



‘#WomenEqualityAsylum: How Far Has Equality Been Achieved in Realizing a Woman’s Right to Seek and Enjoy Asylum from Persecution?’

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Check against delivery

Thank you for this wonderful opportunity to present. Congratulations to my dear friend David Cantor for all the seeds he has planted at the Refugee Law Initiative and to see them growing and flowering, is just wonderful. An open and true collaborator. Out of collaboration good things grow. Congratulations to you and your team.

I’d also like to thank the RLI Working Group on Feminist Theory, Refugees and Displacement (led by Natasha Yacoub) and the Women in Refugee Law Network (led by Moira Dustin and Christal Querton), and their members, for generously sharing with me their articles and works in progress, to help with the preparation for my presentation. I can see that there is a depth of study today and that the future of the sub-discipline is in good hands.

I wanted to do three things today:

- Take this opportunity to give you an insight into my new role as Special Rapporteur on Torture and invite you to consider incorporating the absolute prohibition against torture into your research agendas
- Then moving to the gender question – taking a short walk down memory lane to remind ourselves where we started and where we are now in terms of women’s access to and enjoyment of asylum

- And thinking about the next stages of this journey and what remains to be done ... what have we learned.

I will speak for about 30 minutes, then I'd very much welcome a discussion – comments, questions, thoughts on developing a research agenda on refugee women.

1. Special Rapporteur on Torture: Torture and Refugees

In August last year I was appointed as the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. In its nearly 40 years, I am the 7th Rapporteur, and the first woman appointed by the Human Rights Council.

The interlinkages between torture and persecution are deep and well-established. As we mark World Refugee Day this week, and the International Day in Support of Victims of Torture on Monday, we know that as many as 40% of refugees have experienced torture first hand. Many more have secondary experience of this crime.

In my first report to the General Assembly in October last year, I made reference to “the distressing risks, violence and exploitation facing refugees [that] are unresolved, and potentially worsening; while the lack of legal recognition and nationality of stateless persons – and the consequent denial of rights – is tantamount to inhuman and degrading treatment.”¹ In the part of the report setting out the international legal framework, among other statements, I stated that “torture and inhuman treatment can define the persecution from which refugees are granted asylum, representing the loss of protection of their own governments.”²

The global prohibition against “torture” has profound and widespread impacts for the rights of forcibly displaced people. It is relevant to the definition of torture, as already stated as an example of persecution. And it has also been used to prevent return per the principle of non-refoulement. And the treatment of asylum seekers when they are at the border, or once they have arrived in a country, must be compatible with the standard. The denial of social security and work rights has been held by courts to be inhuman and degrading, leading to the indignity of poverty.

Indeed, as the European Court of Human Rights has said, “the prohibition of torture and inhuman or degrading treatment or punishment is a value of civilisation closely bound up with respect for human dignity”.³

¹ A/77/502, para.10.

² Ibid, para 29.

³ *Bouyid v. Belgium* (No. 23380/90) ECHR 28 September 2015, para. 81.

The prohibition in question is absolute, no derogation from it being permissible even in the event of a public emergency threatening the life of the nation, nor in the most difficult circumstances, such as the fight against terrorism and organised crime or influx of migrants and asylum-seekers, irrespective of the conduct of the person concerned.⁴

The inter-linkages are multiple, and in lieu of a court-based supervisory system on refugee protection, the prohibition of torture is often a go-to right. Let me mention a few key areas.

The torture prohibition has been implicated in various European Court of Human Rights judgments holding the following to amount to “degrading treatment”:

- the detention of an asylum-seeker for three months on police premises pending the application of an administrative measure, with no access to any recreational activities and without proper meals.⁵
- where, pending their request for asylum, the applicants were confined in inadequate conditions not fit for a lengthy stay in an airport transit zone.⁶
- where asylum seekers were destitute and lived rough for several months due to administrative delays preventing them from receiving the support for which the law provided.⁷

For my part, I have recently publicly stated that lengthy detention – and in particular detention without time limits – is inhuman treatment in violation of the Convention against Torture, calling on the Australian and British governments to introduce time limits.⁸ This has been a long labour of love for me, working on this issue since 2006 with the co-written study with Ophelia Field on alternative to immigration detention, which I subsequently updated in 2011.⁹ I intend to catalyse further changes during my time as Special Rapporteur on Torture.

