



**UNHCR Statement**  
**on the Application of Article 1A(2) of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol to Victims of Trafficking in France**

*Issued in the context of two recent decisions of the Cour nationale du droit d'asile in France*

## **1. Introduction**

1.1 The *Cour nationale du droit d'asile* (“CNDA”) has recently overruled two decisions by the Director of the *Office français de protection des réfugiés et apatrides* (“OFPRA”) and granted refugee status to two applicants<sup>1</sup> on the basis of their well-founded fear of persecution for reasons of their “membership of a particular social group”, one of the five grounds enumerated in Article 1A(2) of the 1951 Convention relating to the Status of Refugees (“1951 Convention”)<sup>2</sup> and its 1967 Protocol Relating to the Status of Refugees (“1967 Protocol”),<sup>3</sup> and as implemented in France as per the *Loi n° 2003-1176 du 10 décembre 2003 modifiant la Loi n° 52-893 du 25 juillet 1952 relative au droit d'asile*.<sup>4</sup> OFPRA has lodged an appeal, which is still pending, before the *Conseil d'Etat* against the CNDA decision of 29 April 2011.

1.2 As a United Nations subsidiary organ entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek permanent solutions to the problems of refugees<sup>5</sup> UNHCR has a direct interest in presenting its views on the application of Article 1A(2) of the 1951 Convention and its 1967 Protocol to victims of trafficking. According to its Statute, UNHCR fulfils its mandate *inter alia* by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.”<sup>6</sup> UNHCR’s supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention. Such guidelines are included in the *UNHCR Handbook on Procedures and Criteria for Determining Refugee Status* and subsequent *Guidelines on International Protection* (“UNHCR Handbook and Guidelines”).<sup>7</sup> This supervisory responsibility is reiterated in Article 35 of the 1951 Convention and Article II of the 1967 Protocol.

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<sup>1</sup> CNDA, *J.E.F.* (Nigeria), No. 10012810, 29 April 2011, available at <http://www.unhcr.org/refworld/docid/4fb173852.html> and CNDA, *A.O.* (Kosovo), No. 11017758, 15 March 2012, available at <http://www.unhcr.org/refworld/docid/4fc8d1472.html>.

<sup>2</sup> UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series, vol. 189, p. 137, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html>.

<sup>3</sup> UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations Treaty Series, vol. 606, p. 267, available at: <http://www.unhcr.org/refworld/docid/3ae6b3ae4.html>.

<sup>4</sup> Article L. 711-1 of the Code de l’entrée et du séjour des étrangers et du droit de l’asile.

<sup>5</sup> UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), available at: <http://www.unhcr.org/refworld/docid/3ae6b3628.html> (“UNHCR Statute”).

<sup>6</sup> *Ibid.*, paragraph 8(a).

<sup>7</sup> UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, available at: <http://www.unhcr.org/refworld/docid/4f33c8d92.html>. The Guidelines

1.3 UNHCR's supervisory responsibility has also been reflected in European Union law, including by way of a general reference to the 1951 Convention in Article 78 (1) of the Treaty on the Functioning of the European Union ("TFEU"),<sup>8</sup> as well as in Declaration 17 to the Treaty of Amsterdam, which provides that "consultations shall be established with the United Nations High Commissioner for Refugees (...) on matters relating to asylum policy".<sup>9</sup> Secondary EU legislation also emphasizes the role of UNHCR. For instance, Recital 22 of the Qualification Directive states that consultations with UNHCR "may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention".<sup>10</sup> The supervisory responsibility of UNHCR is specifically articulated in Article 21 of Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status.<sup>11</sup>

1.4 In supervising the application of the 1951 Convention throughout the world for over 60 years, UNHCR has developed unique expertise on refugee law and asylum issues. Such expertise has been acknowledged in the context of the European Union's asylum *acquis*<sup>12</sup> and beyond, including in the pronouncements of the European Court of Human Rights ("ECtHR"), which has highlighted the reliability and objectivity of UNHCR in this field. The Court of Justice of the European Union has recognized the 1951 Convention as "the cornerstone of the international legal regime for the protection of refugees".<sup>13</sup>

1.5 UNHCR wishes to provide its position on the following issues raised by the above-mentioned cases: (i) the interpretation of "membership of a particular social group" in relation to victims of trafficking, including whether it is necessary for members of a

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complement the UNHCR *Handbook* and are intended to provide guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff.

<sup>8</sup> European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01, available at: <http://www.unhcr.org/refworld/docid/4b17a07e2.html>.

<sup>9</sup> European Union, Declaration on Article 73k of the Treaty establishing the European Community, OJ C 340/134 of 10.11.1997, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11997D/AFI/DCL/17:EN:HTML>.

<sup>10</sup> European Union: European Parliament, *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, L 337/11, available at: <http://www.unhcr.org/refworld/docid/4f06fa5e2.html> ("QD Recast").

