, in which the laws of the State are those of the official religion, rejecting cultural/ religious norms that discriminate against women may be seen as a political act. Thus actions that are not normally seen as ‘political’ in the West, such as dressing in an unapproved manner, make a statement that authorities interpret as defiantly political as challenging the fundamental tenants of the State and its power to control its citizens.”¹¹

When Xiao Ming refused to be sold into a marriage, defying the prevailing ‘cultural customs’ of her country, she was also engaging in a political act. Persecution against her can be seen as a result of either her imputed political opinion or religious belief.

“Persecution on the basis of religion, however, may be experienced differently by men and women. Less readily embraced, however, are the claims of women who face discriminatory treatment because of the prevalent religious code of their communities. Women who reject religiously imposed restrictions on their employment, mobility, and dress, have not been as widely recognized as Convention refugees. Either the harm they fear has been characterized as discriminatory and not persecutory, or, although characterized as

¹⁰ Ibid (P 409 in reference to the 1967 Protocol Relating to the Status of Refugees)

¹¹ From www.Gender-relatedrefugee-claims.org

persecutory, has been found unrelated to a Convention refugee ground. Moreover, persecution of women who oppose the imposition of religious codes has also been recognized as persecution on the basis of political and/or social group grounds. ¹²

7. Membership of a Particular Social Group

The Convention ground of membership of a particular social group is relevant to women and female children refugee claimants.

“The Executive Committee of the UNHCR has recognized that women who have transgressed the social mores of their country may be considered such a group. Hathaway identifies gender based groups as a ‘clear example’ of a particular social group because their members share a common and immutable characteristic, that of their sex.”¹³

This will be the starting point for Xao Ming’s claim on the ground of being a member of a particular group, based on the prevailing custom of forced marriage in the Fujian province, this custom applies only to females. Xao Ming, as a Chinese girl and subsequently woman, is subjected to this degrading form of persecution based on her gender, and her biological sex.

“This view was accepted in Canada in the case of Zekiye Incirciyan, a Turkish widow who was persecuted in her country because she did not live under the protection of a male relative. The particular social group was

¹² N. Kelley. The Convention refugee definition and gender based persecution: A decade’s progress. *International Journal of Refugee Law*. Vol.13.no 4. (Oxford University Press, Oxford, 2002). P.563

¹³ From www.Gender-relatedrefugee-claims.org

identified as 'single women living in a Moslem country without the protection of a male relative. The approach of that case has been accepted in other immigration and refugee board decisions in relation to women in Lebanon and Sri Lanka, and interestingly in view of the Nada case, Iran."¹⁴

Clearly, due to the widespread and prevailing degrading custom of forced and sometimes early marriage in the Fujian province, Xao Ming, a native of this region fits the criteria of membership in a particular social group, that of Chinese females, girls and women, who are subject to forced marriage. Additionally, not only is this forced marriage, but money was exchanged, thus, it now becomes slavery. In addition to the non-consensual nature of the transaction, a human being is being sold as a good in exchange for money. This is clearly slavery. That the type of transaction is a marriage that will involve domestic violence, as Chen is already known to be abusive and violent, and that will involve, non-consensual sex, Xao Ming will be subjected to domestic and sexual violence and rape. Given the non-consensual nature of the combination of forced marriage and slavery, she is thus forced into prostitution, selling her body to Chen, to pay for the money her parents received, and this can also be seen as a form as trafficking, as Xao Ming would be transported from one place, for the exchange of money for her person, to another location, from her family's home to Chen's, for reasons of exploitation. As a result of these human rights violations that Xao Ming would be subjected to, she is a member of the social group 'Chinese girls sold or trafficked into forced marriage, prostitution, slavery, domestic and sexual violence, rape and exploitation'.

**{Chinese girls sold or trafficked into forced marriage,
prostitution, slavery, domestic and sexual violence,**

¹⁴ *Ibid*

rape and exploitation, or attempting to flee such situations and are subjected to persecution by the situation itself and by attempts to flee it.}

Given the predominance of selling females into marriage in the Fujian Province and the severe negative consequences of those who attempt to flee, the number of females subjected to this situation would clearly form a social group. Given also the lack of protection and the help of government officials in enforcing this custom, these girls and women are either in danger of being forced into such an arrangement or are in the process of fleeing from it, so there is also the element of impending danger and escape. Those girls and women attempting to flee are subject to further persecution, thus, the group can be further expanded to include,

‘those Chinese girls sold or trafficked into forced marriage, prostitution, slavery, domestic and sexual violence, rape and exploitation, or attempting to flee such situations and are subjected to persecution by the situation itself and by attempts to flee it.’

“In April 1993, the Federal Court of Appeal held that women in China with more than one child who are faced with forced sterilization form a particular social group. The court said, ‘all of the people coming within this group are united or identified by a purpose which is so fundamental to their human dignity that they should not be required to alter it on the basis that interference with a woman’s reproductive liberty is a basic right ranking high in our scale of values.’¹⁵

One may apply similar reasoning to the case of Xao Ming. Her right, as all Chinese girls and women’s right, all girls

¹⁵ *Ibid*

and women across the globe, to liberty in marriage, freedom from trafficking, prostitution, slavery, domestic and sexual violence, rape and exploitation are significantly important human rights. To be subjected to such degrading and inhuman treatment, and forms of torture, with persecution for non-compliance is abhorrent. The girls and women of Fujan province are thus united in this particular social group.

“It is recognized that States, in the exercise of their sovereignty, are free to adopt the interpretation that woman asylum seekers who face harsh or inhuman treatment due to their having transgressed the social mores of society in which they live may be considered as a ‘particular social group’ within the meaning of Article 1 A(2) of the 1951 UN Refugee Convention.”¹⁶

Thus, it has been established that going against social mores may create membership in a particular social group.