⁴ *A. and Others v. the United Kingdom* (No. 3455/05) ECHR 19 February 2009, para. 126; *Mocanu and Others v. Romania* (No. 10865/09, 45886/07, and 32431/08) ECHR 17 September 2014, para. 315; *El-Masri v. the former Yugoslav Republic of Macedonia* (No. 39630/09) ECHR 13 December 2012, para. 195; *Z.A. and Others v. Russia* (No. 61411/15, 61420/15, 61427/15, and 3028/16) ECHR 21 November 2019, paras. 187-88.

⁵ *Tabesh v. Greece* (No. 8256/07) ECHR 26 November 2009, paras. 39-44.

⁶ *Z.A. and Others v. Russia* (No. 61411/15, 61420/15, 61427/15, and 3028/16) ECHR 21 November 2019, para. 195.

⁷ *N.H. and Others v. France*, (No. 28820/13, 75547/13 and 13114/15) ECHR 2 July 2020, para. 184.

⁸ “Limitless detention is inhumane and must end, says UN torture watchdog”, by Charlotte Grieve, Sydney Morning Herald, 18 May 2023, <https://www.smh.com.au/national/limitless-detention-of-refugees-is-inhumane-and-must-end-says-un-torture-watchdog-20230414-p5d0et.html>

⁹ Alice Edwards, “Back to Basics: The Right to Liberty and Security of Person and ‘Alternatives to Detention’ of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants”, published by UNHCR, April 2011, <https://www.unhcr.org/media/no-17-back-basics-right-liberty-and-security-person-and-alternatives-detention-refugees>

I'll be taking this up the issue of conditions of detention of refugees and asylum-seekers in a number of individual cases, plus in my fourth report to the Human Rights Council in March next year, on Current Issues and Good Practices of Prison and Detention Management. I'd welcome submissions from those of you working in this area.

Non-refoulement is of course another major area where refugee rights are being reinforced through the torture prohibition.

We're all familiar with *M.S.S. v. Belgium and Greece*¹⁰, and the cases that followed, in relation to the Dublin Regulation. The prospect of living on the streets in Greece without any material support after having been removed by Belgium, led the European Court of Human Rights to state that not only had Greece violated the ECHR, but also Belgium for having transferred an asylum seeker back to Greece.

Further too, the conditions in an asylum country have also been challenged in respect of, for example, the right to employment. Judgments from South Africa to Europe have found that the combined denial of work rights and social security leads to destitution and undignified treatment in violation of the absolute prohibition against torture or other ill-treatment.¹¹

Finally in the interpretation of persecution, the understanding of torture has at times been integral to pushing the boundaries. More on this later. For example, the ruling in *Aydin v Turkey*¹² that ruled that rape is torture was among the most profound breakthrough arguments.

2. Women's rights to asylum: How far have we come? What are the obstacles still in place? How can we overcome them?

That leads to a good segue into today's topic ...how far have we come? What are the obstacles still in place? How can we overcome them?

In 1951, sex-based persecution as a basis for asylum was roundly rejected at the drafting conference of the Convention relating to the Status of Refugees, including by the the Chairman of the Conference, the 1st High Commissioner for Refugees, Mr. Gerrit van Heuven Goedhart. It should come as no surprise that there was not a single woman among the plenipotentiaries who met in Geneva in 1951 to draw up the Convention. For a long time, the legacy of this exclusion was real and felt.

¹⁰ *M.S.S. v. Belgium and Greece* (No. 30696/09) ECHR 21 January 2011.

¹¹ See, Alice Edwards, Chapters covering Articles 17, 18 and 19 of the 1951 Convention relating to the Status of Refugees, in Andreas Zimmermann et al., *The 1951 Convention relating to the Status of Refugees and its 1967 Protocol: A Commentary* (Oxford University Press, 2011, forthcoming edition to be published in 2023).