<sup>11</sup> European Union: Council of the European Union, *Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status*, 2 January 2006, 2005/85/EC, available at: <http://www.unhcr.org/refworld/docid/4394203c4.html>. Article 21(1)(c) in particular obliges Member States to allow UNHCR "to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure".

<sup>12</sup> The 'European Union's asylum *acquis*' refers to the accumulated legislation, legal acts, and court decisions which constitute the body of European Union asylum law. In this regard, see Recital 10 of *Regulation 439/2010 of 19 May 2010 establishing the European Asylum Support Office*, OJ L 132/11 of 29.05.2010; Recital 22 of *Council Directive 2011/95/EU*. See also the opinion of Advocate-General Sharpston in Case C-31/09, *Nawras Bolbol v Bevándorlási és Állampolgársági Hivata*, recognizing the persuasive force of UNHCR's statements, paragraph 16; and the references to quotations of UNHCR's positions in the opinion of Advocate-General Mazák in Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Aydin Salahadin Abdulla and others v Bundesrepublik Deutschland*, paragraph 20; Opinion of Advocate-General Poiares Maduro in Case C-465/07, *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* [2009] ECR I-921, which also recognizes UNHCR's expertise, paragraph 27.

<sup>13</sup> *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, C-175/08; C-176/08; C-178/08 & C-179/08, European Court of Justice, 2 March 2010, paragraph 52, available at: <http://www.unhcr.org/refworld/docid/4b8e6ea22.html>; *Bundesrepublik Deutschland v. B and D*, C-57/09 and C-101/09, European Court of Justice, 9 November 2010, paragraph 77, available at: <http://www.unhcr.org/refworld/docid/4cda83852.html>.

particular social group to possess common characteristics that are manifested externally in the sense of being visible or identifiable to members of society, (ii) whether the well-founded fear of persecution faced by victims of trafficking is linked to a Convention ground (the “nexus or causal link” issue), and (iii) the interpretation of an internal flight alternative/internal relocation alternative (“IFA”) for victims of trafficking.

## 2. The interpretation of “membership of a particular social group” in relation to victims of trafficking or persons at risk of being trafficked

### 2.1 UNHCR’s Social Group Guidelines

2.1.1 Membership of a particular social group is one of the five grounds enumerated in the refugee definition contained in Article 1A(2) of the 1951 Convention. This refugee definition has been incorporated into French national law and includes the “membership of a particular social group” ground.<sup>14</sup>

2.1.2 Of the five Convention grounds, the “membership of a particular social group” ground has posed the greatest challenge with regard to its interpretation. Neither the 1951 Convention nor the 1967 Protocol provides a definition for this ground. The drafting history also does not shed any light on its meaning, however, over time expert commentary and international jurisprudence have sought to clarify the term. This is reflected in *UNHCR’s Guidelines on International Protection: “Membership of a Particular Social Group” within the context of Article 1A2 of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* (“Social Group Guidelines”).<sup>15</sup> The Social Group Guidelines provide legal interpretative guidance on assessing claims, *inter alia*, made by victims of trafficking or persons at risk of trafficking who assert that they have a well-founded fear of being persecuted for reasons of their membership of a particular social group. Of particular relevance to this case are also *UNHCR’s Guidelines on International Protection on the application of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol to victims of trafficking and persons at risk of being trafficked* (“Trafficking Guidelines”),<sup>16</sup> which provide interpretive guidance on the application of Article 1A(2) of the 1951 Convention to victims or potential victims of trafficking.

2.1.3 As noted in the Social Group Guidelines, States have adopted two dominant approaches to defining a particular social group consistent with the 1951 Convention: (i) the “protected characteristics” approach<sup>17</sup> and (ii) the “social perception” approach.<sup>18</sup> UNHCR’s Social Group Guidelines acknowledge the validity of each approach and attempts to thus accommodate both as **alternative** approaches in a standard definition:

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<sup>14</sup> Article L. 711-1 of the Code de l’entrée et du séjour des étrangers et du droit de l’asile.

<sup>15</sup> UNHCR, *Guidelines on International Protection No. 2: “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*, 7 May 2002, HCR/GIP/02/02, available at: <http://www.unhcr.org/refworld/docid/3d36f23f4.html> (“Social Group Guidelines”).

<sup>16</sup> UNHCR, *Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked*, 7 April 2006, HCR/GIP/06/07, available at: <http://www.unhcr.org/refworld/docid/443679fa4.html> (“Trafficking Guidelines”).

<sup>17</sup> The protected characteristics approach examines whether a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it. An immutable characteristic may be innate (such as sex or ethnicity) or unalterable for other reasons (such as the historical fact of a past association, occupation or status): Social Group Guidelines, para. 6.

<sup>18</sup> The social perception approach examines whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large: Social Group Guidelines, para. 7.