“In Matter of Kasinga (1996), in this precedent setting gender based asylum case, the court ruled that female genital mutilation, which results in permanent disfiguration and poses a risk of serious potentially life threatening complications, can be the basis for the claim of persecution, young women who are members of the Tchambe-Kunsuntu tribe of Northern Togo, who have been subjected to FGM, as practiced by that tribe, and who oppose the practice as recognized as members of a ‘particular social group’ within the definition of the term ‘refugee’.”¹⁷

Several cases exist to illustrate this point further. CRDD M89-00057, Wills, Gauthier, February 16, 1989, where the Iranian claimant was found to be a member of the social group,

¹⁶ *Ibid*

¹⁷ See, <http://amnestyusa.org/womenasylum> retrieved April 15, 2008

'a pro-shah family.' In CRDD M89-00971, Wolfe Hendricks, June 13, 1989, where the Refugee Division found the Peruvian claimant to be a member of a particular social group, her family. Also in CRDD M89-01098, A Sri Lankan refugee was found to be a young Tamil in a Tamil Family. Also in CRDD T89-02313, T89-02314, T89-02315, the claimant was found to be a member of the social group, 'targeted family'.¹⁸ One may also argue based on the facts of Xao Ming that her family forms a 'targeted family', one that is targeted for persecution for political opinion and acts in going against social norms of forced marriage for hiding their daughter's whereabouts and because the man persecuting them, Chen, had the support of his uncle who was a government official.

A further implication of the concept of membership of a particular group is the fact that because of their membership, these people would be persecuted. This implies a number of things, first of all that being a member of a particular group means that as a result of their membership it almost automatically makes them subject to human rights violations. Secondly, that their membership of the social group is something exploited by governments who either fail to protect them when others commit human rights abuses against them, or the governments themselves are actively persecuting them on the basis of their membership in that group. "it is argued that rape, female genital mutilation, and discrimination can all be linked to existing grounds, covered under the 'social group' ground or 'other serious violations of human rights' category outlined in the UNHCR Handbook (1991)."¹⁹ In the discourse of gender based claims, it is important to emphasize that women,

¹⁸ Canadian Gender Asylum Guidelines. Women Refugee Claimants. Fearing Gender Related Persecution. Guidelines issued by the Chairperson pursuant to section 65(3) of the Immigration Act. November 1993, updated 1996. Juan Guillen.

¹⁹ N. Mahmoud. Crimes Against Honor: Women in International Refugee Law. *Journal of Refugee Studies*, (Vol. 9, no. 4, Oxford University Press, Oxford, 1996.)

because of their gender as well as having an imputed political opinion imposed on them, constitute a particular social group. The concept of imputed political opinion cannot be separated from that of membership of a particular social group.

“Some theorists hold that attempts to rework the ‘social group’ ground of the definition do not go far enough to encompass the exploitation and persecution based solely on gender, especially since it often takes place in a social and legal context that does not consider it to be criminal.”²⁰

8. Domestic violence and sexual violence

Another dimension to this case, in addition to the human rights violation of forced marriage, would be that if Xao Ming returns home and stays with Chen, a violent and abusive man, she would surely be subjected to domestic and sexual violence.

“Sexual violence against women and girls usually occurs in situations in which women are forced into a relationship, a contract or an act in which they have no independent right to decide how to behave with men.”²¹

“Women who fear persecution resulting from certain circumstances of severe discrimination on grounds of gender or acts of violence either by public authorities or at the hands of private citizens from whose actions the State is unwilling or unable to adequately protect

²⁰ N. Mahmoud. Crimes Against Honor: Women in International Refugee Law. *Journal of Refugee Studies*, (Vol. 9, no. 4, Oxford University Press, Oxford, 1996.).

²¹ N. Mahmoud. Crimes Against Honor: Women in International Refugee Law. *Journal of Refugee Studies*, (Vol. 9, no. 4, Oxford University Press, Oxford, 1996.). p.368.

the concerned persons. In the refugee law context, such discrimination may amount to persecution.”²²

It has already been established in the facts of the case that Chen is an abusive and violent man, and his uncle, a government official is allowing and supporting his violence towards Xao Ming’s family. If she lives with him she would most likely be subjected to domestic violence, and if she is taken to him against her will, most likely she will also be subjected to sexual violence and rape. In Xao Ming’s society, Chen would be seen as her ‘husband’ so beating her would not raise any need for protection from that particular society.

“Sexual assaults are acts of violence which reveal the subordination status of women in both public and private life. Women become more vulnerable to sexual violence because the law, the institutions responsible for implementing the law, and perhaps even the community often sanction these actions with impunity. Sexual discrimination in law and practice fosters indemnity and the stigma attached to rape often deters women from seeking justice.”²³

Women like Xao Ming, who flee from being sold (trafficked) into marriage,

“can be identified by reference to the fact of their exposure or vulnerability for physical, cultural or other reasons, to violence, including domestic violence, in an environment that denies them protection. These women

²² Canadian Gender Asylum Guidelines. Women Refugee Claimants. Fearing Gender Related Persecution. Guidelines issued by the Chairperson pursuant to section 65(3) of the Immigration Act. November 1993, updated 1996. Juan Guillen.

²³ N. Mahmoud. Crimes Against Honor: Women in International Refugee Law. *Journal of Refugee Studies*, (Vol. 9, no. 4, Oxford University Press, Oxford, 1996.) p. 368.

face violence amounting to persecution because of their particular vulnerability as women in their societies and because they are so unprotected.”²⁴

This describes Xao Ming’s situation based on the facts of the case if she were to return to her home.

