Mr Gehad Madi
UN Special Rapporteur on the human rights of migrants

BY EMAIL hrc-sr-migrant@un.org
Cc: izabella.majcher@un.org

12 December 2025

Dear Mr Madi, Special Rapporteur,

Input to the 2026 report on externalization: gendered impacts of externalization

Thank you for the opportunity to provide input into your further report on the externalization of migration. I am a Senior Research Fellow at the Kaldor Centre for International Refugee Law at UNSW Sydney, where I direct the Offshore Processing project. This submission addresses specific aspects of the gendered impacts of externalization measures involving the transfer of asylum seekers to 'safe third countries' or 'extraterritorial processing'. It summarises key findings relevant to the report from a recent article on the implied *non-refoulement* obligation in the Convention on the Elimination of Discrimination against Women (CEDAW) and the Views of the Committee on the Elimination of Discrimination against Women (CEDAW Committee) in asylum cases.[1] A copy of the article is provided with this submission.

1 States must not return or transfer women to real risks of serious discrimination against women, including gender-based violence (GBV)

CEDAW

Article 2(d) of the CEDAW requires States parties 'to refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation'.

In 2013, in its Views on two separate individual complaints, the CEDAW Committee affirmed that:

> This positive duty encompasses the obligation of States parties to protect women from being exposed to a real, personal and foreseeable risk of serious forms of gender-based violence, irrespective of whether such consequences would take place outside the territorial boundaries of the sending State party: if a State party takes a decision relating to a person within its jurisdiction, and the necessary and foreseeable consequence is that that person's rights under the Convention will be violated in another jurisdiction, the State party itself may be in violation of the Convention.[2]

The CEDAW Committee expanded on this implied *non-refoulement* obligation in General Recommendation No. 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women in 2014.[3] It affirmed that Article 2(d) obliges States parties to protect women from being exposed to a real, personal, and foreseeable risk of serious forms of discrimination against women, including (but not limited to) GBV.[4] Specifically, the Committee stated that:

> States parties have an obligation to ensure that no woman will be expelled or returned to another State where her life, physical integrity, liberty and security of person would be

[1] Madeline Gleeson, 'Unlocking CEDAW's Transformative Potential: Asylum Cases Before the Committee on the Elimination of Discrimination Against Women' (2024) 118(1) *American Journal of International Law* 41.
[2] *M.N.N. v. Denmark*, CEDAW Committee, UN Doc. CEDAW/C/55/D/33/2011 (2013) para. 8.10; *M.E.N. v. Denmark*, CEDAW Committee, UN Doc. CEDAW/C/55/D/35/2011 (2013) para. 8.9.
[3] CEDAW Committee, *General Recommendation No. 32 on the Gender-Related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women*, UN Doc. CEDAW/C/GC/32 (2014) para 23.
[4] Ibid, para 22.

> threatened, *or* where she would risk suffering serious forms of discrimination, including serious forms of gender-based persecution or gender-based violence.[5]

The CEDAW Committee's use of the conjunction 'or' suggested that the *non-refoulement* obligation under CEDAW had two limbs: a first, prohibiting return to a place where a woman's 'life, physical integrity, liberty and security of person would be threatened'; and a second, prohibiting return to a 'risk [of] suffering serious forms of discrimination, including serious forms of gender-based persecution or gender-based violence'. However, the CEDAW Committee has not subsequently articulated an understanding of the obligation as having two limbs. Instead, it has focused simply on whether there is a real, personal, and foreseeable risk of serious forms of gender-based persecution or violence.[6]

The precise contours of the implied *non-refoulement* obligation in the CEDAW are yet to be fully articulated. In the meantime, other treaties also place constraints on the removal of women to harm.

Refugee Convention

Article 33 of the 1951 Convention relating to the Status of Refugees (Refugee Convention) prohibits return of a 'refugee' to any place 'where his [sic] life or freedom would be threatened on account of his [sic] race, religion, nationality, membership of a particular social group or political opinion'. This protection covers people who meet the definition of a 'refugee' in Article 1(A) of the Refugee Convention, as modified by its 1967 Protocol. Both the prohibition on *refoulement* in Article 33 and the refugee definition should be interpreted 'with an awareness of possible gender dimensions', or in a 'gender-sensitive' manner.[7]

Central to the refugee definition is the concept of 'persecution'. Persecution is generally understood as encompassing acts which are sufficiently serious by their nature or repetition as to constitute severe violations of human rights, including but not limited to torture and threats to life or freedom.[8] Additionally, 'a pattern of discrimination or less favourable treatment could, on cumulative grounds, amount to persecution and warrant international protection', in particular where discriminatory measures lead to 'consequences of a substantially prejudicial nature for the person concerned'.[9] Since serious forms of discrimination against women impair or nullify the enjoyment of all other rights, they are likely to reach the severity threshold for 'persecution'.[10] Moreover, it is 'widely accepted that [gender] can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment', and therefore that '[t]he refugee definition, properly interpreted, . . . covers gender-related claims'.[11]

