

*Intergovernmental consultations on migration, asylum and refugees*

*Workshop on asylum issues relating to gender, sexual orientation and gender identity*

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**Keynote statement by**

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***Check against delivery***

**“Judging gender: Asylum adjudication and issues of gender, gender identity and sexual orientation”**

I am honoured to have been invited to give the keynote statement to this important session of the IGC on asylum issues relating to gender, sexual orientation and gender identity. This initiative is timely, as policy-makers, adjudicators and judges in many jurisdictions grapple with the many complex issues around gender-related asylum claims to refugee status, as well as those based on sexual orientation and/or gender identity; and we look forward to discussing these with you.

My presentation will be in three parts. In the first part I will give a short overview of the rich body of work in international refugee and human rights law which has emerged over the past 20 years and which forms the background to the current state of the law. In Parts 2 and 3 I will highlight some of the main issues confronting asylum policy-makers and adjudicators in the two subjects of this workshop: gender-related persecution on the one hand, and sexual orientation and/or gender identity, on the other; and provide some ways of moving past them.

***Terminology***

But first, a short word about terminology so that we embark on this two day discussion on the same page.

“Gender” is generally understood as a concept that is socially constructed. Its construction is complex and influenced by culture, religion, social and political factors, which determine the roles women and men are expected to play, the relationship between those roles, and the value that society places on those roles,

which in turn attaches social standing and status. The concept of “gender” can vary within and among cultures, and over time. At the heart of gender relations is the question of power. “Gender” is not about women specifically; rather it is about social and culturally constructed roles, identities, statuses, and responsibilities that are attributed to men and women respectively on the basis of unequal power.<sup>1</sup> While gender may also impact on the persecutory treatment of men who refuse to conform to accepted norms or mores, or those who speak out in favour of women’s rights, or who are targeted for sexual violence, for the purposes of this presentation, I will focus primarily on women’s claims to refugee status.

Moving to “gender identity”, this phrase refers to

“each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body and other expressions of gender, including dress, speech and mannerisms”.<sup>2</sup>

“Sexual orientation”, on the other hand, refers to

“each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate relations with, individuals of a different gender or the same gender or more than one gender”.<sup>3</sup>

Sexual orientation and gender identity are broad concepts which create space for self-identification. Research over several decades has demonstrated that sexual orientation can range along a continuum, including exclusive and non-exclusive attraction to the same or the opposite sex.<sup>4</sup> Gender identity and its expression also take many forms, with some individuals identifying neither as male nor female, or as both. Whether one’s sexual orientation is determined by inter alia genetic, hormonal, developmental, social and/or cultural influences (or a combination of these), most people experience little or no sense of choice about their sexual orientation or gender identity.<sup>5</sup> While for most people sexual orientation or gender identity are determined at an early age, for others they may continue to evolve across a person’s lifetime. Sexual and gender expressions may thus vary with age, and other social and cultural determinants.<sup>6</sup>

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<sup>1</sup> A Edwards, *Violence Against Women under International Human Rights Law* (Cambridge: Cambridge University Press 2011), Chapter 1.

<sup>2</sup> *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007, available at: <http://www.unhcr.org/refworld/docid/48244e602.html>, at preamble.

<sup>3</sup> Ibid at preamble.

<sup>4</sup> American Psychological Association, *Sexual orientation and homosexuality* (hereafter “APA, Sexual orientation and homosexuality”), available at: <http://www.apa.org/helpcenter/sexual-orientation.aspx>.

<sup>5</sup> There is no consensus among scientists with regards to the exact reasons that an individual develops a particular sexual orientation. See, APA, *Sexual orientation and homosexuality*, ibid.

<sup>6</sup> *Application No. 76175*, New Zealand Appeals Authority, 30 April 2008, available at: <http://www.unhcr.org/refworld/docid/482422f62.html>, para. 92.

## 1. International legal developments

Recognition of gender-related persecution in refugee status determination has come a long way since UNHCR held its first symposium on the topic in 1996, and published the proceedings of that event in the *International Journal of Refugee Law*.<sup>7</sup> It is now well-established that the 1951 Convention of a “refugee” does and should accommodate persecuted women as refugees; and likewise, in a growing number of jurisdictions, LGBTI (lesbian, gay, bisexual, transgender and intersex) individuals, who regularly live their lives in fear of death threats, physical and sexual violence, or serious discrimination. Much of this progress can be traced to jurisprudential interpretations and policy guidance around the “membership of a particular social group” ground (or MPSG), which I will deal with later in the presentation. This progress has also taken place in parallel with the growing recognition of women’s right to equality, and rights around sexual orientation and/or gender identity.