9. Persecution

“There is no doubt that rape and other forms of gender related violence, such as dowry related violence, female genital mutilation, domestic violence, and trafficking, are acts which inflict severe pain and suffering – both mental and physical- and which have been used as forms of persecution, whether perpetuated by State or private actors.”²⁵

In the case of Xao Ming, being forced into marriage has implications beyond this initial human rights implication. It implies a life of domestic and sexual violence including rape, imprisonment, slavery, as well as trafficking. It encompasses a number of serious human rights violations. In the human rights discourse, rape has already been classified as torture.

“Women face persecution and death for disobeying social customs in source countries. Some examples of this disobedience can be: choosing a husband in place of accepting an arranged marriage; undergoing an abortion where it is illegal; becoming politically active

²⁴ Canadian Gender Asylum Guidelines. Women Refugee Claimants. Fearing Gender Related Persecution. Guidelines issued by the Chairperson pursuant to section 65(3) of the Immigration Act. November 1993, updated 1996. Juan Guillen.

²⁵ UNHCR Refugee Agency. 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. P.3

in a women's movement. Women are also abandoned or persecuted for being rape victims, bearing illegitimate children or marrying men of a different race."²⁶

There are two types of persecution, which ultimately have the same end results. In one case it is either actively undertaken by the State, in the second case it is allowed by the State or the State does not take an active role to prevent it. Both of these aspects of persecution apply to our case. In the one, the prevailing social customs themselves are a form of persecution and the state does nothing to protect girls from them, in the second, the state can help enforce these customs and punish those who flee from them, as is the case with Chen and his uncle, a government official. Also, in terms of persecution, past persecution has already occurred and the promise of future persecution will certainly be fulfilled if she goes home. Additionally being sold into marriage and all that it entails is a form of persecution and trafficking.

"Trafficking for the purpose of forced prostitution or sexual exploitation is seen as a form of persecution: Some trafficked women or minors may have a valid claim to refugee status under the 1951 Convention."²⁷

It has been argued previously that forced marriage can be seen as a type of forced prostitution, sexual exploitation as well as slavery.

In terms of agents of persecution, it is important to note that,

"there is scope within the refugee definition to recognize both State and non-State actors of persecution. While

²⁶ N. Mahmoud. *Crimes Against Honor: Women in International Refugee Law*. *Journal of Refugee Studies*, (Vol. 9, no. 4, Oxford University Press, Oxford, 1996.) p. 371.

²⁷ *Ibid*

persecution is most often perpetuated by the authorities of a country, serious discrimination or other offensive acts committed by the local authorities of a county, serious discriminatory or other offensive acts committed by the local populace, or by individuals, can also be considered persecution if such acts are knowingly tolerated by the authorities, or if the authorities refuse, or are unable, to offer effective protection.”²⁸

In Xiao Ming’s case, just the existence of the social custom of forced marriage as a social norm is most likely enough to establish persecution, however, Chen’s behavior re-enforces the claim, and the fact that his uncle, a government official, as well as other government officials do not do anything to protect girls from this tradition are proof that the State is not actively preventing forced marriage and most likely is engaging in a number of practices that encourage or assist this human rights violation in terms of its policy, particularly its defense of members of society who engage in the violation rather than those who are not protected from it.

The moral rules of a society may even take the form of national laws or customs and the infringement of these moral rules may lead to official retaliation or by punishment by the community, whether this is sanctioned by the authorities or not.²⁹

In terms of the cited case example, not only is Chen’s uncle doing nothing to protect her, he can be called in at the whim of Chen to actively persecute her, in favor of Chen, as this uncle is known to act for personal reasons in the past. The explanation of the ground of persecution has been clearly set out in this article as it pertains to gender based claims and its relevance to gender based claims has been established in this case.

²⁸ *Ibid*

²⁹ N. Mahmoud. Crimes Against Honor: Women in International Refugee Law. *Journal of Refugee Studies*, (Vol. 9, no. 4, Oxford University Press, Oxford, 1996.) p.371.

10. Patriarchy

“Women face discrimination based on sex and the subordinate position of their gender in most societies, including those in the West. Violence against women often takes the form of rape or indecent assault.”³⁰

This means that certain types of persecution occurs against women precisely because they are women.

However, it is not enough to say that female refugee issues can be dealt with under the body of pre-existing international human rights law for the simple reason that those laws outside of the 1951 Convention cannot offer refugee status or asylum and therefore are extremely limited means of protection for female refugees.

“Violence against women is a manifestation of historically unequal power relations between men and women. Violence is part of a historical process and is not natural or born of biological determinism. The system of male dominance has historically had roots and its functions and manifestations change over time. The oppression of women is therefore a question of politics, requiring an analysis of the institutions of the State and society, the conditioning and socialization of individuals, and the nature of economic and social exploitation. The use of force against women is only one aspect of this phenomenon, which relies on intimidation and fear to subordinate women... there are patterns of patriarchal domination which are universal though this domination takes a number of different forms as a result of particular and different historical experiences.”³¹

³⁰ Canadian Gender Asylum Guidelines. Women Refugee Claimants. Fearing Gender Related Persecution. Guidelines issued by the Chairperson pursuant to section 65(3) of the Immigration Act. November 1993, updated 1996. Juan Guillen.

³¹ Special Rapporteur on Violence against women, Preliminary Report, 1994 in, F.G. Jacobs and R.C.A. White. (2nd Ed.). The European Convention on Human Rights. (Clarendon Press, Oxford, 1996). P 943.

The problem of patriarchy is the reason that there exists gender based persecution imbedded in societies, cultures and institutions and in which governments turn a blind eye.

“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 procedures and practices may justify gender based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them of the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms... forms of gender based violence help to maintain women in subordinate roles and contribute to their low level of political participation and to their lower levels of education, skills and work opportunities. Abuse against women is systematic and group based.”³²

It is political but because it is against women it isn't considered political. It reflects unjust power of male dominance.³³

11. The inclusion of other Legal Instruments into the body of Refuges Law particularly in refugee status determination cases for gender based claims.