Convention against Torture and ICCPR

The implied *non-refoulement* obligation in the CEDAW is broader than that contained in Article 3 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment*, since it does not require the relevant harm to be committed 'by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity'.[12]

The relationship between the implied *non-refoulement* obligations in the CEDAW and the International Covenant on Civil and Political Rights (ICCPR) is less clear. The UN Human Rights Committee has affirmed that the ICCPR prevents removal 'where there are substantial grounds for believing that there

---

[5] Ibid, para 23 (emphasis added).
[6] See e.g. *A. v. Denmark*, CEDAW Committee, UN Doc. CEDAW/C/62/D/53/2013 (2015) para 9.8; *R.S.A.A. v. Denmark*, CEDAW Committee, UN Doc. CEDAW/C/73/D/86/2015 (2019) para 8.9; *Bandboni v. Switzerland,* CEDAW Committee, UN Doc. CEDAW/C/85/D/173/2021 (2023) para 7.9.
[7] UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 1: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, UN Doc HCR/GIP/02/01 (7 May 2002) ('UNHCR Gender Guidelines') paras 2, 4.
[8] Guy S. Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (4th edn, OUP 2021) 67–71; UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, UN Doc. HCR/1P/4/ENG/REV.4 (2019) ('UNHCR Handbook') paras 51–60; Hugo Storey, *What Constitutes Persecution? Towards a Working Definition* (2014) 26(2) *International Journal of Refugee Law* 272.
[9] UNHCR Gender Guidelines, n 7, para 14; UNHCR Handbook, n 8, paras 51–55.
[10] Of course, even when reaching a sufficient level of severity to constitute 'persecution', such harm is insufficient on its own to ground a refugee claim. In addition to an absence of state protection, it is also necessary to establish a causal link between the relevant harm and at least one of the five grounds set out in Article 1(A) of the Refugee Convention.
[11] UNHCR Gender Guidelines, n 7, para 6.
[12] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, arts 1, 16.

is a real risk of irreparable harm, such as that contemplated by Articles 6 and 7 of the Covenant'[13] (arbitrary deprivation of life and torture or cruel, inhuman or degrading treatment or punishment), and that the relevant risk must be both 'real and personal'.[14] In reading a comparable *non-refoulement* obligation into the CEDAW, the CEDAW Committee's approach was broadly consistent with that of the Human Rights Committee, particularly with respect to the standard of proof and need for a 'real, personal and foreseeable risk'.[15] However, there is ambiguity around the respective scopes of the harm to which return is prohibited. Specifically, is the CEDAW prohibition on return to serious forms of discrimination against women coterminous with, or broader than, the ICCPR prohibition on return to 'irreparable harm'? Some cases fall squarely within the scope of both, such as those involving GBV which also violates Articles 6 and/or 7 of the ICCPR.[16] For other cases involving forms of discrimination against women which have not traditionally been recognized as reaching the Article 6 and/or 7 threshold (such as general, non-violent measures of gender inequality), greater clarity about the relationship between the prohibitions on *refoulement* under the ICCPR and CEDAW is yet to emerge.

2 The prohibition on return or transfer to real risks of serious discrimination against women requires removing States to consider the particular risks faced by women and girls in receiving States

The prohibitions on return or transfer of women and girls to real risks of serious discrimination against women set out above are particularly relevant to externalization practices in which States seek to remove asylum seekers or refugees to receiving States.

A State that intends to remove people from its territory or jurisdiction must make certain enquiries to ensure that removal will not expose them to risks of persecution or other serious harm, either in the receiving State directly or as a result of being removed from there to relevant harm elsewhere ('chain' or 'indirect' refoulement).

A removing State must give due consideration to two distinct issues. First, it should enquire into the extent of violence and discrimination against women in a prospective receiving State and whether the receiving State provides effective protection against these risks. This enquiry requires the State to look at conditions in the receiving State generally.

Second, if a State plans to remove asylum seekers to another State where their claims will be processed, it must make further enquiries into that State's asylum system. In this sense, the decision to transfer an asylum seeker to another country for processing requires a substantially different analysis from that which normally precedes removal to a country of origin. The European Court of Human Rights (ECtHR) explains the difference as follows:

> While in the latter situation the expelling authorities examine whether the asylum claim is well founded and, accordingly, deal with the alleged risks in the country of origin, in the former situation the main issue before them is whether or not the individual will have access to an adequate asylum procedure in the receiving third country.[17]

In the absence of any formal assessment of an asylum seeker's case, it cannot be known whether they would face risks of relevant harm either in their country of origin or any other place to which they might be returned, and so:

> removal to a third country must be preceded by thorough examination of the question whether the receiving third country's asylum procedure affords sufficient guarantees to avoid an asylum-seeker being removed, directly or indirectly, to his country of origin without a proper evaluation of the risks he [sic] faces [of exposure to serious harm].[18]