¹² *Aydin v Turkey* (Case No. 57/1996/676/866) ECHR 25 September 1997.

Some of you may be familiar with my piece in volume 29 of the 2010 special edition of *Refugee Survey Quarterly* where I trace four historical periods, sometimes running in parallel, on how gender has featured – or been sidelined - in international refugee law.¹³

I thought I'd give you the real-life experience behind some of those developments, as now I'm surprised to find myself as having been part of many of those major stages, and something happens it seems when you turn 50, you tend to want to look backwards and are keen to hand over to others to take us forward.

But let's start with what Karen Musalo rightly characterised as the challenges facing women asylum seekers trying to fit inside the 1951 Conventional definition as follows:

First, the harms suffered by women often consist of acts condoned or required by **social norms or culture**, such as female genital mutilation or cutting, or forced marriage. Their characterization as social or cultural norms frequently resulted in a reluctance to define them as persecution.

Second, although gendered forms of persecution can be inflicted for any of the five Convention grounds, it is often imposed because of **gender** – which is not one of the grounds.

Third, persecutors of gendered harms are often **non-state actors**, such as husbands, fathers, or members of the applicant's extended community, and there was resistance to accepting such claims as coming within the refugee definition, owing to the paradigm of the State as the persecuting agent.¹⁴

The second phase I refer to after the exclusion of refugee women from the refugee protection agenda is what was happening in parallel with the “Women's rights are human rights” movement. But what we should recall is that refugee rights were still not really in the fray of these discussions. And for a very long time, there was a distinct divide between refugee rights – and refugee scholars and practitioners – and human rights and human rights scholars and practitioners. That divide has thankfully been bridged, but we still have unhelpful discussions about the obsolescence of refugee law in favour of human rights law, and arguments about how human rights has eclipsed refugee law. I call these arguments unhelpful because they don't advance us ... they pit two existing legal regimes that continue to apply against one another – one that is broad and theoretically applicable to all human beings yet has specific exclusions for foreigners, and the other specially tailored to refugees.

¹³ Alice Edwards, 'Transitioning Gender: Feminist Engagement with International Refugee Law 1950-2010' (2010) 29 *Refugee Survey Quarterly* 21-45

¹⁴ Karen Musalo, 'A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly be Inching Towards Recognition of Women's Claims' (2010) 29 *Refugee Survey Quarterly* 46, pp. 48-49.

That said the incorporation of human rights thinking and human rights standards into refugee law has been in a way revolutionary for refugee women's rights. We might have got there on our own, but human rights certainly helped.

Think *Acosta* – the first case to define “social group”, which was a case not involving a female applicant, as early as 1985 and the definition of social group:

"Persecution on account of membership in a particular social group" refers to persecution that is directed toward an individual who is a member of a group of persons, all of whom share a common, immutable characteristic. i.e., a characteristic that either is beyond the power of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not be required to be changed".¹⁵

The judgement goes on to say:

“The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership.”¹⁶

This aspect of innate and immutability was what opened the doors to women's successful claims to refugee status on account of severe discrimination as women.

The Canadian case of *Ward*¹⁷ (1993) – another case unrelated to women's claims, in fact related to members of Irish Republican Army, the IRA - also adopted a similar standard.

In *Shah and Islam*, in 1999, in the United Kingdom's House of Lords took us a large step forwards. Lord Steyn in describing how “women in Pakistan” could be a particular social group in a case of domestic violence, stated:

“Notwithstanding a constitutional guarantee against discrimination on the grounds of sex a woman's place in society in Pakistan is low. Domestic abuse of women and violence towards women is prevalent in Pakistan. That is also true of many other countries and by itself it does not give rise to a claim to refugee status. The distinctive feature of this case is that in Pakistan women are unprotected by the state: discrimination against women in Pakistan is partly tolerated by the state and partly

¹⁵ *Matter of Acosta*, A-24159781, United States Board of Immigration Appeals, 1 March 1985.

