



## Le Juge français de l'Asile 1952-2012

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*“Protection Conventionnelle et protection subsidiaire, complémentarité ou concurrence? L'exemple de la notion d'apparence à un certain groupe social”*

Keynote Address by

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### Introduction

I am honoured to be part of the celebrations of the 60<sup>th</sup> anniversary of the Cour nationale du droit d'asile. This roundtable provides an important opportunity for UNHCR to present its understanding of the interpretation of “membership of a particular social group” and to discuss the challenges faced by decision-makers, including judges, in applying this Convention ground. I would like to thank the Cour national du droit d'asile (CNDA) for this valuable initiative.

At the outset I would like to emphasize the good examples the French authorities set when it comes to granting refugee protection in Europe. France has since 2008 been the country in Europe receiving the highest number of asylum-seekers. In this regard France has a unique position in terms of setting the standard for refugee protection in the EU.

In this presentation, I will briefly describe UNHCR's supervisory responsibility in respect of the 1951 Convention relating to the Status of Refugees followed by a discussion of the inter-relationship between the 1951 Convention and the EU Qualification Directive's Article 15 on subsidiary protection. I will then provide an overview of the Convention ground 'Membership of a Particular Social Group'; its interpretation and application with a subsequent analysis of the French authorities' approach on MPSG and our own guidelines. In the second half of this paper, I will touch on three current challenges to MPSG; Gender/Women; Sexual Orientation and Gender Identity; Trafficking; and persons fleeing conflict and other forms of violence, and deal with how the ground would be read in a contemporary context.

### **UNHCR's role and France's implementation of the 1951 Convention and the 1967 Protocol**

The 1951 Convention and its 1967 Protocol are the key global instruments governing the protection of refugees, addressing who is a refugee, their rights and responsibilities, and the legal obligations of States. The core of this framework is the obligation to provide protection to refugees and to safeguard the principle of non-refoulement, as recognized in French law 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, thereby confirming the international refugee protection regime and the definition of a refugee in the 1951 Convention. France, as a member of the European Union, has also participated in the development of the European asylum acquis, which has at its heart the 1951 Convention and the aim to harmonize the application of the Convention within the EU.

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, UNHCR has a direct interest in presenting its views on the interpretation and application of Article 1A(2) (the refugee definition) of the 1951 Convention. According to UNHCR's Statute, which is mirrored in Article 35 of the 1951 Convention and Article II of the 1967 Protocol, the organization fulfills 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." UNHCR's "supervisory responsibility" is exercised in part by the issuance of interpretative guidance on the meaning of provisions contained in international refugee instruments, in particular the 1951 Convention. Such guidance is included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status and subsequent Guidelines on International Protection ("UNHCR Handbook and Guidelines"), which were

republished in 2011 as part of the 60<sup>th</sup> anniversary commemorations of the Convention. UNHCR's supervisory responsibility has also been reflected in European Union law.<sup>1</sup>

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 and beyond, including in the pronouncements of the European Court of Human Rights, which has highlighted the reliability and objectivity of UNHCR in this field.<sup>2</sup> Since 1952 France provided in its legislation to involve UNHCR in its refugee status determination procedure by requiring that a UNHCR representative sits at the Commission des Recours des Réfugiés.

### **The relationship between the 1951 Convention and the EU Qualification Directive**

As already mentioned, the 1951 Convention and its 1967 Protocol are at the core of the European asylum acquis. The Court of Justice of the European Union ("CJEU") has likewise recognized the 1951 Convention as "the cornerstone of the international legal regime for the protection of refugees". In particular, the EU Qualifications Directive copied the definition of a refugee in full, with some elaboration. The Qualification Directive further sets up minimum standards for granting subsidiary protection for those who are in need of international protection but who have not satisfied the elements of the refugee definition. Subsidiary protection complements the refugee protection regime but does not replace it.