A number of other legal international human rights instruments in addition to the 1951 Convention can be invoked on behalf of refugee status determination claims particularly those pertaining to gender based claims. These instruments can and should become familiar to the general body of Refugee Law.

³² International Human Rights in Context. Amnesty International, rape and sexual abuse: women, torture and ill treatment of women in detention. 1992. P. 932.

³³ *Ibid* pg. 953-955.

“In terms of those forms of harm that are gender specific: rape, female genital mutilation, forced abortion or sterilization, bride burning, forced marriage, domestic violence, international human rights instruments are invoked to determine acceptable standards. For example, all forms of harm listed above are considered to fall under Articles 3 and 5 of the Universal declaration of Human Rights as they violate the right to life, liberty and security of the person and violate the principle that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”³⁴

Gender based claims are important for a particular reason. They encompass a number of rights. Usually gender based claims are based on a combination of human rights violations: the right to life, protection from torture, inhuman, and degrading treatment, slavery and forced labor, personal liberty and security, freedom of thought, conscience and religion, right to expression, freedom of movement, freedom from discrimination. The case of Xao Ming, as well as the general pattern of most honor killings, forced marriages, bride burning, Female Mutilation, rape, and domestic violence include all of these human rights violations.

In Xao Ming case certain other legal instruments enshrining principles can be used in addition to the grounds found in the 1951 Convention as supplementary law to strengthen the basis of her refugee status.

The Convention against Torture can also be invoked. Torture is prohibited in all circumstances and rape is considered a form of torture. Any sexual relations occurring within a forced marriage, by default would be considered non-consensual sex and therefore be classified as rape. Due to the fact also that Chen’s uncle is a public official who would enforce his nephew’s

³⁴ N. Mahmoud. Crimes Against Honor: Women in International Refugee Law. *Journal of Refugee Studies*, (Vol. 9, no. 4, Oxford University Press, Oxford, 1996.) p.379

marriage to Xao Ming and would punish any action on her part to the contrary, this would constitute cruel, inhuman and degrading treatment and punishment. This criteria would also apply to the forced marriage itself as cruel, inhuman and degrading treatment and punishment. The UN Convention against Torture and other Cruel, Inhuman and Degrading Treatment and Punishment clearly sets can be another legal instrument in Xao Ming's case.

The Convention for the Elimination of All forms of Discrimination against Women (CEDAW), which prohibits discrimination against women can also form the basis for granting refugee status.³⁵ Article 2(f) of The CEDAW reads as follows,

“State parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.”³⁶ Article 2 (f) continues, “To take all appropriate measures, including legislation, to modify or abolish existing laws; regulations, customs, and practices which constitute discrimination against women.”³⁷

When cultural practices violate the dignity of human beings, especially based on gender, cannot be defended solely as cultural practice and must be seen as forms of persecution with a political agenda.

³⁵ Gender Guidelines for Asylum Determination. Researched for the National Consortium on Refugee Affairs. Valji, Nahla and Hunt, Lee Anne De La. 1999. European Union Foundation for Human Rights. P.5.

³⁶ CEDAW Article 2(a) found in Blackstone's International Human Rights Documents. Fourth Edition. P.R. Ghandhi. Oxford University Press. 2004. P.96.

³⁷ *Ibid*

12. Legislation and Policy on Gender Based Claims

This section will be devoted to the policies of Nordic countries in regards to gender based claims and the Canadian guidelines.

“The UNHCR Executive Committee, in Conclusion No. 39, acknowledged that States are free to adopt the interpretation that ‘women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a particular social group within the meaning of article 1A(2) of the [1951 Convention]’. Further, Executive Committee Conclusion No. 73 recommends that States develop ‘appropriate guidelines on women asylum seekers, in recognition of the fact that women refugees often experience persecution differently from refugee men’. Despite these developments, the ‘particular social group’ concept, and more specifically the notion of gender-based persecution, remain unsettled areas of refugee law. As noted during the Symposium, the interpretation of European Union (EU) countries regarding article 1A(2) of the 1951 Refugee Convention tends to be restrictive, as women having transgressed the social mores of their society may not be considered a ‘particular social group’. In the past, no EU countries had guidelines on women refugee claimants fearing gender-based persecution.”³⁸

However, the Convention on Preventing and Combating Violence Against Women and Domestic Violence (CAHVIO) has been entered into in April 2011. Notwithstanding, this is still a relatively new area and precedent and case law need to

³⁸ I. Daoust and K. Folkelius. UNHCR Symposium on Gender-Based Persecution. *International Journal of Refugee Law*. Vol. 8 No. 1/2. (Oxford University Press, Oxford, 1996, p 180-181).

be developed in the direction of international human rights principles.

13. The Canadian Guidelines

The Canadian Guidelines have four categories of importance. Women who fear persecution on the same grounds as men, women who fear persecution on the basis of kinship, women who fear persecution resulting from discrimination on grounds of gender acts or acts of violence by the hands of the state or acts that the state is unwilling to protect them from, women who fear persecution as a consequence of failing to conform to gender-discriminating religious or customary laws or practices in their country of origin.³⁹ The last three apply and will be considered for Xao Ming's case.

“The fourth group of women (in the guidelines) are those who fear persecution because in their country of origin they have transgressed religious or customary laws and practices that discriminate against women. The guidelines cite such social traditions or cultural norms as choosing their own husbands instead of accepting an arranged marriage, wearing makeup, having hair showing, or wearing a certain type of clothing. Such women may be considered as a gender-defined social group.”

