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WOMEN REFUGEES: THE FORGOTTEN MAJORITY.

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ABSTRACT

This paper discusses gender and application and interpretation of the Refugee Convention 1951 vis-à-vis female refugee experience with a primary focus on conflict-related claims by analyzing case laws, reports, and academic discussion and intends to seek whether mistreatment during conflict comes within the ambit of persecution. Subsequent discussion will also try to highlight the claimed 1951 Convention grounds for women refugees and the procedural problems faced by them in such claims. The paper will also engage in the perceived similarity between procedural hurdles faced by them during conflict and peace-time.

INTRODUCTION

All persons suffer the effects of a conflict. Sometimes female refugees can face similar experiences as male refugees while other times, there exists a difference in their experience. Females may be subjected to different violations because of their gender or may be subjected to a similar violation as men but may perceive and be affected by such harms differently. The most common experience is sexual violence committed during conflicts. United Nations 2012 report states that “sexual violence and the shadow of trauma it casts, disproportionately affects women and girls.”¹ Women and girls account for approximately fifty percent of the refugees worldwide and statistics show at-least five out of ten women have experienced sexual violence during conflict². Memela argues they either have no, or less legal rights and, are marginalized and atrocities faced by them

¹ UN Secretary-General, ‘Conflict-Related Sexual Violence: Report of the Secretary-General’, 13 January 2012, UN Doc. S/2012/33, paragraph 6. See generally <https://www.migrationpolicy.org/article/gender-based-violence-against-women-both-cause-migration-and-risk-along-journey>

² United Nations Economic and Social Council (2014) Gender equality and the empowerment of women in natural disasters, Report of the Secretary-General | See generally <https://asiapacific.unwomen.org/en/news-and-events/in-focus/women-refugees-and-migrants#n3>

in their home country have chances of repetition in the asylum country as well.³ Anker reports an increase in the number of refugees from 8.2 million to 15.3 million post-2000s and the majority consists of women and their dependent children⁴. Camus-Jacques call female refugees the “Forgotten Majority” and she entails that the great majority of them comes from conflicted-regions and Third-World countries⁵. One can hypothesize the dissimilar female experience from persistent universal gender inequality where females tend to be poorer and less-educated because of the patriarchal notions, all of which negatively accumulate during their experiences during conflicts.

Females fleeing conflict to claim asylum experience gender-discriminated experience by the decision-makers which often arises during the procedural and credibility process during asylum claims. “It is not immediately obvious that they would be, given that neither the terms ‘sex’ nor ‘gender’ appear in the definition of ‘refugee’ set out in the 1951 Convention, as amended by the 1967 Protocol Relating to the Status of Refugees.”⁶

However, past decades have witnessed a significant focus at the global level on guaranteeing a gender-sensitive and inclusive interpretation of the refugee-definition. This includes UNHCR’s guidance documents⁷, female-asylum seekers guidelines⁸, and state adoption of legislation⁹

³ Memela S., Maharaj B. (2016) Challenges Facing Refugee Women. A Critical Review. In: Domínguez-Mujica J. (eds) Global Change and Human Mobility. Advances in Geographical and Environmental Sciences. Springer, Singapore. https://doi.org/10.1007/978-981-10-0050-8_4

⁴ Deborah E. Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, (15 HARV. HUM. RTS. J., 2002): page 141-142

⁵ G. Camus-Jacques, *Refugee women: the Forgotten Majority*, in G. Loescher & L. Monahan, (eds.) *Refugees and International Relations* (Oxford University Press, 1989): page 141

⁶ Convention Relating to the Status of Refugees (adopted 28 July 1951 and entered into force April 22, 1954), 189 UNTS 137 (1951 Convention), Art. 1A(2)

⁷ Refer to UNHCR, ‘Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons: Guidelines for Prevention and Response’, May 2003 and UNHCR, ‘Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention UNHCR, ‘Handbook for the Protection of Women and Girls’, January 2008

