



**Invisible in the City: Urban Protection Gaps Facing Sexual Minorities Fleeing
Persecution, HIAS LGBTI Symposium
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“Ensuring Protection to LGBTI Persons of Concern”

**Keynote Address by
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I am pleased to have the chance to engage with you on the important topic of protecting lesbian, gay, bisexual, transgender and intersex (“LGBTI”) refugees and asylum-seekers. This symposium provides a good opportunity to deepen our knowledge about the issues facing LGBTI individuals in the forced displacement context, as well as the challenges confronting those who are working to address them. I would like to thank the organisers of this conference, HIAS, one of the leading NGOs in this area and an important UNHCR partner, for this valuable initiative.

LGBTI asylum-seekers and refugees face a myriad of threats, risks and vulnerabilities throughout all stages of the displacement cycle. The persecution they flee from is at times repeated in the country of asylum and also within refugee communities, making it difficult for them to access community support networks and humanitarian services. Even those responsible for providing protection and assistance may not always fully appreciate the challenges LGBTI refugees and asylum-seekers face.

This being said, there is much greater awareness today within the human rights and humanitarian community about the specific protection concerns of LGBTI

refugees and asylum-seekers. The last few years have, for example, seen the emergence of a body of research on this topic. However, just as homophobia and discrimination against LGBTI persons are not new phenomena, neither is that of LGBTI people being part of asylum flows.

Context

The 1951 Convention relating to the Status of Refugees speaks directly to the topic of this symposium. I have no doubt that both the framers of the Universal Declaration of Human Rights and of the 1951 Convention were aware of what had happened in Nazi Germany to LGBTI people. In 1936 the Nazis created a Reich Central Office for the Combating of Homosexuality and Abortion, revised the infamous paragraph 175 of the German Penal Code, arrested people *en masse* on suspicion of homosexuality and incarcerated a good number of them in concentration camps, where they had to wear the *Rosa Winkel*. It is a little known fact that even after the concentration camps had been liberated at the end of the Second World War, some of the pink triangle prisoners were often simply re-imprisoned, as homosexuality remained illegal. We will never know how many LGBTI persons fled Nazi Germany to avoid ending up in the camps. As homosexuality was – and remains in many societies – a social stigma and a criminal offence, they would have been forced to hide their reasons for flight even in their new countries of asylum. Unfortunately, this remains the situation for LGBTI asylum-seekers and refugees in many parts of the world today.

After the Second World War it took a while for the world to acknowledge the LGBTI victims of the Holocaust. Despite the fact that there was no explicit recognition in the refugee definition of persecution for reasons of sexual orientation or gender identity, the drafters of the 1951 Refugee Convention used broad enough language to cover such instances, notably through the introduction of the membership of a particular social group ground. At the centre of the Convention is human dignity, the richness and diversity of human life, and the full expression of individual freedoms. The very purpose of the Convention is the protection of those who manage to flee predicaments that violate their dignity, their identity and freedoms.

In my line of work I have often asked myself, "*Why it is that minorities are particularly targeted*". There are many explanations put forth by both historians and sociologists. As with racism, xenophobia and other forms of discrimination,

homophobia does not come from “cosmos”.¹ It is a human-made construct, ill fed by political, religious, legal and even pseudo-medical justifications. Sadly, it is commonplace for oppression over a minority group to be “legitimized” by the dominating group through artificial distinctions and concepts meant to justify discrimination. Deeply held biases, prejudices and beliefs can surface when conditioned through the socialization process.

Another reason is that departure from the majority “norm”, from the accepted *status quo*, inherently implies social change. Social change can be unsettling and even seen as a threat to the home, family, religion, culture or country. In this context, LGBTI people risk becoming symbols of that threat. We have seen politicians and religious groups in some countries use a strong anti-LGBTI stance to gain votes or resist human rights reform, by portraying LGBTI people as immoral and a Western import. This is not new. We have seen similar resistance and bigotry towards other movements to promote social change in the past. Comparable to the anger and hatred today directed against those advocating for the rights of LGBTI individuals is the denigration and abuse that feminists suffered in the early 20th Century when demanding the right to vote or that members of the civil rights movement experienced in the United States in the mid-20th century.

From a psychological perspective, we know that human beings can be quick to judge, fear and even hate the unknown, the “other” - people who are different. We are inclined to create an “us” and “them”, based on religion, gender, race or even eye colour, to boost our self-esteem, to conform to the majority group or simply to scapegoat the “other.” Moreover, majority members may often not come to the defence of the minority out of fear of being excluded or harmed themselves.