As has been established in the previous paragraphs, Xao Ming is a member of ‘Chinese girls sold or trafficked into forced marriage, prostitution, slavery, domestic and sexual violence, rape and exploitation, or attempting to flee such situations and are subjected to persecution by the situation itself and by

³⁹ Canadian Gender Asylum Guidelines. Women Refugee Claimants. Fearing Gender Related Persecution. Guidelines issued by the Chairperson pursuant to section 65(3) of the Immigration Act. November 1993, updated 1996. Juan Guillen.

attempts to flee it.' Clearly, the basis of the persecution is her gender, for Xao Ming would not be subjected to these cultural customs in Fujian if she were a male. Indeed, gender plays a role in refugee creation.⁴⁰

Additionally, the person

“must have a genuine fear of harm sufficient to constitute persecution should she be returned home, her gender must be the reason for the feared harm, and she must have no reasonable expectation that her home country can protect her.”⁴¹

Xao Ming has no protection. Her well-founded fear has already been confirmed by a number of facts. Chen is violent and abusive and has already harmed her parent's home and forced them to flee from his on-going persecution. His uncle is a member of the government and is enforcing this custom and the persecution of Xao Ming's family has no legal or political protection to prevent it or end it. If Xao Ming returns home, her life would clearly be in danger of persecution as well as punishment for fleeing.

14. The European Union

The European Union must be included as well because a number of Nordic States are also members. The European Council has issued an instrument called the Directive 2004/83/EC which explicitly recognizes the persecution of non-state actors and gender based persecution in Article 9, paras. 2 (a)

⁴⁰ N. Mahmoud. Crimes Against Honor: Women in International Refugee Law. *Journal of Refugee Studies*, (Vol. 9, no. 4, Oxford University Press, Oxford, 1996.) p. 370.

⁴¹ Canadian Gender Asylum Guidelines. Women Refugee Claimants. Fearing Gender Related Persecution. Guidelines issued by the Chairperson pursuant to section 65(3) of the Immigration Act. November 1993, updated 1996. Juan Guillen.

and (f) (gender based persecution).⁴² In light of what we have learned about the role of non-state actors in gender persecution, this is a step in the right direction. This recognizes the State responsibility in persecuting non-state actors and in the case of the State abrogating its responsibility, allows for female claimants to seek refugee status based on both the persecution of non-state actors and gender based persecution. This means that domestic violence, sexual violence, forced marriage, bride burning and other 'cultural' customs should no longer not be accounted for, but should be recognized as grounds for gender based claims, according to the directive.

15. The Netherlands

"When the Netherlands ratified the Refugee Convention, the treaty automatically became incorporated into domestic law."⁴³

"The Aliens Act is the principle piece of domestic legislation that regulates refugee and asylum status in the Netherlands. Although the Aliens Act does not explicitly recognize gender-based violence as a potential ground for persecution, the accompanying Aliens Act Implementation Guidelines (Vreemdelingencirculaire) advocate a 'gender-inclusive approach to asylum.'⁴⁴

⁴² Center for Gender and Refugee Studies. Case Law. Gender Guidelines. Retrieved 22/4/08. http://cgrs.uchastings.edu/law/gender_guidelines.Php#Norway pg. 4-9.

⁴³ See, Australian Lawyers for Human Rights Refugee Law Kit 2004, in, Center for Gender and Refugee Studies. Case Law. Gender Guidelines. Retrieved 22/4/08. http://cgrs.uchastings.edu/law/gender_guidelines.Php#Norway pg. 4-9.

⁴⁴ See, Women's Anti-Discrimination Committee Examines Netherland's Policies on Prostitution, Domestic Violence, Human Trafficking, Committee on Elimination of Discrimination against Women, 767th and 768 meetings, General Assembly, WOM/1601/Rev.1 (24 January 2007), available at <http://un.org.News/Press/docs/2007/wom1601.docs>, in, Center for Gender and Refugee Studies. Case Law. Gender Guidelines.

“The government also issued a Work Instruction on the subject: Immigration and Naturalization Service (IND), Work Instruction no. 148: Women in the asylum procedure (1997) (UNHCR translation reprinted in Thomas Spiijkerboer, *Gender and Refugee Status Annex* (Ashgate 2000): ‘Neither the 1951 Convention nor the Dutch Aliens Act makes an explicit distinction according to gender (man/woman). In order to guarantee that these rules effectively do justice to the asylum applications of both men and women, this work instruction formulates a number of premises. Therefore, this work instruction does not contain a policy change, but is meant to draw attention to specific aspects of the asylum applications of women asylum-seekers relative to their gender and which may be important in assessing whether or not the grant of refugee status or a resident permit is warranted.’ Prior to issuance of the Work instruction, the Dutch Refugee Council issued the following policy directive in 1984: It is the opinion of the Dutch Refugee Council that persecution for reasons of membership of a particular social group, may also be taken to include persecution because of social position on the basis of sex. This may be especially true in situations where discrimination against women in society, contrary to the rulings of international law, has been institutionalized and where women who oppose this discrimination, or distance themselves from it, are faced with drastic sanctions, either from the authorities themselves, or from their social environment, where the authorities are unwilling or unable to offer protection.”⁴⁵

Retrieved 22/4/08. http://cgrs.uchastings.edu/law/gender_guidelines.Php#Norway pg. 4-9.

⁴⁵ See, Center for Gender and Refugee Studies. *Case Law. Gender Guidelines*. Retrieved 22/4/08. http://cgrs.uchastings.edu/law/gender_guidelines.Php#Norway pg. 4-9.