⁸ Guidelines for Women Refugee Claimants Fearing Gender-Related Persecution 2003’ (Canada) (‘Guidelines for Women Refugee Claimants’) Guidelines on Gender Issues for Decision Makers 1996’ (Australia); and ‘Gender Guidelines 2012’ (Australia)

⁹ For example -Canada and Ireland Refugee Act of 1996 (Ireland), sec. 1 (in defining membership of a particular social group)

including ‘gender-perspective’ as one of the convention grounds in the asylum application process. Despite these attempts, various studies show the existence of flaws in consideration of female refugee claims and poor implementation of gender-sensitive policies that clearly have the scope of improvement in the host countries. A major concern is that despite the development they are subjected to social discrimination, prejudice, and exclusion and such improvement require a holistic approach. Eminent scholars point-out that the 1951 Convention has been insufficient in protecting female refugees. This paper aims to discuss female refugee experience with a primary focus on conflict-related claims by analyzing case laws, reports, and academic discussion and intends to seek whether mistreatment during conflict comes within the ambit of persecution. Subsequent discussion will also try to highlight the claimed 1951 Convention grounds for women refugees and the procedural problems faced by them in such claims. The paper will also engage in the perceived similarity between procedural hurdles faced by them during conflict and peace-time.

PERSECUTION

The concept of ‘persecution’ is central to the definition laid down by the flagship treaty on refugees ‘The 1951 Convention.’ Article 1A (2) lays down the main contention that the refugee or the claimant must possess a well-founded fear of harm that qualifies as ‘persecution’. Though the term does not have a categorical definition under the Convention, it mainly pertains to “a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group’ and other serious violations of international human rights constitute persecution.”¹⁰ There exist myriad gender-related forms of abuse, ill-treatment, and harm such as- rape, forcible impregnation, conjugal slavery, female genital mutilation, domestic and dowry-related violence, and trafficking “because they inflict severe pain and suffering (both mental and physical), whether perpetrated by state or non-state actors.”¹¹

¹⁰ UNHCR, ‘Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees’ ,January 1992 | Such human rights would include those listed in the 1981 Convention on the Elimination of All Forms of Discrimination against Women (entered into force 3 September 1981), 1249 UNTS 13 (CEDAW).

¹¹ UNHCR, ‘Guidelines on International Protection No. 1’, para- 9

But only some of the forms of abuse are recognized as equivalent to persecution. The well-established forms of gendered-persecution are discussed below-

RAPE

Rape is a recognized human rights violation¹², and, during the conflict, is the most established form of female persecution. The reasons may vary from opportunistic and include dominion of power and control by the perpetrator.¹³ It is both physically and psychologically traumatizing to the victim and affects their families as well. This is why rape is acknowledged and perceived as an effective tool of genocide – the “crime of all crimes”¹⁴ and war crimes. The threat is prevalent throughout all five stages of fleeing developed by Cox-Berry- namely pre-uprooting, uprooting, transition in refugee camps, resettlement in first asylum country, and adaptation and integration to a new homeland¹⁵. Numerous country guidelines¹⁶ and domestic refugee case-laws also specify rape as a form of persecution. Oosterveld¹⁷ in her extensive study on women fleeing conflict has hypothesized acceptance of past and future feared rape evidence in asylum claims. In one of the cases from the Democratic Republic of the Congo ‘DRC’, the female-claimant and her mother were sexually-assaulted by soldiers on daily visits while her husband was in detention¹⁸. This

¹² UNGA Res. 48/104, 20 December 1993, Art. 2.