“A particular 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 which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.”<sup>19</sup>

The Social Group Guidelines therefore make it clear that in UNHCR’s view only one of the two approaches needs to be met in order to satisfy the particular social group ground.<sup>20</sup>

## **2.2 The “social perception” approach requires only that members of the group share a common characteristic, which makes them a cognizable group or sets them apart from society at large**

2.2.1 France has adopted the “social perception” approach to the identification of particular social groups within the meaning of the 1951 Convention. As set out in the Social Group Guidelines, the social perception approach examines whether or not a group shares a common characteristic, which makes them a cognizable group or sets them apart from society at large.<sup>21</sup> In *Ourbih*, the *Conseil d’Etat* established two criteria for defining a particular social group:

- 1) The existence of characteristics common to all members of the group and which define the group in the eyes of the authorities in the country and of society in general; and
- 2) The fact that the members of the group are exposed to persecution.<sup>22</sup>

2.2.2 In subsequent cases, the CNDA has applied the same reasoning, yet adding that Convention protection was reserved for members of the group who intend to manifest the common characteristics in their external behaviour.<sup>23</sup> Other decisions by the CNDA have added a further element, requiring that the group must be restrictively defined and sufficiently identifiable.<sup>24</sup> UNHCR considers that these additional elements go beyond what is required under the “social perception” approach; see paragraphs 2.3 and 2.4 below.

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<sup>19</sup> Social Group Guidelines, para. 11.

<sup>20</sup> Regarding Article 10(d) of the QD Recast. UNHCR recommended that the EU adopt an alternative approach. See, e.g., *UNHCR Annotated Comments on the EC Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted (OJ L 304/12 of 30.9.2004)*, 28 January 2005, available at: <http://www.unhcr.org/refworld/docid/4200d8354.html>.

<sup>21</sup> Social Group Guidelines, para. 7.

<sup>22</sup> CE, SSR, 23 juin 1997, 171858, *Ourbih*, 171858, France: Conseil d’Etat, 23 June 1997, available at: <http://www.unhcr.org/refworld/docid/3ae6b67c14.html>.

<sup>23</sup> Commission de Recours des Réfugiés (CRR), SR, 12 May 1999, Rec. CRR, p. 46, *D.*, available at: <http://www.unhcr.org/refworld/docid/4a54bbbfd.html>. This case concerned a claim based on sexual orientation (“personnes qui revendiquent leur homosexualité et entendent la manifester dans leur comportement extérieur”). Subsequent cases based on sexual orientation have also reiterated the external manifestation requirement. See, for example, CNDA, 6 April 2009, No. 616907, *K. (Kosovo)* available at: <http://www.unhcr.org/refworld/docid/4dad9db02.html> (p. 61).

<sup>24</sup> This requirement that the group be limited has permitted the CNDA to exclude the following from protection under the “particular social group”: Afghan women who have distanced themselves from traditional customs and society (CRR, 23 November 1998, *Ayoubi*); friends of the former regime in the Democratic Republic of the Congo (DRC) (CRR, 20 October 1999, *Manzinga*); members of the former Bengali aristocracy during the colonial period (CRR, 20 December 1999, *Mahmudul Haque Jewel*).



2.2.3 Although a particular social group cannot be defined exclusively by the persecution that members of the group suffer or by a common fear of being persecuted, this does not prevent persecutory action toward a group being a relevant factor in identifying a group in a particular society (see below at paragraph 2.3.5).<sup>25</sup> Persecution and the grounds for this persecution are separate elements in the refugee definition. As such, UNHCR submits that the requirement introduced by the *Conseil d'Etat in Ourbih* that a defining element of a particular social group is that members of the group be exposed to persecution is at variance with the 1951 Convention and UNHCR's Social Group Guidelines.<sup>26</sup>

## **2.3 The “visibility” requirement is inconsistent with the object and purpose of the 1951 Convention and misconstrues the Social Group Guidelines**

2.3.1 It is UNHCR's view that the ground of “membership of a particular social group” does not require that members of the group be socially visible or that they manifest their attributes or characteristics by their external behaviour in society. It is sufficient that the group is cognizable as a group by society.<sup>27</sup> While manifesting an attribute in one's external behaviour may help to identify the group, it is not a prerequisite to the existence of the group.

2.3.2 Under the “social perception” analysis, the focus is on whether the members share a common attribute that is understood to exist in the society or that in some way sets them apart or distinguishes them from the society at large.<sup>28</sup> “Social perception” requires neither that the common attribute be literally visible to the naked eye nor that the attribute be easily identifiable by the general public.<sup>29</sup> It is furthermore not necessary that particular members of the group or their common characteristics be publicly known in a society. It is sufficient that the group is perceived to exist in a more general, abstract sense.