¹⁶ *Ibid.*

¹⁷ *Canada (AG) v. Ward*, [1993] 2 S.C.R. 689.

sanctioned by the state. Married women are subordinate to the will of their husbands. There is strong discrimination against married women, who have been forced to leave the matrimonial home or have simply decided to leave. Husbands and others frequently bring charges of adultery against such wives. Faced with such a charge the woman is in a perilous position. Similarly, a woman who makes an accusation of rape is at great risk. Even Pakistan statute law discriminate against such women.”¹⁸

So, a close look at the discrimination women face and their standing in society would give rise to recognition as a social group for refugee status purposes.

In the Australian case of *Khawar*¹⁹, in 2002, which adopts the social perception approach, there was far less angst about defining tiered approaches to recognizing women as a social group, as they had to decide whether women were socially recognizable in society, but the question of size did arise, and the judgment of Chief Justice Gleason remains powerful. He stated:

“The size of the group does not necessarily stand in the way ... There are instances where the victims of persecution in a country have been a majority. It is *power*, not number, that creates the conditions in which persecution may occur.’ (para. 33, italics is my emphasis)

‘Women in any society are a distinct and recognisable group; and their distinctive attributes and characteristics exist independently of the manner in which they are treated, either by males or by governments. [-] Women would still constitute a social group if such violence were to disappear entirely. The alleged persecution does not define the group.’ (para. 35)

Chief Justice Gleason’s judgment was also helpful in respect of satisfying the “for reasons of” aspect connecting the persecution by non-state actors and the Convention ground, another stumbling block for women, recognizing that:

“Where persecution consists of two elements, the criminal conduct of private citizens, and the toleration or condonation of such conduct by the state or agents of the state, resulting in the withholding of protection which the victims are entitled to expect, then the requirement that the persecution be by reason of one of the Convention grounds may be satisfied by the motivation of either the criminals or the state.” (para. 31)

¹⁸ *Shah and Islam v. SSHD*, [1999] 2 AC 629, p. 2.

¹⁹ *Minister for Immigration and Multicultural Affairs v Khawar*, [2002] HCA 14.

Much of the reasoning of these judgments made their way into UNHCR's first set of guidelines on gender-related persecution, of which I was the author. The gender-related persecution guidelines were drafted at the same time as the UNHCR guidelines on membership of a particular social group, which were drafted by Alex Aleinikoff. It is possibly why they speak to each other so closely; and why perhaps there is a bias in the gender-related persecution guidelines to dealing with MPSG. If they were rewritten today I think we would be more conscious to utilize all five of the Convention grounds.

For UNHCR, the guidelines clarified: "Women may constitute a particular social group under certain circumstances based on the common characteristic of sex, whether or not they associate with one another based on that shared characteristic."²⁰

Turning now to my journey ...

Let me take you back to my own personal role in developing the international legal framework. First, as an intern in Geneva, and assigned to the Legal Adviser on Refugee Women and Children, Julie Bissland, I was asked to edit the proceedings of the first Symposium on gender-related persecution in refugee status determination in 1996. The proceedings were published in a special edition of the *International Journal of Refugee Law* the following year.

Among my first overseas assignments was two years spent in Sarajevo, Bosnia and Herzegovina in the late 1990s, in the fragile post-conflict context and with a simmering conflict over the border in Kosovo.

Two major developments came out of my time there, working as a protection officer.

I spent my days in the squalid refugee camps set up in response to first arrivals of Kosovars and Roma. The conditions were originally terrible, housing the refugees in an old Coca Cola factory on the outskirts of Sarajevo, with no electricity or heating – it was the dead of Winter with minus 20 degrees on a good day, with a historic dump of snow that created white tunnels through the city. By the time of the NATO airstrikes over Kosovo in 1999, the lines of people crossing the border by any means – trains, buses, walking through the forests, hitchhiking – had grown exponentially. I recall some women arrived with newly born babies they had given birth to en route, the stress causing them to go into labour. There were hundreds of people waiting for a bed at the central train station.

²⁰ UNHCR, 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, HCR/GIP/02/02, 7 May 2002, para. 15.