It is in this spirit that UNHCR congratulates France on the fact that the 1951 Convention is the main protection instrument in France. According to statistics published in the 2011 OFPRA Annual Report, the protection granted under the 1951 Convention

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<sup>1</sup> See, for example, a general reference to the 1951 Convention in Article 78 (1) of the Treaty on the Functioning of the European Union ("TFEU"), 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". 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". 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>2</sup> See, *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>.

represents a little less than one positive decision out of four.<sup>3</sup> The primacy of the 1951 Convention is clear from Article L. 711-1 (Ceseda) which states that subsidiary protection may only be granted if the applicant does not qualify for refugee status under the 1951 Convention. The obligation for the competent authorities to review and assess, first, whether the applicant is a refugee before examining the applicability of subsidiary protection is applied systematically and was firmly reiterated in 2008 by the Conseil d'Etat in its judgment *Pogossyan*.<sup>4</sup> UNHCR notes that the application of L. 712-2 paragraph c) (Ceseda) is particularly marginal in France with an application rate in the first instance 2010 of 3%.

As mentioned, research<sup>5</sup> has shown, however, that due to an improper interpretation linked with what appears to be a reluctance of applying the 1951 Convention, wide variations exist in the interpretation and application of the international protection provisions in the Qualification Directive amongst EU member States, leading to protection gaps for some. These variations are linked to both substantive as well as evidentiary questions. In some instances these gaps are filled by national forms of complementary protection, but in others they are not filled at all. In some EU countries, some applicants are even being denied subsidiary protection under Article 15 (c) of the Qualification Directive whereas they would have qualified for protection in the past in accordance with national legislation that inspired the adoption of this very Article.

## **Background to the MPSG ground**

Now turning to the topic of this panel, membership of a particular social group (or MPSG) is the ground with the least clarity.<sup>6</sup> The inclusion of a 'Membership of a Particular Social Group' as one of the five Convention grounds was made at the suggestion of the representative of Sweden, Mr Petrén, who noted that 'experience has shown that certain refugees had been persecuted because they belonged to particular social groups'. The draft convention made no provision for such cases, and one designed to cover them should accordingly be included, he argued. This last minute insertion by the drafters devoid of any further explanation has challenged its later

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<sup>3</sup> France transposed the Qualification Directive, including Articles 2 (e) and 15 setting out the grounds for subsidiary protection, into national legislation in Article L. 712.1 of the Code de l'Entrée et du Séjour des Étrangers et du Droit d'Asile (Ceseda).

<sup>4</sup> See *c/Pogossyan*, CE, OFPRA, 278227, 10 décembre 2008, AJDA 2008, p. 2373.

<sup>5</sup> UN High Commissioner for Refugees, *Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence*, 27 July 2011

<sup>6</sup> See, Michelle Foster, *The 'Ground with the Least Clarity': A Comparative Study of Jurisprudential Developments relating to 'Membership of a Particular Social'*, UNHCR Legal and Protection Policy Research series, August 2012 available at: <http://www.unhcr.org/refworld/docid/4f7d94722.html>.

interpretation, although it has also allowed the ground to be applied dynamically to cover forms of persecution not previously examined, and as they have evolved. An example of this dynamic interpretation that comes to mind is that of gender-related persecution of women in particular societies, which is now widely acknowledged as forming a basis for refugee status.

### **UNHCR's interpretation of the MPSG ground**

Drawing on the analysis of jurisprudence of various countries in 2001 as part of the 50<sup>th</sup> anniversary events of the 1951 Convention, UNHCR issued Guidelines on International Protection on the meaning of MPSG. Our analysis had found the emergence of two distinct, alternative approaches to defining a particular social group, both considered consistent with the 1951 Convention and 1967 Protocol: the 'protected characteristics' approach and the 'social perception' approach.

The UNHCR Guidelines concluded that it is appropriate to adopt one definition which incorporates both approaches *as an alternative but not on a cumulative basis*:

“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.”

Hence, in recognizing each approach as legitimate, the UNHCR Guidelines do not require that the requirements of both approaches need to be fulfilled in order to establish the existence of a particular social group.

In recent years, the scope of the 'particular social group' ground has, however, been narrowed in a number of jurisdictions in Europe, by regarding protected characteristics and social perception as cumulative rather than alternative approaches. The EU Qualification Directive of 2004 in its Art. (I) (d) has been interpreted by some States as requiring the satisfaction of both tests, although state practice in the EU varies and some EU States reject such an interpretation.