16. Norway

“Norway has adopted the interpretation proposed in Executive Committee Conclusion No. 39.”⁴⁶

“The legal foundation of Norway’s immigration and refugee protection system is the Act concerning the Entry of Foreign Nationals into the Kingdom of Norway and Their Presence in the Realm (Immigration Act (1988, last amended 2002). The Norwegian Ministry of Justice issued guidelines for claims based on gender-based persecution in 1998. In Norway, the 1998 Ministry of Justice guidelines introduced recognition of non-State agents, and the possibility of gender constituting a Convention ground for the granting of refugee status. They also introduced the principle of giving asylum applicants the benefit of the doubt.”⁴⁷

A 2000 report by an NGO (The European Council on Refugees and Exiles) specifies

‘Guidelines effective from 15 January 1998 specifically mention gender related persecution, exemplified as situations where women, through their actions, omissions or statements, violate written or unwritten social rules that affect women particularly, regarding dressing, right to employment, etc. When the punishment for violating such rules can be seen as persecution in

⁴⁶ I. Daoust and K. Folkelius. UNHCR Symposium on Gender-Based Persecution. *International Journal of Refugee Law*. Vol. 8 No. 1/2. (Oxford University Press, Oxford, 1996, p 180-181).

⁴⁷ See, H. Crawley and T. Lester, Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe 26, EPAU/2004/05 (UNHCR 2004) and T.B. Holth, Implementation of a Gender Perspective in Norwegian Refugee Law 40 (2000), in, Center for Gender and Refugee Studies. Case Law. Gender Guidelines. Retrieved 22/4/08. http://cgrs.uchastings.edu/law/gender_guidelines.Php#Norway pg. 4-9.

accordance with the Geneva Convention, asylum should be granted... There is no special procedure or special accommodation for female asylum seekers.”⁴⁸

Norway announced in February 2007 that (presumably more extensive) gender-based persecution guidelines will accompany an upcoming draft Alien’s Act.”⁴⁹

17. Sweden

“Immigration and refugee determination in Sweden are regulated by the Swedish Aliens Act. A new Aliens Act entered into force on 31 March 2006, replacing the 1989 Aliens Act. According to the Swedish Government’s Human Rights Webpage, the new law replaces the former administrative appeals system with a new system for appeals and procedures in immigration cases... The Act explicitly includes gender as a particular social group within the definition. The Swedish Migration Board (Migrationsverket) issued guidelines on gender-based persecution upon instruction of the Swedish government in March 2001.”⁵⁰

⁴⁸ See, European Council on Refugees and Exiles, Norway, European Asylum systems: legal and social conditions for asylum seekers and refugees in Western Europe (2000), in Center for Gender and Refugee Studies. Case Law. Gender Guidelines. Retrieved 22/4/08. http://cgrs.uchastings.edu/law/gender_guidelines.Php#Norway pg. 4-9.

⁴⁹ See, UNHCR Press Release, UNHCR welcomes Norwegian steps to strengthen refugee protection, 9 February 2007, in, Center for Gender and Refugee Studies. Case Law. Gender Guidelines. Retrieved 22/4/08. http://cgrs.uchastings.edu/law/gender_guidelines.Php#Norway pg. 4-9.

⁵⁰ See, Sweden: Swedish Migration Board, Gender-Based Persecution: Guidelines for Investigation and Evaluation of the Needs of Women for Protection, 28 March 2001 in, Center for Gender and Refugee Studies. Case Law. Gender Guidelines. Retrieved 22/4/08. http://cgrs.uchastings.edu/law/gender_guidelines.Php#Norway pg. 4-9.

18. Arguments against Gender Based Claims

Three main types of arguments against gender based claims have been proposed. These arguments are invalid and easily refuted. Several weak and refutable arguments exist against gender based claims. They include arguments limiting gender based claims on the grounds that the definition of a social group should be restricted to exclude gender, arguments limiting gender based claims based on arguments for cultural relativism, and arguments against gender based claims using the so called 'floodgate' reasoning. All of these arguments are flawed and shall be rebutted here.

(1) Limitations on the type of social group

One argument attempts to claim that persecution based on membership in a social group in which the group has to do with gender or abuse is not valid. The weakness that lies in this argument is that there are cases by analogy of people who are members of groups based on other violations and who suffer persecution for such. There is no reason why gender or abuse should be made invalid criteria for defining certain groups.

“Abused women unprotected by their country of origin were not a particular social group. The panel reasoned that the existence of persecution alone should not define a particular social group. The guidelines however, suggest that abused women can form a particular social group based on the fact of their abuse. The view that a particular social group can in part be defined by its abuse gained support in the Cheung case, in which the Federal Court of Appeal held women in China facing coerced sterilization as a result of the one-child policy could form a particular social group.”⁵¹

⁵¹ UNHCR Refugee Agency. 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. P.3

Thus, the persecution of Xao Ming, in this case based on her being a

‘Chinese girls sold or trafficked into forced marriage, prostitution, slavery, domestic and sexual violence, rape and exploitation, or attempting to flee such situations and are subjected to persecution by the situation itself and by attempts to flee it’,

though in part is based on gender and in part on abuse, has a basis for being a particular social group. However, the previously cited case law has demonstrated that membership of a particular social group, whether based on abuse, going against social mores, or something as small as a family, has basis and is grounded in a broad interpretation of the 1951 Convention.

We will see in subsequent paragraphs clear refutations for these arguments.

“In the refugee context it is still unclear how far the ambit of ‘social group’ can be stretched in domestic abuse cases. Nor is it clear how rigorous the test will be for determining a lack of State protection and the supporting evidence that will be required.”⁵²

The UNHCR definition of a social group is 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 that is innate, unchangeable, or which is otherwise fundamental to identify conscience or the exercise of one’s rights.⁵³

⁵² *Ibid*

⁵³ UNHCR definition of Social Group found in UNHCR The UN Refugee Agency. Guidelines On International Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees. P. 3.