The relevant assessment should focus on whether a receiving States is bound by *and complies with* relevant international law standards, meaning that effective protection is in fact available to asylum

[13] UN Human Rights Committee (HRC), *General Comment No. 31[80]: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004) para 12.
[14] See e.g. *Kaba v. Canada*, HRC, UN Doc. CCPR/C/98/D/1465/2006 (2010) para 10.1.
[15] See also Başak Çalı, Cathryn Costello & Stewart Cunningham, 'Hard Protection Through Soft Courts? *Non-refoulement* Before the United Nations Treaty Bodies' (2020) 21(3) *German Law Journal* 355, 374.
[16] *Kaba*, n 14.
[17] *Ilias and Ahmed v Hungary*, ECtHR (Grand Chamber), App no 47287/15 (21 November 2019) [131].
[18] Ibid [137].

seekers and refugees.[19] This standard requires the removing State to confirm that the scope of protection against *refoulement* in the receiving State is at least as broad as in the removing State. It also requires examination of the protection provided to asylum seekers and refugees in practice.[20] Asylum procedures in the receiving State do not need to be identical to those of a removing State. However, the UN High Commissioner for Refugees (UNHCR) advises that there should be '*comparable* asylum systems and standards' between the two countries.[21] At a minimum, the receiving State's asylum procedures should meet international standards for fair refugee status determination (RSD) to ensure that asylum seekers are not wrongfully denied protection and removed to persecution or other serious harm.[22]

Turning to the gendered aspects of removal to extraterritorial processing, general enquiries into the conditions in and asylum processes of a receiving State will not be sufficient to discharge a removing State's *non-refoulement* obligations. A removing State cannot rely on a blanket determination that a receiving State is 'safe' without looking at the specific risks that women and girls (and other protected groups) may face there. In this sense, a receiving State may be 'safe' for some asylum seekers, but not for others. In the absence of guarantees that asylum seekers will not face real risks of persecution, irreparable harm or serious forms of discrimination against women, transfer should not occur.

In all removal contexts, States should conduct an individualised assessment of each asylum seeker's circumstances prior to removing them from its territory or jurisdiction to ensure that removal does not violate the principle of *non-refoulement*.[23] This assessment assumes particular importance in the context of removal of asylum seekers to another State for processing. When an asylum seeker faces removal after examination of their asylum claim on its merits, the relevant risk assessment will often occur as part of the RSD process or be based on evidence provided during that process. By contrast, when an asylum seeker is removed to a third State for processing, the removing State will not yet have had an opportunity to consider their individual circumstances. Accordingly, even if there is a sufficient basis for a removing State's designation of a receiving State as generally 'safe', and even if this assessment has given due weight to the specific risks faced by women and girls, blanket determinations of safety cannot fully replace the need for individualised risk assessments.[24] Removal procedures must contain some mechanism for individuals to raise specific risk factors or concerns about a host State, and the possibility of exemption from transfer or removal if relevant risks are identified.

I welcome the opportunity to discuss these matters further.

Yours sincerely,

Madeline Gleeson
Senior Research Fellow
Kaldor Centre for International Refugee Law, UNSW Sydney

[19] *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144; [2011] HCA 32, [66] (per French CJ), [116], [125]-[126] (per Gummow, Hayne, Crennan and Bell JJ).
[20] Ibid [67]; *M.S.S. v Belgium and Greece*, ECtHR (Grand Chamber), App No. 30696/09 (21 January 2011) [353].
[21] UNHCR, *UNHCR Observations on the Nationality and Borders Bill, Bill 141, 2021-22* (October 2021) para 95 <https://www.unhcr.org/uk/sites/uk/files/legacy-pdf/615ff04d4.pdf> (emphasis added).
[22] See e.g. Michelle Foster, 'The Implications of the Failed "Malaysian Solution": The Australian High Court and Refugee Responsibility Sharing at International Law' (2012) 13(1) *Melbourne Journal of International Law* 395, 412-414; UNHCR, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate* (August 2020); UNHCR, *Effective Processing of Asylum Applications: Practical Considerations and Practices* (March 2022) <https://www.refworld.org/docid/6241b39b4.html>; Brian Barbour, *Asylum Capacity Development: Building New and Strengthening Existing Systems*, Policy Brief 14, Kaldor Centre for International Refugee Law, (September 2023) <https://www.kaldorcentre.unsw.edu.au/sites/kaldorcentre.unsw.edu.au/files/Policy_Brief_14_Asylum_Capacity_Development.pdf>.
[23] *John Doe et al v Canada*, Inter-American Commission on Human Rights, Report No. 78/11, Case 12.586 (21 July 2011) [94]; UNHCR, *Legal Considerations regarding access to protection and a connection between the refugee and the third country in the context of return or transfer to safe third countries* (April 2018) para 4 <https://www.refworld.org/docid/5acb33ad4.html>.
[24] Goodwin-Gill and McAdam, n 8, 318.