### **The French Approach**

The Qualification Directive makes clear that it is establishing only 'minimum standards',<sup>7</sup> and that EU Member States retain the power to “introduce or maintain

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<sup>7</sup> See, e.g., Qualification Directive, Preamble para 6 and Art. 1 “The purpose of this Directive is to lay down minimum standards for the qualification of third country nationals . . . as refugees . . . .”

more favourable provisions.”<sup>8</sup> In other words, the Qualification Directive’s approach to defining ‘membership of a particular social group’ operates as a floor, not a ceiling.

Of the two approaches, the ‘social perception’ approach – requiring that persons share a common characteristic that sets them apart from society but does not require that characteristic to be visible to the naked eye or for members of the group to know or associate with one another - is firmly entrenched in French jurisprudence. In the decision of *Ourbih* in 1997,<sup>9</sup> the Conseil d’Etat established two criteria for defining a particular social group; ‘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 ‘the fact that the members of the group are exposed to persecution.’ However, some recent jurisprudence has added elements that are not required.

First, in its decision in *Djellal* in 1999,<sup>10</sup> the Commission des Recours des Réfugiés (CRR) applied this reasoning to the leading case on sexual orientation, to the effect that protection as a refugee was reserved for ‘persons who claim their homosexuality and manifest it in their external behaviour.’ This appears to require that not only the characteristics of the group be identifiable to society generally, but that those members of the group seeking protection manifest such attributes in their external behaviour. The same approach was used by the CRR in 2005, in the case *Mme G*,<sup>11</sup> where it was decided that the claimant also lacked exterior manifestation of her sexual orientation.

The UNHCR Guidelines do not set forth any “social visibility” requirement. The analysis focuses on whether members of a social group share a common attribute that is understood to exist in society or that in some way sets them apart or distinguishes them from society at large. ‘Social perception’ requires neither that this common attribute be literally visible to the naked eye nor that it be easily identifiable by the general public. It does not suggest the sense of community or group identification that might exist for members of an established organization—social group members may not be recognizable even to each other. Rather, the ‘social perception’ determination rests simply on whether a group is “cognizable” or “set apart from society” in some way.<sup>12</sup> As Posner J of the US Court of Appeals for the Seventh Circuit noted in the case *Gatimi v. Holder*,<sup>13</sup> “[a] homosexual in a homophobic society will pass a heterosexual. If you are

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<sup>8</sup> Preamble para. 8; see also Art. 3 stating that “Member States may introduce or retain more favourable standards for determining who qualifies as a refugee”.

<sup>9</sup> See *Ourbih*, Conseil d’Etat, 171858, 23 June 1997.

<sup>10</sup> 12 May 1999.

<sup>11</sup> See *Mme G*. Commission des Recours des Réfugiés (CRR), 04039953/513547 C+, 25 March 2005.

<sup>12</sup> Social Group Guidelines para 7.

<sup>13</sup> See 578 F. 3d 611, 615 (7th Cir. 2009).

a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible; and to the extent that the members of the targeted group are successful in remaining invisible, they will not be 'seen' by other people in society as a segment of the population". This is the same approach taken with respect to the other grounds in the refugee definition such as religion or political opinion: persons persecuted for their religious or political beliefs may obtain refugee status regardless of whether their belief manifested itself in non-visible private ways or more visible public ways.

These requirements, which could be categorized as "external manifestation" and/or "visibility" are not, in UNHCR's view, compatible with general principles underlying the interpretation of the refugee definition, nor it would seem in line with the Conseil d'Etat's decision in *Ourbih*, as well as the 2010 decisions of OFPRA c/ A.<sup>14</sup> and OFPRA c/ M.H.<sup>15</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>16</sup> which does not require behaviours to be expressed in an externally visible manner. The CNDA has recognized that social groups may exist where members of the group have neither asserted nor manifested their attributes in society but where such expression would have a bearing on their risk of persecution, as demonstrated in the cases CNDA, C. (Tunisie)<sup>17</sup> and CNDA, M.N. (Cameroon).<sup>18</sup> This approach appears to have been more constant since the above-mentioned Conseil d'Etat decisions of 14 June 2010. UNHCR welcomes this change of approach of not requiring "external manifestation" and encourages its continuation. After all, it would be against the object and purpose of the 1951 Convention, and in fact absurd to require persons to expose themselves to persecution in order to be able to seek protection from it.