2.3.3 Further, “social perception” does not suggest a sense of community or group identification as might exist for members of an organization or association. Thus, members of a social group may not be recognizable even to each other. Rather, the determination rests simply on whether a group is “cognizable” or “set apart from society” in some way. This is the same approach taken in respect of the other grounds, such as religion or political opinion, as persons persecuted for their religious or political beliefs would qualify for refugee status,

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<sup>25</sup> The Social Group Guidelines (at para. 14) state that: “[...] a particular social group cannot be defined exclusively by the persecution that members of the group suffer or by a common fear of being persecuted. Nonetheless, persecutory action toward a group may be a relevant factor in determining the visibility of a group in a particular society. To use an example from a widely cited decision, “[W]hile persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognizable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group.” McHugh, J., in the High Court of Australia decision *Applicant A v. Minister for Immigration and Ethnic Affairs*, (1997) 190 CLR 225, 264, 142 ALR 331, available at: <http://www.unhcr.org/refworld/docid/3ae6b7180.html>.

<sup>26</sup> Social Group Guidelines, para. 14.

<sup>27</sup> UN High Commissioner for Refugees, *Rocio Brenda Henriquez-Rivas, Petitioner v. Eric H. Holder, Jr, Attorney General, Respondent. The United Nations High Commissioner for Refugees' Amicus Curiae Brief in Support of Petitioner*, 23 February 2012, No. 09-71571 (A098-660-718), p. 16, available at: <http://www.unhcr.org/refworld/docid/4f4c97c52.html>.

<sup>28</sup> Social Group Guidelines, para. 7.

<sup>29</sup> UN High Commissioner for Refugees, *Rivera-Barrientos v. Holder, United States Attorney General: Brief of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Petitioner*, 18 August 2010, No. 10-9527, p. 13, available at: <http://www.unhcr.org/refworld/docid/4c6cdb512.html>.

regardless of whether their belief is manifested in non-visible private ways or more visible public ways.<sup>30</sup>

2.3.4 Nevertheless, an attribute or characteristic that is given expression in an external manner may reinforce a finding that an applicant belongs to a particular social group, but it is not a pre-condition for recognition of the group. In fact, a group of individuals may seek to avoid manifesting their characteristics in society precisely to avoid attracting persecution.<sup>31</sup> The requirements of “visibility” and/or “external manifestation” are also, in UNHCR’s view, inconsistent with the *Conseil d’Etat*’s decision in *Ourbih* which did not require a test of visibility or of “external manifestation”. In addition, “external visibility” does not appear as a condition to be fulfilled in two decisions of the *Conseil d’Etat* dated 14 June 2010, *OFPRA c/ A.*<sup>32</sup> and *OFPRA c/ M.H.*<sup>33</sup> According to these decisions, the definition of “membership of a particular social group” must be read in accordance with Article 10 of the Qualification Directive<sup>34</sup> that does not require behaviours to be expressed in an external manner or of protest. The CNDA has recognized that social groups may exist where members of the group have neither asserted nor manifested their attributes in society where such expression would have a bearing on their risk of persecution.<sup>35</sup> This approach appears to have been more constant since the above mentioned *Conseil d’Etat* decisions of 14 June 2010.

2.3.5 As noted in paragraph 2.2.3, while persecutory acts targeted at the group should not exclusively define the group, “it may be a relevant factor in determining the visibility of a group in a particular society.”<sup>36</sup> This language used in the Social Group Guidelines relates to the role of persecution in defining a particular social group and is meant to illustrate how being targeted can, under some circumstances, lead to the identification or even the creation of a social group by its members which is set apart in a way that renders them subject to

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<sup>30</sup> Social Group Guidelines, para. 15.

<sup>31</sup> UNHCR, *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department - Case for the first intervener (the United Nations High Commissioner for Refugees)*, 19 April 2010, available at: <http://www.unhcr.org/refworld/docid/4bd1abbc2.html>, para. 26 et seq.; UNHCR, *UNHCR statement on religious persecution and the interpretation of Article 9(1) of the EU Qualification Directive*, 17 June 2011, available at: <http://www.unhcr.org/refworld/docid/4dfb7a082.html>, at Section 4.3.

<sup>32</sup> CE, *OFPRA c. A.*, No. 323669, 14 June 2010, available at: <http://www.unhcr.org/refworld/docid/4fc8d9012.html>.

<sup>33</sup> CE, *OFPRA c. M.H.*, No. 323671, 14 June 2010.

<sup>34</sup> Council of the European Union, *Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted*, 19 May 2004, 2004/83/EC, available at: <http://www.unhcr.org/refworld/docid/4157e75e4.html> (“Qualification Directive”). Member States shall take Art. 10, paragraph 1 d) of the Qualification Directive into account when assessing the reasons for persecution. According to the above-mentioned norms, a social group is considered as such when: members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.

<sup>35</sup> CNDA, *C. (Tunisie)*, No. 634565/08015025, 7 July 2009 available at <http://www.unhcr.org/refworld/docid/4dad9db02.html> (p. 58): “the situation of homosexuals in Tunisia, even if they have not asserted or publicly manifested their sexual orientation, makes it possible to regard them as a defined group of people that is sufficiently identifiable in the eyes of the Tunisian authorities and society for them to be at risk of persecution.”; CNDA, *M.N. (Cameroon)*, No. 09012710, 10 January 2010: “Given the situation currently prevailing in Cameroon, the situation of homosexuals, even if they have not asserted or publicly manifested their sexual orientation, makes it possible to regard them as a defined group of people that is sufficiently identifiable in the eyes of the Tunisian authorities and society for them to be at risk of persecution.”