Fortunately, research shows that prejudices are mutable and, when shedding light on them through mindfulness, it is possible to overcome them. We can, for instance, work to change the way society labels and stigmatizes LGBTI people, by honouring our common heritage, embracing diversity and fostering understanding. And we should not forget there are also stories of acceptance and courage in our refugee files: a sister who would give her gay brother money and encouragement to flee the country; a mother who would save her transgender son by persuading the police not to oblige him to present his ID document; a

¹ To use the expression of Mr Doudou Diene, (former) Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, 2002-2008.

man who would warn a lesbian neighbour about her possible arrest because of her sexual orientation. There are always some people who despite risks will not be silent about injustice against others.

Legal developments

There has been growing awareness about the rights of LGBTI individuals. I would like to mention in particular the 2007 *Yogyakarta Principles* and the contribution they have made to a better appreciation of how human rights norms apply and are to be interpreted in the context of sexual orientation and gender identity. At the LGBTI Roundtable organized by UNHCR in 2010 – in which some of you participated – we recognized that the cross-fertilization between human rights law and refugee law could be strengthened by using the Principles as a legal, practical and advocacy tool. It is perhaps premature to assess the role played by the Principles in making concrete improvements in the lives of LGBTI people. However, encouragingly, the Principles *have* been drawn upon on numerous occasions by the United Nations – including UNHCR, by States, activists, asylum courts and tribunals.²

For almost two decades the UN has documented violations against LGBTI people and articulated human rights standards in the context of sexual orientation and gender identity.³ More recently, the UN has become more public on this issue and called, at the highest levels, for equal rights, non-discrimination, an end to violence and the abrogation of laws that criminalize

² As noted by the Delhi High Court: “The [Yogyakarta] principles are intended as a coherent and comprehensive identification of the obligation of States to respect, protect and fulfil the human rights of all persons regardless of their sexual orientation or gender identity.” *Naz Foundation v/s Government of NCT of Delhi and Others, High Court of Delhi at New Delhi*, India, 2 July 2009. See <http://www.ypinaction.org>, a website hosted by [ARC International](#) to track and evaluate the use of the *Yogyakarta Principles*.

³ See, for example, UN Human Rights Council, 17, Human rights, sexual orientation and gender identity, 15 June 2011, <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/G11/141/94/PDF/G1114194.pdf?OpenElement>; 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, available at: <http://www.unhcr.org/refworld/docid/4ef092022.html>. See also International Commission of Jurists (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>.

same-sex relationships.⁴ In May this year, the UN High Commissioner for Refugees issued a message to all staff, recognizing the particular harm and discrimination faced by LGBTI persons of concern and encouraging all of us to help improve their protection as well as to eliminate homophobia and transphobia in the workplace.

Legal rights of LGBTI individuals have been asserted in international and domestic courts as well. As the excellent “*Sexual Orientation, Gender Identity and Justice: A Comparative Law Casebook*” by the International Commission of Jurists illustrates, extraordinary progress has been made in favour of the rights to equality for LGBTI people.⁵

Since the first refugee claims based on sexual orientation and gender identity were recognized in the 1980s, jurisprudence in this area of refugee law has also continued to evolve – but at times with diverging views in different jurisdictions. We have identified a number of trends in this regard, which I would now like to set out briefly.

The first trend is that of demanding “discretion”, meaning whether the 1951 Convention protects persons who could have avoided persecution by simply concealing their sexual orientation. The idea that gay people should tolerate being discreet about their sexual orientation was dismissed by the UK Supreme Court in 2010 in *HJ and HT*,⁶ which has also received wide attention outside Europe. Nevertheless, such “discretion” reasoning continues to be used in a number of countries, particularly in Europe.⁷ Discretion has the potential to

⁴ “Ending Violence and Criminal Sanctions Based on Sexual Orientation and Gender Identity”, UN Secretary-General’s remarks on Human Rights Day, 10 December 2010, available at: <http://www.un.org/News/Press/docs/2010/sgsm13311.doc.htm>.

⁵ 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>.

⁶ See, *HJ and HT 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>.