Second, other decisions by the CNDA have added a further element, requiring that the group must be restrictively defined and sufficiently identifiable.<sup>19</sup> This seems to stem

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<sup>14</sup> See, c. A., CE, OFPRA, 323669, 14 June 2010, available at:

<http://www.unhcr.org/refworld/docid/4fc8d9012.html>.

<sup>15</sup> See c. M.H., CE, OFPRA, 323671, 14 June 2010.

<sup>16</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 ("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>17</sup> See C. (Tunisie), CNDA, 634565/08015025, 7 July 2009.

<sup>18</sup> See M.N. (Cameroon), CNDA, 09012710, 10 January 2010.

<sup>19</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

from a general concern about the potential for unlimited expansion of the social group ground, rather than a question of legal analysis.<sup>20</sup> However the fact that large numbers of persons risk persecution cannot be a ground for refusing to extend international protection where it is otherwise appropriate. It is also important to bear in mind that none of the other Convention grounds are limited by the question of size.<sup>21</sup> Moreover, a 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; having a well-founded fear of persecution.<sup>22</sup> And as Judge 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.”<sup>23</sup>

The third variation to accepted practice is the requirement introduced by the Conseil d’Etat in *Ourbih*, such that a defining element of a particular social group is that members of the group be exposed to persecution. This requirement conflates the two elements of the definition; the group should not be defined solely by reference to the threat of the persecution.

UNHCR considers that these additional elements go beyond what is required under the ‘social perception’ approach, and in turn, could deny refugee status to persons who are otherwise entitled to it.

## **Current Challenges**

In the second half of this paper, I would like to touch on a number of current challenges to MPSG. As expressed in the UNHCR 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>24</sup>

Four particular issues have arisen in Europe and elsewhere in relation to membership of a particular social group, and are worthwhile exploring in this forum: gender/women; sexual orientation and gender identity; victims of trafficking; and persons fleeing conflict and other forms of violence.

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society, *Ayoubi*, CRR, 23 November 1998; friends of the former regime in the Democratic Republic of the Congo (DRC), *Manzinga*, CRR, 20 October 1999; members of the former Bengali aristocracy during the colonial period, *Mahmudul Haque Jewel*, CRR, 20 December. 1999.

<sup>20</sup> See *Ayoubi* CRR, 23 November 1998; *Manzinga*, CRR, 20 October 1999; *Mahmudul Haque Jewel*, CRR, 20 December 1999.

<sup>21</sup> Social Group Guidelines paras 18-19.

<sup>22</sup> Social Group Guidelines para 17.

<sup>23</sup> Minister for Immigration and Multicultural Affairs v *Khawar* (2002) 210 CLR 1, 13 [33] (Gleeson CJ) (*‘Khawar’*).

<sup>24</sup> Social Group Guidelines, para. 3.



## *Gender/Women*

Whether “women” can be a particular social group is not a new question, but it continues to raise a number of legal issues. As stated in the UNHCR Guidelines on Gender-Related Persecution “sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently than men. Their characteristics also identify them as a group in society, subjecting them to different treatment and standards in some countries.”<sup>25</sup> In other words, women are a social group under either of the two approaches to MPSG.

Some European jurisdictions have explicitly included gender or sex in national legislation, or recognised them through guidance to decision-makers. Cases accepted include those involving female genital mutilation, sexual violence, forced marriage and domestic violence.

However, there are still several obstacles to successful recognition of gender-based claims based on the particular social group ground. One of the most prevalent difficulties is the reluctance of both lawyers and decision-makers to frame the relevant particular social group as simply ‘women’; yet according to leading case law this is possible regardless of which test is adopted. In the leading decision of the Australian High Court in *Khawar*, Gleeson CJ explained that the particular social group in that case could be characterized simply as ‘women’ on the basis that ‘[w]omen in any society are a distinct and recognizable group (...) their distinctive attributes and characteristics exist independently of the manner in which they are treated, either by males or by governments.’ In fact he went on to state that, “Women would still constitute a social group if such violence were to disappear entirely. The alleged persecution does not define the group”.<sup>26</sup> Another issue is that of credibility, especially in claims raising rape and sexual violence, and women are disbelieved despite evidence suggesting widespread or systematic forms of violence, including rape in conflict, carried out against women and/or girls.