Many governments that took part in the 1996 symposium are in this room, and many have adopted or updated their policy guidance, while others have explicitly acknowledged in national legislation that persecution on account of one’s sex/gender, and/or gender identity and/or sexual orientation, is a valid basis for refugee status. In the European Union, this has been promoted by the Qualifications Directive, which purposefully recognises inter alia gender-specific forms of persecution, and that the MPSG ground includes the characteristic of sexual orientation, while gender is also mentioned.<sup>8</sup>

Parallel developments in international humanitarian law and international human rights law, as well as more recently in international criminal law, have also helped solidify gains in refugee law. Worth noting in this regard are the important international decisions recognising rape as a form of torture and, in specific circumstances, genocide; and variously recognising forced prostitution, sexual slavery, forced marriage (or conjugal slavery), and female genital mutilation, whether perpetrated in peacetime or wartime, as prohibited under international law.<sup>9</sup> The UN Committee on the Elimination of Violence against Women’s General Recommendation No. 19 also marks violence against women out as a serious form of discrimination.<sup>10</sup>

In Europe, the Council of Europe’s 2011 *Convention on Preventing and Combating Violence against Women*, the “Istanbul Convention”, is worthy of note, having been signed by nine IGC participating States. It importantly requires Contracting Parties to “take the necessary legislative and other measures to ensure that gender-based violence against women may be recognised as a form of persecution” or give rise to

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<sup>7</sup> International Journal of Refugee Law, *Special Issue Autumn 1997: UNHCR Symposium on Gender-Based Persecution* (22-23 February 1996).

<sup>8</sup> See, for example, Articles 9(2)(f) and 10(1)(d), *EU Council Directive 2004/83/EC 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*, 29 April 2004, OJ L 337/9, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:337:0009:0026:EN:PDF>.

<sup>9</sup> For more on these cases, see Edwards, *Violence Against Women*, supra note 1.

<sup>10</sup> UN Committee on the Elimination of All Forms of Discrimination against Women (CEDAW), *General Recommendation No. 19: Violence against Women*, 1992, A/47/38, available at: <http://www.unhcr.org/refworld/pdfid/453882a422.pdf>.

subsidiary/complementary protection.<sup>11</sup> The significance that this Convention was adopted in Turkey, the country at the heart of the *Aydin v. Turkey* judgment of the European Court of Human Rights, in which rape was first recognised as torture, is not lost on those of us working for years in this area.<sup>12</sup>

Also in 2011, the European Union adopted the *Directive on preventing and combating trafficking in human beings and protecting victims*. Notably, the Directive requires States to provide information to victims of trafficking about applying for international protection as part of the “assistance and protection” measures contained in that Directive.<sup>13</sup> It also recalls the primacy of the 1951 Convention, while the principle of *non-refoulement* is restated.<sup>14</sup>

In respect of sexual orientation and/or gender identity, since the UN Human Rights Committee’s 1994 decision in *Toonen v. Australia*, it has been accepted that sexual orientation is a prohibited ground of discrimination under international human rights law.<sup>15</sup> Building on *Toonen*, and other decisions,<sup>16</sup> the 2007 *Yogyakarta Principles* were developed by a group of experts to explain how human rights norms apply and are to be interpreted in the context of sexual orientation and/or gender identity. In Principle 23 they recognise the right of persons to seek asylum from persecution on account of their sexual orientation and gender identity.<sup>17</sup>

There have also been a number of research initiatives of NGOs and academics, which contribute to a growing body of materials to inform the debate.<sup>18</sup>

UNHCR, for its part, issued *inter alia* guidelines on gender-related persecution<sup>19</sup> and MPSG,<sup>20</sup> in 2002; and in 2010, we organised a meeting of experts to discuss refugee

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<sup>11</sup> Article 60, Council of Europe, *Convention on Preventing and Combating Violence against Women and Domestic Violence* (Istanbul Convention), 7 April 2011, available at: <https://wcd.coe.int/ViewDoc.jsp?id=1772191>. See, also, Article 61 on *non-refoulement*.

<sup>12</sup> *Aydin v Turkey*, Application no. 23178/94, Council of Europe: European Court of Human Rights (ECHR) Judgment, 25 September 1997, available at: <http://www.unhcr.org/refworld/publisher,ECHR,TUR,3ae6b7228,0.html>.

<sup>13</sup> Article 11(6), *Directive 2011/36/EU of the European Parliament and the of the Council on preventing and combating trafficking in human beings and protecting its victims*, 5 April 2011, OJ L 101/1, replacing Council Framework Decision 2002/629/JHA, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:0001:0011:EN:PDF>.

<sup>14</sup> *Ibid* at preambular para. (11).

<sup>15</sup> *Toonen v. Australia*, CCPR/C/50/D/488/1992, UN Human Rights Committee (HRC) Communication, 4 April 1994, available at: <http://www.unhcr.org/refworld/docid/48298b8d2.html>.

<sup>16</sup> See, also, *Goodwin v. United Kingdom*, Application no. 28957/95, Council of Europe: European Court of Human Rights (ECHR) Judgment, 11 July 2002, available at: <http://www.unhcr.org/refworld/docid/4dad9f762.html>; *Lawrence, et al. v. Texas*, United States Supreme Court, 26 June 2003, available at: <http://www.unhcr.org/refworld/docid/3f21381d4.html>.

<sup>17</sup> *Yogyakarta Principles*, supra note 2.