¹³ Al-jazeera, “Myanmar gang-rape victim wins legal battle with military” Retrieved 19 December, 2020 from https://www.aljazeera.com/news/2020/12/19/myanmar-gang-rape-victim-wins-legal-battle-with-military?fbclid=IwAR1v3iY5IHB4QBAm6PgvQzBufKizl3x6GTyaTjvRgigkOWfRB_cS_2-Cts0 “Myanmar’s most powerful institution, whose soldiers have long been accused by rights groups of using rape as a weapon of war in the country’s conflict zones”

¹⁴ Dissenting Opinion of Judge Koroma, Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), 3rd February 2006, para 13

¹⁵ Fariyal Ross, ‘Contagion of violence against Refugee women in Conflict and Displacement.’ Retrieved 18 December 2020 from <https://www.ncbi.nlm.nih.gov/books/NBK207254/>

¹⁶ See generally, United Kingdom, ‘Asylum Gender Guidelines’, Art. 2A.16–8; United States, ‘Considerations for Asylum Officers’, 9and Canada, ‘Guidelines for Women Refugee Claimants’, Art. B ‘Assessing the Feared Harm’

¹⁷ Valerie Oosterveld, *Women and Girls Fleeing Conflict: Gender and the Interpretation and Application of the 1951 Refugee Convention*, in IN FLIGHT FROM CONFLICT AND VIOLENCE: UNHCR'S CONSULTATIONS ON REFUGEE STATUS AND OTHER FORMS OF INTERNATIONAL PROTECTION 183–214 (Volker Türk, Alice Edwards, & Cornelis Wouters eds., 2017).

¹⁸ AB (New Zealand); 73894 : Ibid at page 188

amounted to a well-founded fear of persecution. Another claimant from Haiti was granted refugee status when she was gang-raped for her political opinion during the 1991-coup by the military.¹⁹ Another case of a female applicant's rape from DRC was rejected by the adjudicator, who held that the perpetrator found her attractive and the crime was of common nature and personal one.²⁰ On appeal, the tribunal examined the evidence which concluded the applicant was raped on her refusal to marry the nephew of the Afghan warlord who had detained her husband. The tribunal granted her status and concluded that forceful marriage during conflicts is an act of aggression. The UK which is perceived to have a stringent refugee policy had rejected claims of a Tamil woman who was repeatedly raped by Sri Lankan soldiers and at one point the soldiers forced her father to watch them commit the act. In the appeal, the court took note of her suicide attempt and forceful impregnation and was granted impunity on fear of future persecution by the soldiers²¹. The main obstacle deduced by Oosterveld was that adjudicators do not consider the after-effects of past rape or the stigma and discrimination attached to it which lead to future fear of persecution²².

VIOLENCE INFLICTED IN OTHER FORMS

Other forms include forced prostitution, breast and genital mutilation, forced sexual slavery and as compared to rape their after-effects appear to be similar to it. Ill-treatment in the form of conjugal and domestic slavery, forced impregnation and sterilization or forced abortion adds to gender-related abuse in conflict because of their categorical targeting of control over female reproductive organs.

Torture, imprisonment, or enslavement may on name appear as gender-neutral forms of abuse but even this form of ill-treatment leans more towards targeting and affecting women through sexual

¹⁹ Elena Gotelli, 'The Protection of Refugee Women under International Law: Achievements ad Challenges' Luiss Guido Carli page 19 https://tesi.luiss.it/20124/1/077702_GOTELLI_ELENA.pdf

²⁰ Kika (Canada); 73894 et al para 5 Ibid 189

²¹ Ibid at 187-190

²² Ibid page- 191

touching or sexual favors or ‘entertainment’ to escape imprisonment or torture. Another factor would be one’s perception of harm. “A preliminary empirical research suggests that loss of a child, separation from children, and witnessing harm to children or family members are particularly viewed by women as primary harms to the self, often as or more egregious than a severe violation of their bodies.”²³ Due to the interwoven nature of conflict-related and personal or non-conflicted harms, women are unable to comprehend sexual-violence as the nucleus of their claim in regards to describing their persecution fears. It has come to light that adjudicators’ focus inclines towards the most common gender-focused violation rather than viewing fear as a whole. They tend to compartmentalize or normalize and marginalize accounts of sexual violence claims and focus on only the non-gendered-specific facets of the claim. For instance, in the Canadian case²⁴ discussed above, after the claimant’s appeal was upheld with nexus to Convention grounds and the court considered the instance of the robbery at her house which resulted in the mutilation of her neighbors and their children. The adjudicator categorized rape, beatings, robbery, and mutilation as ‘localized crimes’ and held perpetrators targeted the applicant for the money which led to the subsequent acts. The adjudicator tends to ignore the political and social climate of the applicant’s country while dismissing such claims. Hence, “A closer look at the conflict background . . . and how it was fought, will often establish a link to the Convention”²⁵.