## *Sexual Orientation and/or Gender Identity*

In some European jurisdictions sexual orientation and gender identity have been explicitly included in domestic legislation either as an example of a particular social group, or as an independent ground for refugee status, in some cases as a result of the

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<sup>25</sup> Guidelines on International Protection: Gender Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, para 30.

<sup>26</sup>See *Khawar* [35].

transposition of Art. 10(1)(d) of the Qualification Directive which provides that, 'depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation'.

In several French cases concerning forced marriage and sexual orientation membership of a particular social group has not been applied as a Convention ground. According to the judgments, the reason for this rejection is that it has not been established that the 'behaviour of the claimant has been perceived by society as transgressing the social order'.<sup>27</sup> It appears that French jurisprudence has come to require an affirmative stance of protest and social transgression on the part of the claimant, without which he or she will not be perceived as a member of a social group by society.<sup>28</sup> This has resulted in the rejection of claims where the applicant did not seek to 'express openly her homosexuality through her behaviour' so that 'she does not belong to a group of persons sufficiently circumscribed and identifiable to constitute a social group'.<sup>29</sup> On the other hand persons who assert their homosexuality and manifest it in their exterior behaviour are more likely to be accepted as falling within the particular social group ground.

As mentioned earlier, the UNHCR Social Group Guidelines do not set forth any "social visibility" requirement. Rather, the 'social perception' determination rests simply on whether a group is "cognizable" or "set apart from society" in some way.<sup>30</sup>

As stated in the recently issued UNHCR Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity,<sup>31</sup> LGBTI applicants who have concealed their sexual orientation in the country of origin might not have experienced persecution in the past. It is possible that their concealment was not a voluntary choice and was modified precisely to avoid the threat of being persecuted. As noted by the High Court of Australia: "it is the threat of serious harm with its menacing implications that constitutes the persecutory conduct. To determine the issue of real chance without determining whether the modified conduct was influenced by the threat of harm is to fail to consider that issue properly." Additionally, LGBTI persons, who have left their country of origin for a reason other than their sexual orientation and/or have "come out" after arrival in the country of asylum, could qualify

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<sup>27</sup> See *Mlle M*, CRR, 531968, 29 September 2005 (Congo, forced marriage).

<sup>28</sup> See *Mlle T*, CRR, 519803, 29 May 2005, in which the CRR noted that there would be a PSG (in that case, women refusing an imposed marriage) 'where that attitude is regarded by all or part of society as transgressive of customs and laws in force'. See also *Mme B*, CNDA, 620881, 5 December 2008; *Mlle N*, CNDA, 574495, 2 April 2008; *Mme D*, CNDA 638891, 12 March 2009.

<sup>29</sup> See *Mlle F*, CNDA, 513547, 25 March 2005.

<sup>30</sup> Social Group Guidelines para 7.

<sup>31</sup> SOGI guidelines

for refugee status if they can demonstrate a well-founded fear of persecution if returned to their country.<sup>32</sup>

As with claims based on political opinion, an applicant claiming a fear of being persecuted on account of his or her sexual orientation need not show that the authorities knew about his or her sexual orientation before he or she left the country of origin.

Clearly there are other difficult questions that decision-makers need to grapple with in such claims, including the question of credibility. I hope you will find our recently issued Guidelines of help in this regard.

## **Trafficking**

Another issue of relevance is whether or how victims of trafficking and those who are at risk of being trafficked, qualify for refugee status. UNHCR's 2006 Trafficking Guidelines provide that, "a society may, depending on the context, view persons who have been trafficked as a cognizable group within that society."<sup>33</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.

In relation to the two cases *J.E.F. (Nigeria)* and *A.O. (Kosovo)*,<sup>34</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.

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 the widely accepted by several jurisdictions, including Belgium, Germany, Spain, Austria, Switzerland and the

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<sup>32</sup> Ibid.

<sup>33</sup> Trafficking Guidelines para. 39.