<sup>18</sup> See, for example, International Commission of Jurists (ICJ), *Sexual Orientation, Gender Identity and Justice: A Comparative Law Casebook*, 6 September 2011, available at: <http://www.unhcr.org/refworld/docid/4f9eae7c2.html>.

<sup>19</sup> 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*, 7 May 2002, HCR/GIP/02/01, available at: <http://www.unhcr.org/3d58ddef4.html>.

<sup>20</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*

claims based on sexual orientation and/or gender identity, and published a guidance note on the same.<sup>21</sup> I wish to mention today that this week we have issued the latest set of *Guidelines on International Protection No. 9*,<sup>22</sup> which complement UNHCR's *Handbook on Criteria and Procedures*.<sup>23</sup> These Guidelines provide advice on substantive, procedural, evidentiary and credibility issues relating to such claims. We are also working to improve our country of origin (COI) eligibility guidelines, so that the experiences of LGBTI persons are reflected more fully, although the shortage of up-to-date, reliable and relevant information does not make this an easy task. We also continue to conduct capacity building and training activities in respect of interviewing, assessing credibility, reception and substantive issues.

I would now like to turn to deal with the challenges facing adjudicators in the two areas of this workshop: first, of women's refugee claims based on gender; followed by sexual orientation and/or gender identity claims.

## **2. Women's refugee claims based on gender**

The unequal treatment of women and girls throughout the world remains one of the greatest challenges to building a global community based on equality and non-discrimination. The Pakistani schoolgirl, Malala Yousafzai, who dared to go to school and speak out against the Taliban, and who is now struggling for her life after being shot in a cowardly act of violence, is a moving, yet incredibly depressing, example of the very real risks of persecution women and girls face in many countries.<sup>24</sup> Women and girls continue to be subjected to physical, mental and sexual violence, inhuman and degrading treatment, and deprived of their rights because of gender discrimination, in a wide range of contexts.

The question whether persecuted women can be refugees under the 1951 Convention seems uncontroversial and now well-settled as a matter of international refugee law.<sup>25</sup> Yet, closer scrutiny of the case law in a number of jurisdictions suggests that there are multiple impediments to the recognition of women's asylum claims. In this presentation, I will deal with two of these issues - first, the continuing difficulties of recognising "women" simply as a "social group" and second, recognising violence perpetrated against women in armed conflict as persecution.

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*relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/02, available at:*  
<http://www.unhcr.org/3d58de2da.html>.

<sup>21</sup> UNHCR, *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity, 21 November 2008, available at:*  
<http://www.unhcr.org/refworld/docid/48abd5660.html>.

<sup>22</sup> UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity, 23 October 2012, HCR/GIP/12/09, available at:*  
<http://www.unhcr.org/refworld/docid/50348afc2.html>.

<sup>23</sup> The full set of UNHCR's Guidelines on International Protection and its Handbook is available at: 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>.

<sup>24</sup> "Malala Yousafzai: Pakistan activist, 14, shot in Swat", *BBC News: Asia*, 9 October 2012, available at: <http://www.bbc.co.uk/news/world-asia-19882799>.

<sup>25</sup> For an historical account of the acceptance of persecuted women as refugees under international refugee law, see A. Edwards, "Transitioning Gender: Feminist Engagement with International Refugee Law and Policy 1950-2010" (2010) 29 *Refugee Survey Quarterly* 21. See the rest of the edition for various reflections on the past 20 years of practice and policy on refugee women's rights.

Other matters that remain problems for women's claims, but for time constraints I cannot address, include the fact that women are more likely than men to be granted subsidiary protection [or derivative status] than refugee status; the wide variation in the recognition rates of women's claims;<sup>26</sup> and the issue of credibility. In relation to the latter, some of the latest research shows that for example, women are disbelieved more often than men when claiming to have been raped, despite evidence suggesting widespread or systematic forms of such violence in their country of origin, being carried out against women and/or girls.<sup>27</sup>

### ***Women as a particular social group***

In the absence of an explicit ground of "gender" in the refugee definition, the ground most regularly used in women's refugee claims has become that of MPSG. In the absence of any guidance from the *travaux préparatoires* on the ground, national courts have developed their own approaches to defining the scope of MPSG. Two dominant approaches can be distilled from the case law – "protected characteristics" on the one hand, and "social perception" on the other.<sup>28</sup>

The "protected characteristics" approach<sup>29</sup> examines whether a group is united either by an innate or immutable characteristic, or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it, with "sex" being explicitly identified as an example of the former.<sup>30</sup> The "social perception" approach, on the other hand, based on a plain reading of the text, examines whether a particular social group shares a common characteristic which makes it cognizable or sets the group's members apart from society at large. Again,

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<sup>26</sup> The latest report on gender-related claims covering Europe suggests, for example, that women are more likely than men to be granted subsidiary protection than refugee status; and that there is a wide variation in recognition rates of women's claims within the nine European countries studied: see, Asylum Aid, *Gender-Related Claims in Europe*, May 2012, available at: <http://www.unhcr.org/refworld/docid/4fc74d342.html>.