<sup>36</sup> Social Group Guidelines, para. 14. See also, UNHCR, *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*, 31 March 2010, available at: <http://www.unhcr.org/refworld/docid/4bb21fa02.html>, at para. 35: “The fact that members of a group have been or are being persecuted may serve to illustrate the potential relationship between persecution and a particular social group.”

persecution. This illustration is not intended to modify the “social perception” approach or to define this approach as requiring “external manifestation” rather than or in addition to “perception”. Further, it is not intended to establish or support “visibility” as a decisive requirement that must be met in every case in order to demonstrate membership of a particular social group.

2.3.6 In conclusion, nothing in the 1951 Convention or its 1967 Protocol or the Social Group Guidelines supports the imposition or use of such tests to make a social group determination.

## **2.4 The “circumscription” requirement is inconsistent with the object and purpose of the 1951 Convention and the Social Group Guidelines**

2.4.1 As a matter of construction, the definition of the group needs delimiting so as not to render the other four Convention grounds superfluous,<sup>37</sup> but this delimitation does not bear on the size of the group itself. In UNHCR’s view, the size of the purported group is not a relevant criterion in determining whether a particular social group exists within the meaning of Article 1A(2) of the 1951 Convention.<sup>38</sup> Particular social groups may thus be broadly defined. “Women” is an example of a social subset of individuals who share common characteristics and are frequently perceived in society as a group (e.g. insofar as they are treated differently to men). As such, they may constitute a particular social group.<sup>39</sup>

2.4.2 Although the size of the group has sometimes been used as a basis for rejection of more broadly defined groups such as “women” from the application of Article 1A(2), this argument has no basis in fact or law.<sup>40</sup> French jurisprudence requiring that the group be restrictively defined appears to stem from a general concern about the potential for unlimited expansion of the social group ground.<sup>41</sup> This concern is misplaced. First, it is a well-established principle that “the fact that large numbers of persons risk persecution cannot be a ground for refusing to extend international protection where it is otherwise appropriate”.<sup>42</sup> Second, none of the other Convention grounds are limited by the question of size.<sup>43</sup> Third, a

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<sup>37</sup> Social Group Guidelines, para. 2.

<sup>38</sup> Social Group Guidelines, para. 18.

<sup>39</sup> Social Group Guidelines, para. 12. See also, 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*, 7 May 2002, HCR/GIP/02/01, available at: <http://www.unhcr.org/refworld/docid/3d36f1c64.html> (“Gender-Related Persecution Guidelines”), para. 30.

<sup>40</sup> Social Group Guidelines, para. 18-19; Gender-Related Persecution Guidelines, para. 31; Trafficking Guidelines, para. 37.

<sup>41</sup> See cases cited in footnote 26 above: CRR, 23 November 1998, *Ayoubi*; CRR, 20 October 1999, *Manzinga*; CRR, 20 December 1999, *Mahmudul Haque Jewel*.

<sup>42</sup> Social Group Guidelines, para. 18-19; Gender-Related Persecution Guidelines, para. 31; Trafficking Guidelines, para. 37. As Dawson J noted in the High Court of Australia decision in *Applicant A*, “I can see no reason to confine a particular social group to small groups or to large ones; a family or a group of many millions may each be a particular social group”: *A and Another v Minister for Immigration and Ethnic Affairs and Another*, Australia: High Court, 24 February 1997, available at: <http://www.unhcr.org/refworld/docid/3ae6b7180.html> and as Gleeson CJ noted in the High Court of Australia decision in *Khawar*, “[i]t is power, not number, that creates the conditions in which persecution may occur”, *Minister for Immigration and Multicultural Affairs v. Khawar*, [2002] HCA 14, Australia: High Court, 11 April 2002, para. 33, available at: <http://www.unhcr.org/refworld/docid/3deb326b8.html>. For recent acknowledgement of this in a civil law case, see decision No. 3414 / 2009, 28079130032011100466, Spain: *Tribunal Supremo*, 24 October 2011, available at: <http://www.unhcr.org/refworld/docid/4fd604e72.html>: “In fact, the group size is not an important criterion” (p. 7).

<sup>43</sup> Social Group Guidelines, para. 18-19; Gender-Related Persecution Guidelines, para. 31; Trafficking Guidelines, para 37.

broad definition of the group does not mean that all members of the group will qualify as refugees – each applicant must still meet the other criteria of the refugee definition.<sup>44</sup>

## **2.5 Victims of trafficking or persons at risk of trafficking may constitute a particular social group under the “social perception” approach**

2.5.1 The “membership of a particular social group” ground for refugee protection should be read in a contemporary context. Social groups that did not exist in the past may exist or be emerging today. As expressed in the Social Group Guidelines, “the term membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms.”<sup>45</sup> Victims and potential victims of trafficking may qualify as refugees where it can be demonstrated that they fear being persecuted for reasons of their membership of a particular social group.