(2) Limitation of cultural relativism

Essentially, governments are seen as responsible for maintaining human rights standards particularly when cultural values go against them. Moreover, what is deemed a 'cultural value' may at times be political oppression. "Cultural relativism is often cited as a reason for ignoring the claims of gender persecution."⁵⁴ There are arguments that governments are not responsible for the cultural norms of their societies when those norms violate human rights.⁵⁵ These claims, in light of internationally accepted Human Rights instruments, such as the CEDAW, have little foundation. (Article 5(a) of the CEDAW obliges State parties to

"take all appropriate measures (a) to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary to all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."⁵⁶

Clearly the forced marriage of girls and women like Xiao Ming are severe violations of human rights that cannot be rationalized away as 'cultural norms.' According to Chairman Mawani, of the Canadian Immigration and Refugee Board,

⁵⁴ Gender Guidelines for Asylum Determination. Researched for the National Consortium on Refugee Affairs. Valji, Nahla and Hunt, Lee Anne De La. 1999. European Union Foundation for Human Rights.

⁵⁵ See, Gender Asylum Reflects Mistaken Priorities. By Dan Stein. 1996 Human Rights Brief a publication of the Center for Human and Humanitarian Law at Washington College Law, American University. Retrieved February, 2007.

⁵⁶ Gender Guidelines for Asylum Determination. Researched for the National Consortium on Refugee Affairs. Valji, Nahla and Hunt, Lee Anne De La. 1999. European Union Foundation for Human Rights.

⁵⁷ *Ibid*

“This is not simply a matter of imposing western standards on other countries. It is a matter of respecting internationally accepted human rights standards.”⁵⁷

(3) Limitations of the Floodgate argument

The third major argument, the so called ‘floodgate’ argument is as follows.

“An inclusion of gender-persecution would open a ‘floodgate’ swamping those countries with applicants. This fear has little foundation for a number of reasons. The floodgate argument is based on the assumption that the category of woman as a specific group is too large and ambiguous and by opening up this category and accepting refugees on this basis, millions more will present themselves, as violence against women is endemic and universal. However, there is nothing in the concept of refugee or in the Convention definition that allows for the exclusion of a claim on the basis that it is a persecution shared with large numbers of others. Each claim must be assessed separately. In the United States, ‘social group’ must be given a broad and liberal interpretation in order to protect groups who do not necessarily have political, religious, or racial ties at the root of the persecution. The existence of large numbers of persecuted women does not and cannot disqualify a woman from being a claimant. Just as gendered violence is endemic and universal, the existence of political violence is also endemic the world over, yet the fear of large numbers of possible political refugees does not preclude the recognition of their plight. Women are many times constrained socially and economically and hindered from reaching opportunities to make a claim. Lastly, accepting gender persecution on grounds for asylum does not imply that all such applicants would be granted asylum.”⁵⁸

⁵⁸ *Ibid*

The idea that because gender claims allow for women, and women are half the population and face large-scale oppression, abuse and persecution, they should not have protection, is incongruous. "approximately two-thirds of the global refugee population are female, yet the majority of refugee claimants are male."⁵⁹ Half the world's population are men, and men face serious political persecution. Should their human rights then be denied, because there are so many of them? Of course not. Had Xao Ming a different judge, perhaps he would have argued that her cultural customs should be respected, that her husband is just mean, and can do what he wants with his wife, as domestic violence is an accepted cultural practice, and that if we give Xao Ming asylum, we would have to give every Chinese, and possibly almost every other female on earth asylum, as the statistics for rape, domestic and sexual violence, all based on gender, the world over, are simply staggering. Fortunately, such a judge is not the one arguing Xao Ming's case and her refugee claim is well established in this article.

Another example of a floodgate argument against gender based claims this time in the context of Zimbabwe is as follows:

"domestic violence occurs in all societies and if 'unprotected Zimbabwean women or girls subject to wife abuse' formed a particular social group, then so would 'unprotected African women and girls and, by extension, all unprotected women and girls subject to abuse. The implications of a policy suggesting that any abused woman could find refuge in Canada is staggering."⁶⁰

The problem with this kind of argument is that it negates the entire human rights discourse which values the life and quality of life of the individual in the face of human rights

⁵⁹ N. Mahmoud. Crimes Against Honor: Women in International Refugee Law. *Journal of Refugee Studies*, (Vol. 9, no. 4, Oxford University Press, Oxford, 1996.) p. 372

⁶⁰ *Ibid*

violations. For example, a primary argument for the ban on torture in all circumstances has to do with precisely this particular issue of the quality of life of the individual who is tortured. The ban on torture states unequivocally that torture under all circumstances is wrong. The reasoning behind this is that in no way should an individual human being's quality of life be compromised to justify a State policy that claims to be acting on behalf of a large number of people. This same argument may be applied against the Zimbabwean judge. Just because a large number of human beings suffer the same human rights violation does not in any way make the violation less serious, nor does it erase the responsibility of States to protect each individual human being and their human rights who would be subjected to the violation. It is almost as if this judge is saying, "well, because everyone is doing it, then it must be ok." This type of morally decadent reasoning is meaningless in the human rights discourse.

Another counter argument against the floodgate argument is as follows:

"although the majority of displaced people are female, statistics show that they make up only one third of asylum seekers in the west, and that proportionately fewer are granted refugee status than men."⁶¹

19. Conclusion

Other than forced marriage and all of its implications, there are also scenarios that lend themselves to gender based claims following the previous lines of reasoning found in this article. For example, honor killings of females who are

⁶¹ N. Mahmoud. Crimes Against Honor: Women in International Refugee Law. *Journal of Refugee Studies*, (Vol. 9, no. 4, Oxford University Press, Oxford, 1996.) p. 368.

either accused of violating social norms regarding premarital relations, or who choose to change their religion or marry a member of a different religion would also be able to be classified as members of particular social groups. In the case of women who are accused of impropriety, and are subject to honor killings based on these accusations they would be a social group. The same would apply to women who have changed their religion or married men of a different religion in certain societies. They would be considered members of a particular group, i.e., women who changed their religion or women who married out of their religion and are subject to honor killing for doing so. The fact that they would indeed be subjected to honor killings indicates that as a result of being members of these particular social groups, they would also face persecution which is precisely basis for the 1951 Convention. Their so called 'impropriety' and/or marriages to outsiders or religion changes constitute their memberships of particular social groups which are composed of women under the same circumstances. Further, which when considered together with the persecution that they would face, therefore constitute a valid refugee status claim based on gender.