<sup>27</sup> See, H. Baillot, S. Cowan and V. E. Munro, "Hearing the Right Gaps: Enabling & Responding to Disclosures of Sexual Violence within the UK Asylum Process" (2012) 12 *Social and Legal Studies* 269-296; H. Baillot, S. Cowan and V. E. Munro, "Crossing Borders, Inhabiting Spaces: The (In) Credibility of Sexual Violence in Asylum Appeals" in S. Fitzgerald, ed., *Regulating the International Movement of Women: From Protection to Control* (New York: Routledge, 2011) 111-131.

<sup>28</sup> On the emergence and subsequent development of the two approaches, see respectively: T.A. Aleinikoff, "Protected Characteristics and Social Perceptions: An Analysis of the Meaning of "Membership of a Particular Social Group", in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law* (University of Cambridge, 2003) 263; M. Foster, *The 'Ground with the Least Clarity': A Comparative Study of Jurisprudential Developments relating to 'Membership of a Particular Social Group'*, UNHCR, Legal and Protection Policy Research Series, April 2012, PPLA/2012/02, available at: <http://www.unhcr.org/refworld/docid/4f7d94722.html>.

<sup>29</sup> This approach is attributed to the decision in *Matter of Acosta*, Interim Decision No. 2986, 19 I. & N. Decisions 211, 1 Mar. 1985, available at <http://www.unhcr.org/refworld/docid/3ae6b6b910.html> and later clarified by the Canadian Supreme Court in *Canada (Attorney-General) v. Ward* [1993] 2 SCR 689, available at <http://www.unhcr.org/refworld/docid/3ae6b673c.html>. This approach is also followed in the United Kingdom: *Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, Session 1998-1999, United Kingdom: House of Lords (Judicial Committee), 25 March 1999, [*Shah and Islam*] available at, <http://www.unhcr.org/refworld/docid/3dec8abe4.html>.

<sup>30</sup> See, *Ward* and *Acosta*, *ibid.*



women or a subset thereof have also been recognised as a social group under this approach.<sup>31</sup>

In light of these two approaches, and recognizing both as valid legal interpretations, UNHCR in its 2002 guidelines adopted a definition that treats them as alternative, rather than cumulative.<sup>32</sup> In the guidelines a particular social group is defined as

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>33</sup>

UNHCR also stated clearly in its Guidelines on Gender-Related Persecution that:

It follows that 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>34</sup>

And further that:

Women may constitute a particular social group under certain circumstances based on the common characteristic of sex, whether or not they associate with one another based on that shared characteristic.<sup>35</sup>

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<sup>31</sup> The social perception approach is attributed to the Australian High Court based on an ordinary reading of the words, see *Applicant A and Another v. Minister for Immigration and Ethnic Affairs and Another*, High Court of Australia, (1997) 190 CLR 225, available at <http://www.unhcr.org/refworld/docid/3ae6b7180.html>. Gender was recognized under this approach in the case of *Minister for Immigration and Multicultural Affairs v Khawar* [2002] HCA 14, 11 April 2002, available at <http://www.unhcr.org/refworld/docid/3deb326b8.html>. It is also followed in France: *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>. The French test is summarized as a two-part test: (a) 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 (b) The fact that the members of the group are exposed to persecution. See, 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*, 12 June 2012, available at: <http://www.unhcr.org/refworld/docid/4fd84b012.html>.

<sup>32</sup> Regrettably not all jurisdictions have accepted the "alternative" view intended by UNHCR's definition. In the United States, for example, a number of courts have wrongly interpreted UNHCR's definition as cumulative rather than alternative: see, 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), available at: <http://www.unhcr.org/refworld/docid/4f4c97c52.html>. Likewise, the European Union Qualifications Directive appears to treat them as cumulative, although the view of different member states varies on this: See Directive 2011/95/EU, supra note 13.

<sup>33</sup> UNHCR, *Guidelines on MPSG*, supra note 20, at para. 11.

<sup>34</sup> UNHCR, *Guidelines on Gender-Related Persecution*, supra note 19, at para. 30..

<sup>35</sup> UNHCR, *Guidelines on MPSG*, supra note 20, at para. 15.

Yet despite these clear foundations, there have emerged a number of negative practices.

A surprising, yet persistent challenge 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. Gleeson CJ of the Australian High Court explains 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.”<sup>36</sup> 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>37</sup>

Yet there remains a tendency in some courts and tribunals to want to narrow the group to a specific subset of women, or to require what I would call a “gender plus” standard. Some circuits in the US, for example, have introduced a so-called “particularity” requirement, which suggests that the proposed group should be capable of being “accurately (...) described in a manner sufficiently distinct that the group would be recognized, in the society in question, as a discrete class of persons.”<sup>38</sup> To the extent that this requirement is intended to mean something more than that the group be “particular”, it seems the Board may have conflated “particularity” with its “social visibility” requirement, in part to address over-expansion of the category.<sup>39</sup> I will come back to this when discussing sexual orientation.