2.5.2 As noted in UNHCR’s Trafficking Guidelines, “a society may, depending on the context, view persons who have been trafficked as a cognizable group within that society.”<sup>46</sup> In establishing that victims or potential victims of trafficking may qualify for refugee status for reasons of their membership of a particular social group, it is not necessary that the members of a particular group know each other or associate with each other as a group. It is, however, necessary that they either share a common characteristic other than their risk of being persecuted or are perceived as a group by society at large.<sup>47</sup> In relation to the two cases underlying this statement,<sup>48</sup> the CNDA has recognized that victims of trafficking may constitute a particular social group within the meaning of the 1951 Convention, framing the group for example as ‘women subjected to human trafficking by trafficking networks’. The CNDA has also affirmed that women fleeing other forms of gender-related persecution such as forced marriage and female genital mutilation may fall within the “particular social group” category and be eligible for protection under the 1951 Convention.<sup>49</sup>

2.5.3 In many refugee claims relating to gender-based persecution, including trafficking-related claims, the particular social group could be characterized simply as “women” or “women from [name of country]”. This approach has been widely accepted by several jurisdictions, including Australia, the United Kingdom, Canada and New Zealand.<sup>50</sup> Factors which may distinguish women as targets for traffickers are generally connected to their vulnerability in certain social settings and therefore certain social subsets of women may also

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<sup>44</sup> Social Group Guidelines, para. 17; Trafficking Guidelines, para. 37.

<sup>45</sup> Social Group Guidelines, para. 3.

<sup>46</sup> Trafficking Guidelines, para. 39.

<sup>47</sup> Trafficking Guidelines, para. 37.

<sup>48</sup> See supra note 1.

<sup>49</sup> See e.g. CNDA, S., No. 643746/09002565, 19 November 2009 (women refusing forced marriage and viewed as transgressing social norms of Guinean society), available at: <http://www.unhcr.org/refworld/docid/4dad9db02.html> (p. 56) ; CNDA, D., No. 636210/08016675, 28 July 2009, available at: <http://www.unhcr.org/refworld/docid/4dad9db02.html> (p. 57); i.e. persons showing their opposition to being subject to female genital mutilation (FGM), or refusing to subject their minor children to it, such opposition being perceived as a transgression of customary norms in their country of origin, and who are consequently subject to violence themselves or whose minor daughters are subject to FGM against their will.

<sup>50</sup> That “women” or women from a particular country can constitute particular social groups have been recognized by several jurisdictions. See jurisprudence from Australia (e.g. *Khawar* (2002) 210 CLR), the UK (e.g. *Shah and Islam* [1999] 2 AC 629 and *K. v. Secretary of State for the Home Department* [2007] 1 AC 412), Canada (e.g. *Gutierrez v. Minister of Citizenship and Immigration* (2011) FC 1055; *Josile v. Minister for Citizenship and Immigration* (2011) FC 675; *Begum v. Minister of Citizenship and Immigration* [2011] FC 10), New Zealand (e.g. NZ Refugee Status Appeals Authority, Refugee Appeal No. 71427 (16 August 2000); *AV (Iran)* [2011] NZ Immigration and Protection Tribunal 800150 (22 November 2011)).



constitute particular social groups. Women and subsets thereof may share common characteristics such as gender and social class, which set them apart in society. Examples of such subsets of women could, depending upon the context, be single women or single mothers, illiterate or poorly educated women.<sup>51</sup>

2.5.4 Former victims of trafficking who have escaped their traffickers (including those who have been freed through law enforcement action), including from abroad, sometimes with unpaid “debts” owed to the trafficking rings, would be a cognizable group in certain contexts. Their past experience including their exploitation and/or their escape from the traffickers could set them apart in society. In the eyes of the perpetrators, their refusal to submit and pay back perceived debts counteract the hegemony and control of the trafficking network, thus marking them out. CNDA has acknowledged this risk in identifying “women who were forced into prostitution and who have escaped their pimps/traffickers” as constituting a particular social group within the meaning of the 1951 Convention.<sup>52</sup> UNHCR welcomes this development in French jurisprudence.