⁷ The 2011 Fleeing Homophobia report, examining practices across the European Union, found discretion reasoning still being invoked in Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, France, Germany, Hungary, Ireland, the Netherlands, Malta, Poland, Romania, Spain, Norway and Switzerland. See, Vrije Universiteit Amsterdam, *Fleeing Homophobia, Asylum Claims Related to Sexual Orientation and Gender Identity in Europe*, September 2011, available at: <http://www.unhcr.org/refworld/docid/4ebba7852.html>. See also, e.g., *A v. The State (Immigration Appeals Board)*, HR-2012-667-A (Case No. 2011/1688), Norway: Supreme Court, 29 March 2012, available at: <http://www.unhcr.org/refworld/docid/50084d772.html>; *Supreme Administrative Court Decision of 13 January 2012*, KHO:2012:1, Finland: Supreme Administrative Court, 13 January 2012, available at: <http://www.unhcr.org/refworld/docid/4f3cdf7e2.html>.

undermine one of the basic tenets of refugee law – that the 1951 Convention protects persons who have a well-founded fear of being persecuted on account of who they are; and that one should not therefore be compelled to hide, change or renounce one’s identity in order to avoid persecution.

The second trend is “criminalization” and the challenges involved in determining whether laws criminalizing same-sex relations amount to persecution. The mere existence of laws criminalizing same-sex conduct is insufficient, in some jurisdictions, for recognition of refugee status; recent or regular enforcement of the law is required. Some countries also require that applicants show that steps towards enforcement have taken place in his or her individual case. It is not enough that the applicant wishes to avoid the risk of the law being applied to him or her. In our view, such an interpretation would not do justice to the actual or feared predicament of LGBTI individuals, not just from a potential law enforcement perspective but also at the level of societal discrimination in countries criminalizing same-sex relationships.

The third is “sexualization”. With this I mean the over-emphasis by some decision-makers on sexual acts rather than on sexual orientation as an identity. 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 mores. Rarely is the threat of persecution simply about the enforcement of laws against a particular sexual act.

The fourth concern is “stereotyping”. Sexual orientation and gender identity are not visible in the same way that race and nationality are and perhaps other particular social groups may be. This has meant that decision-makers have been preoccupied with obtaining evidence whether an applicant is in fact LGBTI. For lack of guidance and knowledge, they have relied on their own personal assumptions or stereotypes to conclude if somebody is LGBTI or not, which risks undermining the impartiality of decision-making.⁸

The fifth trend I would like to highlight is that of “disbelief” - which often goes hand in hand with stereotyping. Not all courts accept the self-identification of the applicant as LGBTI. Some ask for witness statements or documentation such as letters, ignoring the fact that this might be impossible for the applicant to

⁸ 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>, p. 287.

produce, in particular where he or she has been doing everything they could to hide their sexual orientation – to be “discreet”. Their stories may not be deemed credible because there is no reliable and sufficiently detailed country of origin information to corroborate their accounts.

These issues will be further addressed in UNHCR’s forthcoming guidelines on which I will elaborate a bit later. We are also contributing to jurisprudence through court interventions under the Office’s supervisory responsibility in respect of international refugee instruments. We have, for example, submitted two legal briefs⁹ and are currently working on a third for the Court of Justice of the European Union, which will be considering the discretion issue.¹⁰

Apart from the need for engagement in the jurisprudential sphere, I agree with the “*Invisible in the City*” report that there is also a need for greater mainstreaming of the protection of LGBTI persons of concern. UNHCR has endeavoured to do this through the development of policy documents and guidelines, trainings to increase staff and partner awareness, as well as enhancing operational protection, particularly in the areas of refugee status determination, resettlement and community services.

Policy and Operational Developments

In order to inform our guidelines, and to explore how to improve approaches to the protection of LGBTI people, UNHCR has organized several expert consultations and roundtables, including, as I mentioned previously, the 2010 *Roundtable on Asylum-Seekers and Refugees Seeking Protection on Account of their Sexual Orientation and Gender Identity*, which focused on identifying and addressing protection concerns experienced by LGBTI individuals throughout the various stages of displacement.¹¹ In 2011, UNHCR, together with the

⁹ UNHCR, *Advisory Opinion by UNHCR to the Tokyo Bar Association Regarding Refugee Claims Based on Sexual Orientation*, 3 September 2004, available at: <http://www.unhcr.org/refworld/docid/4551c0d04.html>; UNHCR, *HJ and HT v. Secretary of State for the Home Department - Case for the first intervenor (the United Nations High Commissioner for Refugees)*, 19 April 2010, available at: <http://www.unhcr.org/refworld/docid/4bd1abbc2.html>.

¹⁰ UNHCR Observations in the cases of *Minister voor Immigratie en Asiel v. X, Y and Z* (C-199/12, C-200/12, C-201/12) regarding claims for refugee status based on sexual orientation and the interpretation of Articles 9 and 10 of the EU Qualification Directive (forthcoming).