The question of demography, as well as size (and floodgates), has been in the background to a number of social group decisions, in several jurisdictions. In the US’ Court of Appeals for the Ninth Circuit in *Sanchez-Trujillo*, in 1986, it was held that “The statutory words ‘particular’ and ‘social’ which modify ‘group’ ... indicate that the term does not encompass every broadly defined segment of a population, even if a certain demographic division does have some statistical relevance”<sup>40</sup> and in turn that the group be “small, readily identifiable.”<sup>41</sup> While the latter aspect of size has been widely criticized by legal scholars,<sup>42</sup> and openly rejected in most jurisdictions<sup>43</sup> and by UNHCR,<sup>44</sup> the question of “demographic groups” still lingers. Gummow J in *Applicant*

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<sup>36</sup>See *Khawar*, supra note 31 at 35. See also per Lord Hoffman LJ in *Shah and Islam*, supra note 29 and La forest J in *Ward*, supra note 29 at 34.

<sup>37</sup> *Ibid*.

<sup>38</sup> *Matter of S-E-G-, et al.*, 24 I&N Dec. 579 at 584 (BIA 2008), United States Board of Immigration Appeals, 30 July 2008, available at: <http://www.unhcr.org/refworld/docid/4891da5b2.html>.

<sup>39</sup> UNHCR, Amicus Curiae Brief *Henriquez-Rivas*, supra note 32 at iv.

<sup>40</sup> *Sanchez-Trujillo, et al., v. Immigration and Naturalization Service*, 801 F.2d 1571 at 1576, United States Court of Appeals for the Ninth Circuit, 15 October 1986, available at: <http://www.unhcr.org/refworld/docid/4a3a3af50.html>.

<sup>41</sup> *Ibid* at 1576.

<sup>42</sup> See, Aleinikoff, supra note 28.

<sup>43</sup> See *Applicant A*, supra note 31 (although accepts that not every broadly defined demographic group constitutes a PSG). *Shah and Islam*, supra note 29.

<sup>44</sup> UNHCR argues that size of the persecuted group is irrelevant as the other four grounds are not subject to a size criterion: see, UNHCR, Social Group Guidelines, supra note 25 at paras. 18-19.



A, Australia's leading case on MSPG, for example, agreed that demographic factors alone do not define a particular social group.<sup>45</sup>

But this prompts a further level of inquiry: when is a factor of identity such as sex/gender merely a demographic fact rather than a social attribute or characteristic? The failure to recognise that "women" writ large are a social group, regardless of the society in which they live, leads lawyers and adjudicators to elaborate groups that could be categorised as "artificial or legal constructs" rather than social groups; and in other ways to contort what is happening in reality and the reasons for their persecution.<sup>46</sup>

A related obstacle to the recognition of women's refugee claims under the MSPG ground is the fact that "social group" has become the default ground, whereas political opinion is often a more obvious, yet under-utilised, ground [and far less complex].

Why is it so difficult to recognize acts of a woman in transgressing social customs as political? Why are certain acts (for instance, acts contravening religious dress codes) considered to be non-religious in a society where there is no separation between the State and religious institutions? Why are young girls who refuse to undergo female genital mutilation not political dissidents, breaking one of the fundamental customs of their society? Why has rape during ethnically motivated armed conflict not been seen as only criminal and not also racial in character?<sup>47</sup>

Why is this still the case? One answer that has been given for this bias permeating advocacy and decision-making is the stereotyping of women's roles and actions as non-political, and women as "social" rather than "political" beings.<sup>48</sup> Lawyers and decision-makers continue to fail to see women or their actions as political, rather than as social. If Malala Yousafzai was to claim asylum, would her lawyers and decision-makers rush to categorise her as a member of a social group, or would they venture to call her actions political, and rightly falling with the political opinion ground?

### ***Violence perpetrated against women in conflict situations***

A second area of inquiry I wanted to touch on today, is the seeming difficulties of recognising women's refugee claims based on violence perpetrated against them *in*

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<sup>45</sup> See *Applicant A*, supra note 31.

<sup>46</sup> *In re Fauziya Kasinga*, 3278, United States Board of Immigration Appeals, 13 June 1996, available at: <http://www.unhcr.org/refworld/docid/47bb00782.html>. In this decision the group accepted was "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice". Even if they had accepted the group as "women", only those women who could claim to be at risk of this practice would qualify for refugee status, and this would have limited the protected group to those women from Tchamba-Kusuntu tribe. The real basis for the persecution was however their gender/sex as "women". Also, they could have raised the ground of "nationality" (as ethnicity) because it was women from their tribe who were at particular risk.

<sup>47</sup> A. Edwards, "Age and Gender Dimensions in International Refugee Law", in E. Feller, V. Türk and F. Nicholson, *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003) 46, at 68 (footnotes omitted). Also restated in A. Edwards "Transitioning Gender" supra note 25 at 30 (this article also notes other areas for improvement in the analysis of women's refugee claims including internal flight/relocation alternative).