In this regard, a holistic approach to widen the ambit of gender-related persecution is needed where the adjudicators give a fair chance and must listen carefully to the claimants to assess cumulative harms they have incurred for their application. Though the procedure is required to be stringent, the level should not be such that rightful claims are brushed aside under the garb of the procedure.

²³F. Ní Aoláin, D. F. Haynes and N. Cahn, *On the Frontlines: Gender, War, and the Post-Conflict Process* (New York: Oxford University Press, 2011), 48, 154.

²⁴ Supra note 17

²⁵ G. S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn. (New York: Oxford University Press, 2007), page 126.

1951 CONVENTION GROUNDS: MEMBERSHIP OF A PARTICULAR SOCIAL GROUP (MPSG)

Since ‘gender’ as the ground is not overtly mentioned in the refugee definition, females are steered into the category of MPSG. The gender-specific claims of females must be categorized into the other grounds mentioned namely- “race, religion, nationality or political opinion.”²⁶ MPSG is the pre-recognition of a group and means a group of people with innate and unchangeable characteristics other than fear of being persecuted as propounded by UNHCR. Persecutory action towards MPSG such as conflict-related sexual violence committed against women characterizes the victims into a visible group that is stigmatized within society. The ‘women’ can be identified from a particular country such as Afghani, Albanian women while in other instances category is broadened to provide enough differentiation such as Hazara women disowned by her husband with no family support²⁷ or an educated Dalit-Indian woman tortured by the husband and in-laws.²⁸ Application of such approaches differ on a case-to-case basis, however, most MPSG gender-specific cases deal with private harms committed during peace-time such as genital mutilation or domestic violence, or forced marriage. For instance, this UK case²⁹ stipulates Somali women form MPSG not because they are women but because of pervasive gender-discrimination, in Somalia, while in the HH case³⁰ the focus was mainly the applicant’s private condition. In cases where it’s well-established that persecution is due to ‘gender’ then the most-appropriate particular social group is ‘women’. Edwards opines that “Inter-sectionality, in and of itself, can be positive and necessary because it recognizes the lived realities of female members of a society – who are not only female but also of a particular age, religion, race and so on”.³¹ Thus, the application of other-

²⁶ Article 1A(2), 1951 Convention. | UNHCR, ‘Guidelines on MPSG’, paras. 2-10.

²⁷ AZ(Afghanistan)[2017]NZIPT80122123)
https://forms.justice.govt.nz/search/Documents/IPTV2/RefugeeProtection/ref_20170920_801221.pdf

²⁸ (GL) India [2019] NZIPT 801546
https://forms.justice.govt.nz/search/Documents/IPTV2/RefugeeProtection/ref_20190314_801546_abstract.pdf

²⁹ HM (United Kingdom), para. 33

³⁰ HH (United Kingdom), para. 351-352

³¹ A. Edwards, ‘Age and Gender Dimensions in International Refugee Law’, in E. Feller, V. Turk and F. Nicholson (eds.), *Refugee Protection in International Law | UNHCR’s Global Consultations on International Protection* (Cambridge University Press, 2003), at 47.

grounds in the Convention is necessary to deepen inter-sectionality in female conflict-related refugee claims.

POLITICAL OPINION

As a convention ground is of utmost importance in conflict-related claims and is the second most applicable ground for females after MPSG. This ground includes ways in which female is imputed politically in a conflict. In LM Congo³² the claimant was associated with a political party in her country of origin. Further, political opinion is also imputed based on familial relationships or females with opposing political views or distinct racial or ethnic identity from the perpetrators. In LM Iraq³³, the claimant was at risk for not wearing Hijab at work which instigated the Iraqi militia. Instances are also taken into consideration in which the claimant classifies her actions as apolitical. Thus, overt reliance on MPSG should be carefully re-evaluated by adjudicators as a female is at-risk with her apolitical stance as well as when her family has close nexus with political activities. Apart from the narrow interpretation of the Convention grounds, female refugee claim is further restricted by the insensitive application procedure which is discussed in the next section.