Eventually when another camp of wooden containers and canvas tents was constructed, it was clear that there were many harrowing stories. One of the most striking memories for me is how many men would approach me, husbands and fathers, quietly telling me that there was something wrong with their wife or daughter, that they were worried about them, that they needed help. One man told me that his wife had started violently beating the children, and she had never done that before. We arranged counselling for the families at a centre for women and children in Sarajevo set up for the Bosnian survivors. What was again striking to me is that the men would continue to take advantage of this counselling. They were there, always early, waiting for the bus to take them into the city. The women very quickly did not want to take part. I always felt this was because the men could not understand what had happened, or how he had allowed it to happen, of course a warped narrative in his own head. Whereas the women just wanted to get on with their lives and wanted to forget.

Many of these families were considered particularly fragile – physically, emotionally, psychologically - to be able to stay in the camps, so as the focal point on refugee women and children, I started preparing cases for resettlement. Almost all my cases were victims of severe sexual assault, rape, sexual enslavement, and other egregious harms. I took the view that what had happened to them was so reminiscent of severe pain or suffering inflicted on purpose that it was torture, and started framing the submissions arguing that rape is a form of torture and therefore persecution, making them eligible for refugee status and therefore resettlement. Until that point, recognizing rape in war as a war crime or human rights violation was embryonic at best, ignored at most. It was 1999. But the circumstances in Bosnia – and the use of sexual aggression to commit genocide – was so striking that the time was right for these arguments to be once and finally put forward and accepted.

That was a major breakthrough that then found its way into UNHCR doctrine and into the policy, guidelines and legislation of States.

The second major change that came about at that time, was being approached by the small human rights team in the UN operation in Sarajevo, asking for help with resettling a growing number of victims of human trafficking who had showed up at their offices, or who were recovered in UN police raids of brothels. These women, mostly from Eastern European countries, had been duped into traveling to Bosnia, and were now stuck.

Because UNHCR was the only agency with a capacity to move people via resettlement, we discussed how we could possibly use this route to also provide sanctuary for these abused women, who did not want to return to their own countries and families, through deep shame and anger but also because they feared the traffickers would track them down, or their families. They knew someone had paid for them and they had a large debt to pay off. It was unsafe.

Occasionally, we also bolstered the scant witness protection programme of the ICTY (International Criminal Tribunal for former Yugoslavia) by referring cases and transporting victims and witnesses to the court.

These women led me to start thinking through how these women – lured to Sarajevo by fake boyfriends with opportunities for new lives – were lied to, tricked, and then enslaved into the prostitution scene in Sarajevo, of which later was revealed through the tireless work of Madeline Rees and Sirpa Rautio (with whom I was collaborating) and Katherine Bolkovac, that the UN peacekeepers were heavily implicated. The movie *The Whistleblowers* depicts that time.

The tentacles of the traffickers also reached into the refugee camps, recruiting vulnerable women with the promise of salaries, and in their vulnerability no matter how many warnings we tried to give individual women, they felt that working in these “bars” was preferable to staying idle in the refugee camps with no prospects.

So, I set about trying to craft arguments that victims of trafficking could be refugees, drawing on the threats of reprisals from trafficking rings, severe family or community ostracism and similar arguments, and started debating whether this was persecution. I had decided it was arguable. Alas, my arguments were rejected by my boss, but thankfully, they have since become internationally accepted legal position.

Frustrated and despondent that I was not able to assist these women in Bosnia, I wrote a short piece on this for FMR - *Forced Migration Review* – arguing that victims of trafficking could be refugees. That piece, together with the impressive work of Professor Ryszard Piotrowicz, paved the way for current doctrine. I later hired Ryszard to write the UNHCR trafficking guidelines, coincidentally Ryszard was my professor of international law at the University of Tasmania, all those years before, when we studied the Bosnia conflict every week in class.

These developing legal positions then hit the 50th anniversary of the 1951 Convention – a different time – but when at least on the legal front there was a willingness to reimagine the refugee definition to be more rights-based and progressive.

The reason I’ve brought this back to the personal, is because as researchers and scholars, you are familiar with all the materials. But what these stories do tell us is that the answers to some of our biggest challenges are quite often not found in books, but in our lived experiences and can be inspired by different contexts.