Expanding the Convention grounds to include gender based human rights violations against women is a necessary and effective means to offer female refugees protection and asylum. The creation of a new ground; that of persecution based on gender alone is still seen as too broad and because of the limits of patriarchy will take a long time in achieving. However, expanding the current Convention grounds would provide for the needs of refugee women and girls.

Bibliography

- N. Mahmoud. *Crimes Against Honor: Women in International Refugee Law*. Journal of Refugee Studies, (Vol. 9, no. 4, Oxford University Press, Oxford, 1996.) Pages 368-382.
- N. Kelley. *The Convention refugee definition and gender based*

persecution: A decade's progress. International Journal of Refugee Law. Vol.13.no 4. (Oxford University Press, Oxford, 2002). P.559-568

Gender Guidelines for Asylum Determination. Researched for the National Consortium on Refugee Affairs. Valji, Nahla and Hunt, Lee Anne De La. 1999. European Union Foundation for Human Rights.

UNHCR Refugee Agency. *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. (7 May 2002)

UNHCR Guidelines on International Protection: Application of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked. (7 April 2006)

Canadian Gender Asylum Guidelines. *Women Refugee Claimants. Fearing Gender Related Persecution.* Guidelines issued by the Chairperson pursuant to section 65(3) of the Immigration Act. November 1993, updated 1996. Juan Guillen.

I. Daoust and K. Folkelius. *UNHCR Symposium on Gender-Based Persecution.* International Journal of Refugee Law. Vol. 8 No. 1/2. (Oxford University Press, Oxford, 1996, p 180-181).

M. Eriksson. *Gender-Based Persecution-The Evolution of the Refugee Definition.* (Examensarbete Med Pratik. 2003, P52

Books

Blackstone's International Human Rights Documents. Fourth Edition. P.R. Ghandhi. Oxford University Press. 2004.

Brownlie, Ian, and Goodwin-Gill, Guy S. (Editors). *Basic Documents on Human Rights.* 4th Edition. Oxford University Press, (2002).

Special Rapporteur on Violence against women, Preliminary

- Report, 1994 in, F.G. Jacobs and R.C.A. White. (2nd Ed.). *The European Convention on Human Rights*. (Clarendon Press, Oxford, 1996). P 943.
- The Refugee in International Law*, Second Edition. Guy S. Goodwin-Gill. Oxford University Press, 1996.
- Seddon, Duran. (Editor). (2002). *Immigration, Nationality and Refugee Law Handbook*. 2002 Edition. British Nationality, Page 561.
- Wallace, Rebecca. (1997). *International Human Rights Texts and Materials*. London: Sweet and Maxwell. Page 151.
- International Human Rights in Context. *Amnesty International, rape and sexual abuse: women, torture and ill treatment of women in detention*. 1992. P. 932, pg. 953-955.

Documents

- UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
- UN 1979 Convention on the Elimination of All Forms of Discrimination against Women.
- 1999 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.
- 1951 Convention

Websites

- www.gender-relatedrefugee-claims.org
- www.hambastegi.org/reports/fact-sheet.htm
- Gender Asylum Reflects Mistaken Priorities. By Dan Stein. 1996 Human Rights Brief a publication of the Centre for Human and Humanitarian Law at Washington College Law, American University. Retrieved February, 2007.
- See, H. Crawley and T. Lester, Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe 26, EPAU/2004/05 (UNHCR 2004)

and T.B. Holth , Implementation of a Gender Perspective in Norwegian Refugee Law 40 (2000), in, Center for Gender and Refugee Studies. Case Law. Gender Guidelines. Retrieved 22/4/08. http://cgrs.uchastings.edu/law/gender_guidelines.Php#Norway pg. 4-9.

See, European Council on Refugees and Exiles, Norway, European Asylum systems: legal and social conditions for asylum seekers and refugees in Western Europe (2000), in Center for Gender and Refugee Studies. Case Law. Gender Guidelines. Retrieved 22/4/08. http://cgrs.uchastings.edu/law/gender_guidelines.Php#Norway pg. 4-9.

See, UNHCR Press Release, UNHCR welcomes Norwegian steps to strengthen refugee protection, 9 February 2007, in, Center for Gender and Refugee Studies. Case Law. Gender Guidelines. Retrieved 22/4/08. http://cgrs.uchastings.edu/law/gender_guidelines.Php#Norway pg. 4-9.

See, Australian Lawyers for Human Rights Refugee Law Kit 2004, in, Center for Gender and Refugee Studies. Case Law. Gender Guidelines. Retrieved 22/4/08. http://cgrs.uchastings.edu/law/gender_guidelines.Php#Norway pg. 4-9.

See, Women's Anti-Discrimination Committee Examines Netherland's Policies on Prostitution, Domestic Violence, Human Trafficking, Committee on Elimination of Discrimination against Women, 767th and 768 meetings, General Assembly, WOM/1601/Rev.1 (24 January 2007), available at <http://un.org/News/Press/docs/2007/wom1601.docs>, in, Center for Gender and Refugee Studies. Case Law. Gender Guidelines. Retrieved 22/4/08. http://cgrs.uchastings.edu/law/gender_guidelines.Php#Norway pg. 4-9. <http://amnestyusa.org/womenasylum> retrieved April 15, 2008.