PROCEDURAL AND EVIDENTIARY BARRIERS

Such barriers further bolster hurdles for female claimants as it is observed that cases with sufficient gender and conflict-related information are dealt with thoroughly and with sensitivity. Though accessing accurate country-of-origin (COI) is a herculean task, UNHCR has been a reliable source. However, there is scope for improving COI on both gender-conflict issues to include a wider range of reliable international and non-governmental UN documents, such as Security Council resolutions referring to gender-specific abuse reports of the UN Secretary-General written according to Security Council resolutions 1889 and 1960 and other UN reports providing qualitative and quantitative information on the female in conflict-situations. All host countries

³² LM Congo (United Kingdom), para. 105 and para. 113.

³³ LM Iraq (United Kingdom), para 6

should be incentivized to collect reliable updated data for their representatives and “where there is lack of information, adjudicators should be cautioned against drawing speculative conclusions or assuming lack of persecution to ease the process for female-claimants.”³⁴

Though females are more susceptible to adjudicators’ distrust at the first instance, female’s credibility is often diluted if the decision-maker does not observe an appropriate demeanor as per feminine standards such as the claimant not crying enough or not revealing their violation trauma with inherent consistency. These act as disincentives for females who are already subjected to hostility and discomfort revisiting their past trauma. Therefore, establishing credibility during the claim procedure is often diluted due to insensitive gender-related refugee claims processes. Such disincentives are not exclusive and exist beyond conflict-related claims but in conflict situations, such hurdles are more often than not amplified.

CONCLUSION

In light of the above discussion, it can be construed that women are susceptible to myriad challenges to claim refugee status. Gender-related violence in the form of rape has been attributed as persecution but the claim is still difficult to claim majorly due to two reasons. Based on the cases discussed above, firstly, adjudicators tend to characterize rape as a ‘private act’ rather than persecution and secondly, they do not take into consideration the repercussions of past rape in creating future fear of persecution. Another challenge is the narrow perception of gender-related persecution during conflicts. Rape and related forms of sexual-violence are fundamentally recognized but decision-makers tend to overlook non-sexual gendered violations which on the face appear to be gender-neutral. This leads to another obstacle where adjudicators tend to attribute gendered-specific violations to the pervasive gender inequality and render such as insufficient to amount to past or future persecution. This can be lessened with a holistic approach towards the applicant’s claim which shall be backed up with gendered-nature persisting during the conflict as well as in-depth and reliable country-of-origin information which includes gender-oriented

³⁴ Supra Note 17 at page 211. | See generally Jane Freedman (2010) Mainstreaming gender in refugee protection, Cambridge Review of International Affairs, 23:4, 589-607, DOI:10.1080/09557571.2010.523820

discrimination during the conflict-period. This would be supplemented by including other grounds like political opinion for objective and successful female claims.

Another way of incentivizing gender-specific claims will be by broadening the ambit of female claims beyond MPSG. MPSG is often accurate however adjudicators tend to create further sub-groups or artificial-claims which dilute the results. Other obstacles that ensue challenges for women-refugees is lack of COI which is conflict-period specific. The decision-makers fail to understand the actual vulnerabilities of women which is amplified by insensitive evidentiary and procedural requirements and lack of state protection therefore, dilutes their credibility.

While taking note of prevailing developments in acceptance of female-related claims in international and domestic refugee law, the room for improvement still exists. There is a rising need for widened conceptions of women-in-conflict-related Convention grounds which take cognizance of insensitive application procedure and relaxes stringent credibility requirements. The above has to be supplemented by an in-depth understanding of the present, past, and future risks of gendered-related persecution that should aim to transform and recognize less-seeming gendered-neutral abuse of women as 'persecution.'