<sup>48</sup> A. Edwards "Transitioning Gender", supra note 25.

*conflict situations*. I want to refer you to a paper by Professor Valerie Oosterveld commissioned and published by UNHCR on this topic.<sup>49</sup> There are two particularly interesting findings from that research, which are worth exploring in this workshop: the first is that during conflict, gender norms often take on even greater socio-political significance than during peacetime. For example, “the role of women in the biological and social reproduction of group identity places them in a position of particular vulnerability”.<sup>50</sup> In this way, gender-related acts in conflict take on deeper meanings, or have a wider impact (for families, for communities), thereby creating differentiated experiences. According to the research, such impacts are rarely recognised in asylum adjudication processes. There continue to be cases, for example, that incorrectly characterise rape or other forms of sexual violence committed in conflict as “private” or “criminal” conduct, and therefore not persecutory.

A second, more entrenched problem, which Oosterveld’s research discusses, is that decision-makers often classify gender-related violence as part of the general indiscriminate consequences of conflict, and therefore not persecutory in the sense of the refugee definition. This appears to be done without necessarily considering the potential gender-related reasons for that violence (for example, the various ways in which rape is used as a weapon or strategy of war) or the broader political and other dimensions of conflict.<sup>51</sup> It is now widely acknowledged that the causes, character, conduct, and effects of contemporary armed conflict are deeply rooted in political, religious and ethnic factors (mirrored in the Convention grounds), notwithstanding the multitude of other factors driving and/or prolonging conflict - such as economic exploitation.<sup>52</sup>

It is also clear that low level warfare has as its targets the disruption of social and cultural relations, and civilians.<sup>53</sup> As noted by A.T. Nathan, “[w]omen are the bearers of culture not just in the clichéd senses that they socialize children [...], but in the more fundamental sense that groups of people define their identities – what makes them different – in large part through the statuses and roles that they ascribe to women.”<sup>54</sup> Being allocated such a role [and responsibility which attaches to that role], military/political tactics aimed at disrupting the social, political and cultural foundations of a particular society are often perpetrated through and on women’s bodies. Such acts can rarely be characterised as indiscriminate but rather deeply embedded in politics, ethnicity, religion, social processes, *and* gender – and should as such be recognised as legitimate grounds for refugee status.

### **3. Asylum claims based on sexual orientation and/or gender identity**

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<sup>49</sup> V. Oosterveld, “Women and Girls Fleeing Conflict: Gender and the Interpretation and Application of the 1951 Refugee Convention”, UNHCR Legal and Protection Policy Research Series No. 29, September 2012, available at: <http://www.unhcr.org/pages/4a16b17a6.html>.

<sup>50</sup> H. Crawley, *Refugees and Gender: Law and Process* (UK: Jordan Publishing Ltd., 2001) 88, as referred to in Oosterveld, *ibid* at 31.

<sup>51</sup> Oosterveld, *supra* note 48 at 32.

<sup>52</sup> Theo Farrell and Olivier Schmitt, “The Causes, Character and Conduct of Armed Conflict, and the Effects on Civilian Populations, 1990-2010”, UNHCR Legal and Protection Policy Research Series No. 26, April 2012, available at: <http://www.unhcr.org/4f8d606d9.html>.

<sup>53</sup> *Ibid*.

<sup>54</sup> A.T. Nathan, “Universalism: A Particularistic Account”, in L.S. Bell, A.J. Nathan and I. Peleg (eds.), *Negotiating Culture and Human Rights* (NY: Columbia University Press, 2001) 249, at 356.

I will now turn to deal with claims to refugee status based on sexual orientation and/or gender identity. LGBTI individuals are the targets of killings, sexual and gender-based violence, physical attacks, torture, arbitrary detention, accusations of immoral or deviant behaviour, denial of the rights to assembly, expression and information, and discrimination in employment, health and education, in all regions.<sup>55</sup> Many countries maintain severe criminal laws for consensual same-sex relations - in fact last count was 78 – a number of which stipulate imprisonment and/or corporal punishment.<sup>56</sup> In at least five countries homosexual acts are punishable by death. In these and other countries, the authorities may not protect LGBTI individuals from abuse and persecution by non-State actors, resulting in impunity for perpetrators and implicit, if not explicit, tolerance of such abuse and persecution.