When I reflect on why and how these breakthroughs happened... I can say a few things:

- I was in the right place at the right time. The long line of rape victims suffering unspeakable violence designed to break their spirit was a reality. I was later transferred to Rwanda, and we also know that similar attacks on women's bodies formed part of the genocidal aggression.
- Listening to how women described what had happened to them, being present, letting them speak.
- It was a much more flexible system, a time much more open to experimentation and new ideas – the UN was not the mammoth bureaucracy it now is. We were not constrained by constant reporting against pre-set benchmarks, but were judged rather by getting out there and being with the refugees and solving problems with limited resources. There were openings – and necessities - to think creatively, to think smart, to try new things.
- And finally, I think being young and not yet shaped by existing dogma, helped. An uncontaminated mind can throw up new ideas, and as I said, my trafficking arguments were rejected at first. I was 26 years old at the time, rather oblivious to the wealth of feminist writings on these issues, but pushed by circumstances and a desire to find a solution for the very vulnerable women I met – there was a sense of urgency about their situations and how to attract governments to their claims.

3. Charting a course with your help for the next stages in this battle ...

So many challenges appear to be the same as they were. I have noted what Moira Dustin and Christal Querton said about the loss of momentum around women's asylum issues compared with the 1980s and 1990s. More specifically, they worry that there may be a perception that enquiry into the protection of refugee women is no longer pressing. And that as so much law was settled back then, further study may seem redundant or unoriginal.

You are all carrying out important work on these issues, in great depth and with great expertise.

I'd love to take this up as our discussion point ...

I flag this all by highlighting that we are in a serious period of a roll back on women's rights – Afghanistan, Iran and even the United States – and with more countries in war than at any other time since 1945, the risks of violence and persecution against women in gender-specific ways are very real. We have serious data already coming out of Sudan, for example.

But let me say three more things before turning over the floor to you:

First, I appeal to you - don't throw the baby out with the bath water. As gender discussions are evolving and touching on almost all walks of life, the "innate or immutable" understanding of sex –

the *Acosta* standard - as a ground for asylum has saved millions of women and girls from persecution, and needs to be reinforced not undermined.

Second, for many years I raised what I called the “surprising, yet persistent challenge [of] the reluctance of both lawyers and decision- makers to frame the relevant particular social group as simply “women”” – self-censorship has led to thinking that narrower groups would be more palatable to decision-makers, and courts. I called this the “gender plus” standard – or the “women plus” standard. The risk is that it leads to the artificial demographic groups that the courts warned us about and rejects. The most convoluted defined groups go something like this: ““young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice” in the case of *In re. Fauziya Kasinga*.²¹

And yet we have judgments that pave the way for broader groups. For the first time, I believe, the EU’s recent country guidance is perhaps the first breakthrough where they encourage, considering the Taliban’s policy and implementation of an extreme form of sharia, that recognise Afghan women and girls are “in general at risk of persecution”, and hence eligible for refugee status. The adoption of this standard by Denmark and Sweden that Afghan women and girls fleeing the Taliban are “automatically” refugees is a positive break with normal individualized assessments.

Third, and final point today, although we could cover many more, is the question of non-state persecution (whether in peacetime or wartime). We await the judgment of the European Court of Justice on the family violence case of C-621/2 involving a Kurdish woman of Turkish nationality whose application for international protection was based on a fear of violence in the family context including fear of being subjected to an honour crime and forced marriage. The Advocate-General’s position²², although in some areas a little confused, does accept that women – whether generally or as a distinct sub-set of society – constitute a social group (paras 72-73) and accepts that forced marriage and domestic violence are forms of persecution when the state has not exercised their due diligence.

I think on that note, I have spoken enough. But as I said, it’s been a real privilege to be here, and I look forward to our discussion.

ENDS

²¹ *In re Fauziya KASINGA, Applicant*, Interim Decision 3278, 13 June 1996, United States; Board of Immigration Appeals.

²²<https://curia.europa.eu/juris/document/document.jsf?text=&docid=272702&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1>