<sup>34</sup> See *J.E.F. (Nigeria)* CNDA, 10012810, 29 April 2011 and *A.O. (Kosovo)*, CNDA, 11017758, 15 March 2012.

United Kingdom.<sup>35</sup>

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. UNHCR welcomes this development in French jurisprudence.

### *Conflict and other situations of violence*

There is a danger, in particular with regard to the protection of people fleeing armed conflict and other situations of violence, to grant subsidiary protection rather than refugee protection despite the fact that many are refugees. As UNHCR 2011 ‘Safe at Last’ study shows, there are large discrepancies between EU Member States on the granting of refugee protection for people fleeing armed conflicts or conflict-like situations such as in Somalia, Iraq or Afghanistan. However, during the negotiations on the Qualification Directive, the scope of Article 15(c) was narrowed. The reference to situations of systematic and generalized violations of human rights was deleted, and terminology was adopted which is not entirely clear. When the final text was approved, UNHCR noted that Recital 26<sup>36</sup> and the term “individual” in Article 15(c) might prove

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<sup>35</sup> In cases involving gender-specific claims by women, the general approach in Belgium appears to be either to simply assert membership of a particular social group of “women”, or to recite the jurisprudential evolution of the category of particular social group with reference to Ward and Shah as well as the Qualification Directive, hold that it is therefore recognized that sex can form the basis of a particular social group, and then find the claimant at risk due to her membership of the group “women”. The Austrian High Court for Asylum held that: Generally, a social group is constituted by characteristics, of which the person’s disposition is derived, such as sex. Women for example represent a “particular social group” within the meaning of the Geneva Refugee Convention, (cf. Köfner / Nicolaus, Principles of asylum law in the Federal Republic of Germany, II, 456). In any case, the complainant presented the risk of persecution because of her membership in a particular social group (the group of elderly single women without any social support in Iraq). In Spain in several decisions involving FGM and forced marriage, gender has been recognized as a particular social group by the Tribunal Supremo (Supreme Court). See, e.g., 2781/2009 (11 May 2009); 5931/2006; 735/2003; 1836/2002; 3428/2002; and 3930/2002. In STS 5931/2006 (6 October 2006) the Tribunal Supremo stated that ‘persecution based on sex definitely amounts to social persecution’, citing SSTS (31 May 2005) dec. no. 1836/2002.

difficult to interpret, in light of the objective of addressing protection needs arising in the context of “indiscriminate” violence. UNHCR called on Member States not to adopt a minimalist interpretation of the Directive’s provisions on subsidiary protection.<sup>3738</sup>

It is UNHCR’s view that, properly interpreted, the 1951 Convention applies to many people fleeing armed conflict and other situations of violence. The 1951 Convention makes no distinction between people fleeing peacetime or wartime situations. Nothing in its wording hinders its application to those fleeing armed conflict and other situations of violence. Further, it must be borne in mind that many conflicts are rooted in ethnic, religious or political differences or that the impact or effects of the violence – direct and/or indirect – differs along ethnic, religious, political, social, economic or gender lines. While violence in contemporary conflict situations may often appear indiscriminate, it is in fact discriminate in its cause, character or effect. As a result people fleeing such situations may well qualify as refugees. UNHCR has recently held an expert meeting in Cape Town, South Africa, where these issues were discussed in more detail, and we intend to issue guidelines on this topic in 2013.

## **Conclusion**

As this presentation shows, the beauty of refugee law is its dynamism and adaptability to ever changing realities on the ground. The Social Group Ground is a particular reflection of this aspect, enabling a true evolution in thinking. Indeed, as we celebrate the 60th anniversary of the Court, paying tribute to this characteristic of the Convention is paying homage to what the framers of the Convention had in mind when they crafted the instrument in the wake of the Second World War. I much look forward to engaging with you in the discussion on these issues.

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<sup>37</sup> See 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, 28 January 2005, comment on Recital 26 and Article 15(c), at <http://www.unhcr.org/protect/PROTECTION/43661eee2.pdf>.

<sup>38</sup> See UNHCR Statement on Subsidiary Protection Under the EC Qualification Directive for People Threatened by Indiscriminate Violence, UN High Commissioner for Refugees, January 2008