I will deal with five obstacles to recognition of such claims.<sup>57</sup>

The first is the issue of “**discretion**”, that is, does the 1951 Convention protect persons who could avoid persecution by concealing (or “being discreet”) about their sexuality or gender identity? This question has been dealt with in a number of jurisdictions.<sup>58</sup> In accepting that gay men are a particular social group,<sup>59</sup> Lord Rodger in the UK Supreme Court decision in *HJ (Iran) and HT (Cameroon)*,<sup>60</sup> clarified that it was “unacceptable” to rely on the ability of the individual to “act discreetly and

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<sup>55</sup> See, UN Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 17 November 2011, (hereafter “OHCHR, Report on sexual orientation and gender identity”), available at: <http://www.unhcr.org/refworld/docid/4ef092022.html>. For an overview of jurisprudence and doctrine, see also ICJ, *Sexual Orientation and Gender Identity in Human Rights Law, References to Jurisprudence and Doctrine of the United Nations Human Rights System*, 2010, fourth updated edition, available at: <http://www.unhcr.org/refworld/docid/4c627bd82.html>; ICJ, *Sexual Orientation and Gender Identity in Human Rights Law, Jurisprudential, Legislative and Doctrinal References from the Council of Europe and the European Union*, October 2007, available at: <http://www.unhcr.org/refworld/docid/4a54bbb5d.html>; ICJ, *Sexual Orientation and Gender Identity in Human Rights Law: References to Jurisprudence and Doctrine of the Inter-American System*, July 2007, available at: <http://www.unhcr.org/refworld/docid/4ad5b83a2.html>.

<sup>56</sup> See, International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), “State-sponsored Homophobia, A World Survey of laws prohibiting same-sex activity between consenting adults”, May 2012, available at: [http://old.ilga.org/Statehomophobia/ILGA\\_State\\_Sponsored\\_Homophobia\\_2012.pdf](http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2012.pdf).

<sup>57</sup> These obstacles are drawn, inter alia from UNHCR, “Ensuring Protection to LGBTI Persons of Concern”, Keynote Address by Volker Türk, Director of International Protection, UNHCR, , 20 September 2012, available at: <http://www.unhcr.org/refworld/docid/505c14152.html>.

<sup>58</sup> See, for example, *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, [2010] UKSC 31, United Kingdom: Supreme Court, 7 July 2010, available at: <http://www.unhcr.org/refworld/docid/4c3456752.html>; UN High Commissioner for Refugees, *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>; *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs*; *Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs* [2003] HCA 71, High Court of Australia, 9 December 2003, per Gummow and Hayne JJ. (Paras. 78-83).

<sup>59</sup> *Ibid*, *HJ (Iran) and HT (Cameroon)*, *ibid.*, per Lord Hope at para. 10. The cases involved gay men fearing persecution in Iran and Cameroon respectively.

<sup>60</sup> *HJ (Iran)*, *supra* note 57.

conceal his sexual identity indefinitely to avoid suffering persecution".<sup>61</sup> He stated that this is because "it involves the applicant denying or hiding precisely the innate characteristic which forms the basis of his claim for persecution."<sup>62</sup>

Paraphrasing our own guidelines:

That an applicant may be able to avoid persecution by concealing or by being "discreet" about his or her sexual orientation or gender identity, or has done so previously, is not a valid reason to deny refugee status. [...] a person cannot be denied refugee status based on a requirement that they change or conceal their identity, opinions or characteristics in order to avoid persecution.<sup>63</sup>

With this general principle in mind, the question thus to be considered is what predicament the applicant would face if he or she were returned to the country of origin. This requires a fact-specific examination of what may happen if the applicant returns to the country of nationality or habitual residence and whether this amounts to persecution. The question is not, could the applicant, by being discreet, live in that country without attracting adverse consequences. It is important to note that even if applicants may so far have managed to avoid harm through concealment, their circumstances may change over time and secrecy may not be an option for the entirety of their lifetime. The risk of discovery may also not necessarily be confined to their own conduct.<sup>64</sup>

The idea that LGBTI people should hide, change or renounce their sexual orientation and/or gender identity is at odds with the Convention, the object and purpose of which is to protect persons who have a well-founded fear of being persecuted for who they are, or for their beliefs or views. It is also out of line with how the other grounds have been interpreted and applied.

The second trend is "**criminalization**" and the challenges involved in determining whether laws criminalizing same sex relations amount to persecution, in particular when such laws are rarely if ever enforced. From our guidelines:

It is well established that such criminal laws are discriminatory and violate international human rights norms. Where persons are at risk of persecution or punishment such as by the death penalty, prison terms, or severe corporal punishment, including flogging, their persecutory character is particularly evident.<sup>65</sup>

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<sup>61</sup> *HJ (Iran)*, supra note 57 per Lord Rodger at para. 75-76. See, also, *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs*; *Appellant S396/2002*, supra note 57 per Gummow and Hayne JJ. at paras. 78-83, who held that: "The question to be considered in assessing whether the applicant's fear of persecution is well founded is what may happen if the applicant returns to the country of nationality; it is not, could the applicant live [discreetly] in that country without attracting adverse consequences."

<sup>62</sup> *Ibid.*

<sup>63</sup> UNHCR Guidelines on Sexual Orientation, supra note 22.

<sup>64</sup> *Ibid.*, at para. 32.

<sup>65</sup> *Ibid.* at para. 26.