### **3. Victims and potential victims of trafficking may be persecuted “for reasons” of one or more of the Convention grounds (“nexus” or “causal link”)**

3.1 To qualify for refugee status, an individual must establish a well-founded fear of persecution “for reasons of” race, nationality, religion, membership of a particular social group or political opinion. Victims and potential victims of trafficking may thus qualify as refugees where it can be demonstrated that they have a well-founded fear of being persecuted for reasons of their membership of a particular social group or any of the other Convention grounds. It is sufficient that the Convention ground be a relevant factor contributing to the persecution; it is not necessary that it be the sole, or even dominant, cause. According to UNHCR:

“In relation to asylum claims involving trafficking, the difficult issue for a decision-maker is likely to be linking the well-founded fear of persecution to a Convention ground. Where the persecutor attributes or imputes a Convention ground to the applicant, this is sufficient to satisfy the causal link.”<sup>53</sup>

3.2 Both the Trafficking Guidelines and *UNHCR’s Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the*

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<sup>51</sup> Trafficking Guidelines, para. 38.

<sup>52</sup> In several decisions taken before the decisions of 29 April 2011 and 15 March 2012 concerning female victims of trafficking and referred to in footnote 1, the CNDA took the view that female victims of trafficking were not eligible for refugee status under Article 1A(2) of the 1951 Convention. According to the Court at that time, female victims of trafficking would rather be eligible for subsidiary protection in consideration of the fact they face a real risk of serious harm in their countries of origin due to the fact they are escaping a trafficking network and that they still have to pay back their debt. See CNDA, 29 July 2011, *O.*, No. 10020534 (Nigerian woman escaping a prostitution network in Spain), available at <http://www.unhcr.org/refworld/docid/4fc8d40a2.html>; CNDA, 1 October 2010, No. 10001027, *O.* (Nigerian woman forced into a prostitution network in the UK and submitted to the “juju” ritual who escaped in France where she was reached by her traffickers), available at <http://www.unhcr.org/refworld/docid/4fc8d6562.html>; CNDA, 18 November 2009, *O.*, No. 097650 (Nigerian woman who was reduced into slavery at first and then sold to a prostitution and drug trafficking network in Italy from which she was removed upon arrival in France); CNDA, 23 October 2009, *E.*, No. 09000931 (Nigerian woman forced into prostitution in France on account of an influential person in Nigeria).

<sup>53</sup> Trafficking Guidelines, para. 29, UNHCR, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees*, April 2001, available at: <http://www.unhcr.org/refworld/docid/3b20a3914.html>, at paras. 19 and 25.

*1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* provide legal interpretative guidance on the causal link between the well-founded fear of persecution and a Convention ground.<sup>54</sup> The following substantive issues are relevant in determining the causal link between their well-founded fear of persecution and a Convention ground:

“In cases where there is a risk of being persecuted at the hands of a non-State actor for reasons related to one of the Convention grounds, the causal link is established, whether or not the absence of State protection is Convention-related. Alternatively, where a risk of persecution at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for reasons of a Convention ground, the causal link is also established.”<sup>55</sup>

“Trafficking in human beings is generally a commercial enterprise [...]; this overriding economic motive does not, however, exclude the possibility of Convention-related grounds in the targeting and selection of victims of trafficking. [...] For instance, States where there has been significant social upheaval and/or economic transition or which have been involved in armed conflict resulting in a breakdown in law and order are prone to increased poverty, deprivation and dislocation of the civilian population. Opportunities arise for organized crime to exploit the inability, or lack of will, of law enforcement agencies to maintain law and order, in particular the failure to ensure adequate protection for specific or vulnerable groups.”<sup>56</sup>

“For example, members of a certain race or ethnic group in a given country may be especially vulnerable to trafficking and/or less effectively protected by the authorities of the country of origin. Victims may be targeted on the basis of their ethnicity, nationality, religious or political views in a context where individuals with specific profiles are already more vulnerable to exploitation and abuse of varying forms. Individuals may also be targeted by reason of their belonging to a particular social group. As an example, among children or women generally in a particular society some subsets of children or women may be especially vulnerable to being trafficked and may constitute a social group within the terms of the refugee definition. Thus, even if an individual is not trafficked solely and exclusively for a Convention reason, one or more of these Convention grounds may have been relevant for the trafficker’s selection of the particular victim.”<sup>57</sup>

#### **4. The applicability of Internal Flight or Relocation Alternative to claims for international protection by victims of trafficking or persons at risk of being trafficked**

4.1 UNHCR’s position on the applicability of Internal Flight or Relocation Alternative (“IFA”) is contained in *UNHCR’s Guidelines on “Internal Flight or Relocation Alternative”*

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<sup>54</sup> Trafficking Guidelines, paras. 29–32; Gender-Related Persecution Guidelines, paras. 28–31.

<sup>55</sup> Trafficking Guidelines, para. 30.

<sup>56</sup> Trafficking Guidelines, para. 31.

<sup>57</sup> Trafficking Guidelines, para. 32.

*Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees* (“IFA Guidelines”).<sup>58</sup>

4.2 A consideration of IFA necessitates regard for the personal circumstances of the individual claimant and the conditions in the country for which the IFA is proposed. Within the context of the holistic assessment of a claim for refugee status, the assessment of whether or not there is an IFA requires two main analyses: (i) the *relevance analysis*,<sup>59</sup> and (ii) the *reasonableness analysis*.<sup>60</sup>

4.3 When undertaking the relevance analysis, it is important to note that with regard to trafficking for the purpose of sexual exploitation, which is recognized as a form of gender-related persecution,<sup>61</sup> the agent of persecution is often a non-State agent, and as such, particular considerations, as set forth in the IFA Guidelines, apply:

“Where the claimant fears persecution by a non-State agent of persecution, the main inquiries should include an assessment of the motivation of the persecutor, the ability of the persecutor to pursue the claimant in the proposed area, and the protection available to the claimant in that area from State authorities. As with questions involving State protection generally, the latter involves an evaluation of the ability and willingness of the State to protect the claimant from the harm feared. A State may, for instance, have lost effective control over its territory and thus not be able to protect. Laws and mechanisms for the claimant to obtain protection from the State may reflect the State’s willingness, but, unless they are given effect in practice, they are not of themselves indicative of the availability of protection. Evidence of the State’s inability or unwillingness to protect the claimant in the original persecution area will be relevant. It can be presumed that if the State is unable or unwilling to protect the individual in one part of the country, it may also not be able or willing to extend protection in other areas. This may apply in particular to cases of gender-related persecution.”<sup>62</sup>

4.4 As such, any assessment of IFA would need to examine the availability and accessibility of State protection from potential retaliation, threats of re-trafficking in the proposed area of relocation as well as safe-houses and other appropriate support. These must be effective and of a durable nature, and would require more than the existence of national anti-trafficking legislation or Non-Governmental Organizations operating in the area. This may require physical protection and identity change.<sup>63</sup>

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<sup>58</sup> UNHCR, *Guidelines on International Protection No. 4: “Internal Flight or Relocation Alternative” Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, 23 July 2003, HCR/GIP/03/04, available at: <http://www.unhcr.org/refworld/docid/3f2791a44.html> (“IFA Guidelines”).

<sup>59</sup> The elements to be examined under this analysis are the following: Is the area of relocation practically, safely and legally accessible to the individual? Is the agent of persecution a State or non-State agent? Would the claimant be exposed to a risk of being persecuted or other serious harm upon relocation?

<sup>60</sup> The criterion to be examined under this analysis is: Can the claimant lead a relatively normal life without facing undue hardship?

<sup>61</sup> UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendations No. 19*, adopted at the Eleventh Session, 1992 (contained in Document A/47/38), 1992, A/47/3, paras. 6–9 and Article 6, para. 14, available at: <http://www.unhcr.org/refworld/docid/453882a422.html>.

<sup>62</sup> IFA Guidelines, para. 15.

<sup>63</sup> Council of Europe, *Council of Europe Convention on Action Against Trafficking in Human Beings*, 16 May 2005, CETS 197, available at: <http://www.unhcr.org/refworld/docid/43fded544.html>, Art. 28 (2), which was ratified by France on 9 January 2008.

4.5 Moreover, criminal trafficking networks often have a wide reach. This may have an impact upon whether an IFA is safe. It is not sufficient simply to find that the original agent of persecution has not *yet* established a presence in the proposed relocation area. Rather, there must be reason to believe that the reach of the agent of persecution is likely to remain outside the designated place of internal relocation.

4.6 With respect to the “reasonableness analysis” for IFA, victims of trafficking are already persons with certain vulnerabilities,<sup>64</sup> and therefore their capacity to re-establish themselves in a new location may be more limited. In conclusion, the following substantive and evidentiary issues should be taken into consideration when considering the reasonableness of an IFA:

“The personal circumstances of an individual should always be given due weight in assessing whether it would be unduly harsh and therefore unreasonable for the person to relocate in the proposed area. Of relevance in making this assessment are factors such as age, sex, health, disability, family situation and relationships, social or other vulnerabilities, ethnic, cultural or religious considerations, political and social links and compatibility, language abilities, educational, professional and work background and opportunities, and any past persecution and its psychological effects. In particular, lack of ethnic or other cultural ties may result in isolation of the individual and even discrimination in communities where close ties of this kind are a dominant feature of daily life. Factors which may not on their own preclude relocation may do so when their cumulative effect is taken into account. Depending on individual circumstances, those factors capable of ensuring the material and psychological well-being of the person, such as the presence of family members or other close social links in the proposed area, may be more important than others.”<sup>65</sup>

“Psychological trauma arising out of past persecution may be relevant in determining whether it is reasonable to expect the claimant to relocate in the proposed area. The provision of psychological assessments attesting to the likelihood of further psychological trauma upon return would militate against finding that relocation to the area is a reasonable alternative. In some jurisdictions, the very fact that the individual suffered persecution in the past is sufficient in itself to obviate any need to address the internal relocation issue.”<sup>66</sup>

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<sup>64</sup> Trafficking Guidelines, para. 32.

<sup>65</sup> IFA Guidelines, para. 25.

<sup>66</sup> IFA Guidelines, para. 26.