Even if irregularly, rarely or ever enforced, criminal laws prohibiting same-sex relations could lead to an intolerable predicament [...][rising to the level of persecution. Depending on the country context, the criminalization of same-sex relations can create or contribute to an oppressive atmosphere of intolerance and generate a threat of prosecution for having such relations. The existence of such laws can be used for blackmail and extortion purposes by the authorities or non-State actors. They can promote political rhetoric that can expose [...] individuals to risks of persecutory harm. They can also hinder [...] persons from seeking and obtaining State protection.<sup>66</sup>

Assessing the “well-founded fear of being persecuted” in such cases needs to be fact-based, focusing on both the individual and the contextual circumstances of the case.<sup>67</sup>

Third, “**sexualization**”, or the over-emphasis by some decision-makers on sexual conduct, rather than on sexual orientation as an identity, is also a problem in refugee status determination in some countries. Not only can it lead to intrusive and humiliating questioning about one’s sexual life, it also overlooks the fact that LGBTI people are often persecuted because of the threat they represent to prevailing social and cultural norms; and that “that sexual orientation and gender identity are ultimately about a person’s identity, whether or not that identity is manifested through sexual acts.”<sup>68</sup>

Fourth, the emergence of a test of “**social visibility**” in the interpretation of membership of a particular social group in a number of jurisdictions has also impacted, or could particularly impact, claims based on sexual orientation and/or gender identity. The best caution so far against the “social visibility” test was articulated by Posner J of the Seventh Circuit in *Gatimi v Holder*:

Women who have not yet undergone female genital mutilation in tribes that practice it do not look different from anyone else. A homosexual in a homophobic society will pass as heterosexual. If you are 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 target group are successful in remaining invisible, they will not be “seen” by other people in society “as a segment of the population”.<sup>69</sup>

UNHCR has made similar arguments in its multiple amicus interventions on this issue.<sup>70</sup> In particular, UNHCR has been at pains to stress that the social perception approach is different from social visibility. The social perception approach does not require that the group be visible to the naked eye in a literal sense nor that the common attribute be one that is easily recognizable to the general public. Further, “social perception” does not mean to suggest a sense of community or group identification as might exist for members of an organization or association.<sup>71</sup> While

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<sup>66</sup> Ibid at para. 27.

<sup>67</sup> Ibid at para. 28.

<sup>68</sup> Ibid at para. 63. Vii.

<sup>69</sup> *Gatimi v. Holder*, 578 F. 3d 611 (7<sup>th</sup> Circ. 2009) available at:

<http://www.unhcr.org/refworld/docid/4aba40332.html>, per Posner J. at 3.

<sup>70</sup> As an example see 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, available at:

<http://www.unhcr.org/refworld/docid/4c6cdb512.html>.

<sup>71</sup> Ibid.

the visibility of a particular group may acknowledge its existence, it is not a *precondition* to recognition. There is no requirement that homosexual applicants, for example, externally manifest their identity, not least when one notes that the persecution test is in fact prospective in orientation. Requiring some sort of social visibility or external manifestation also ignores cases of imputed social group or political opinion, where a person may be persecuted because they are perceived to belong to that group.

Fifth and finally are the issues of evidence and credibility. Our new guidelines provide advice on both these issues, but two factors should be pointed out which can undermine or influence status determination – the first, the “stereotyping” of LGBTI individuals (and in turn the failure to understand their cases in their particular contexts), and the second, a culture of disbelief, which is not at present helped by the inadequacy of COI. Credibility and evidence are indeed complex issues, also very relevant to women’s claims, and so it is welcomed that we will be dealing with them in this workshop.

### **Conclusion**

In conclusion, it is clear that we have travelled a long way since the 1980s when the Executive Committee first acknowledged that women could be members of a particular social group for the purposes of refugee status.<sup>72</sup> Nonetheless there remain a number of obstacles to the full and inclusive interpretation of the refugee definition, to properly reflect gender, gender identity and sexual orientation, and to the harmonization of interpretation across jurisdictions to ensure predictability and fairness in decision-making. When confronted by these issues, I am reminded of the paraphrased words of Lord Justice Clyde in *Horvath* (paraphrased), “In the context of refugee status determination it is important not to be seduced by complexity and sophisticated over-analysis.”<sup>73</sup>

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<sup>72</sup> UNHCR Executive Committee, “Refugee Women and International Protection”, 18 October 1985, Conclusion No. 39 (XXXVI) 1985, available online at: <http://www.unhcr.org/3d4ab3ff2.html>.

<sup>73</sup> *Refugee Appeal No. 74665/03*, New Zealand Refugee Status Appeals Authority, 7 July 2004, available at: , referring to Clyde LJ in *Horvath v. Secretary of State for the Home Department* [2001] 1 AC 489, 508F (House of Lords), <http://www.unhcr.org/refworld/docid/3ae6b6e04.html>: “The dangers of over-sophistication in the construction and application of the Convention are real and significant. Prolonged debate about the niceties of the language may readily lead to delay in the processing of what in the interests of everyone should be a relatively expeditious process. Of course there may often be difficult points of fact to be resolved and uncertainties in matters of fact which may not immediately be open to a clear answer. But it is obviously undesirable to heap onto the shoulders of the adjudicators and the members of the tribunals who already have a heavy burden of work an additional complexity in the unravelling of legal issues on the precise construction of the particular words used in the Convention.”