¹¹ Participants included 29 experts from sixteen countries drawn from governments, non-governmental organizations (NGOs), academia, the judiciary and international organizations, as well as a number of UNHCR staff. See UNHCR, ‘Summary Conclusions: Asylum Seekers and Refugees Seeking Protection on Account of their Sexual Orientation and Gender Identity,’ Expert Roundtable organized by the United Nations High Commissioner for Refugees, Geneva,

International Association of Refugee Law Judges and the European Legal Network on Asylum, convened an expert meeting to discuss common issues facing the judiciary and legal representatives in examining asylum claims related to sexual orientation and gender identity.¹² We have also, together with NGO partners, organized side events and panel discussions at the annual UNHCR-NGO Consultations, to discuss sexual orientation, gender identity and refugee rights, explore related protection challenges and identify areas requiring further development and analysis.

As lack of awareness of LGBTI issues and the need for training and guidance have been identified as knowledge, capacity, and tools gaps, UNHCR has developed policy and practical guidance for staff, partners, State authorities and decision-makers, to promote a consistent and rights-based approach to the protection of LGBTI people.

In 2008, UNHCR issued a Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity,¹³ to improve decision-makers' awareness about the specific experiences of LGBTI asylum-seekers and encourage a deeper analysis of the legal questions involved. The Guidance Note is currently being updated in light of new developments and will be issued later this year. It will address comprehensively both substantive and procedural issues for the determination of refugee claims based on sexual orientation and gender identity under the 1951 Convention.

Last year, UNHCR released a *Need to Know Guidance Note on Working with Lesbian, Gay, Bisexual, Transgender and Intersex Persons in Forced Displacement* with input from ORAM.¹⁴ The Guidance Note is meant for UNHCR and partner staff to improve their understanding of the rights and the distinct vulnerabilities of LGBTI refugees and promote concrete actions to ensure that they are protected throughout all stages of their displacement. It provides practical tips on how to

Switzerland, 30 September – 1 October 2010. See also UNHCR, 'The Protection of Lesbian, Gay, Bisexual, Transgender and Intersex Asylum-Seekers and Refugees', Discussion paper, 22 September 2010.

¹² See UNHCR, IARLJ, ELENA, 'Informal Meeting of Experts on Refugee Claims Relating to Sexual Orientation and Gender Identity,' Bled, Slovenia, 10 September 2011.

¹³ 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>.

¹⁴ UNHCR, 'Working with Lesbian, Gay, Bisexual, Transgender and Intersex Persons in Forced Displacement', Need to Know Guidance 2, 2011, available at <http://www.unhcr.org/refworld/docid/4e6073972.html>.

make the office environments more accessible, make programmes safe for, and inclusive of, LGBTI persons, and promote participation. We will continue to disseminate the *Need to Know Guidance* widely to raise awareness of LGBTI protection issues with partners and governments. In addition, UNHCR's Age, Gender and Diversity Policy¹⁵ explicitly refers to LGBTI refugees and asylum-seekers.

However, policy and guidance will be of limited effect, if prejudice and ignorance prevail among those responsible for implementing that guidance. To remedy lack of understanding among our own as well as partner staff,¹⁶ we are in the process of developing a training package with ORAM to increase the capacity of staff to deliver protection to LGBTI persons of concern. This package covers terminology, responses to day-to-day protection issues, refugee status determination (RSD) and LGBTI-sensitive interviewing techniques. Training using this material was piloted earlier this year and we hope to take this further forward in 2013. UNHCR is also developing a separate e-learning and facilitator's guide on social exclusion for UNHCR and partner staff and will include material on groups who are often discriminated against: persons with disabilities, older persons, LGBTI people, as well as minorities and indigenous groups.

The refugee status determination and resettlement processing phases are often the stages when LGBTI persons of concern will self-identify, but also where the most vital decision-making concerning their future will occur. That is why we have strengthened our focus on informing these processes. You will no doubt have noted that our eligibility guidelines and country of origin research now systematically include a section on the treatment of LGBTI individuals.

The RSD Learning Programme, which is mandatory for all UNHCR staff conducting RSD or with national capacity-building responsibilities, deals with

¹⁵ UNHCR, 'Age, Gender and Diversity Policy: Working with people and communities for equality and protection', 1 June 2011, available at <http://www.unhcr.org/refworld/docid/4def34f6887.html>.

¹⁶ A global survey undertaken by ORAM on NGO attitudes towards LGBTI asylum-seekers and refugees found that although the large majority of respondents believed that individuals persecuted on the basis of sexual orientation or gender identity deserved refugee protection, there was a silence, a 'shroud of invisibility' surrounding LGBTI individuals and their protection needs, with many NGOs unaware of the LGBTI refugees in their midst as well as of the need for targeted policies to help them. ORAM, 'Opening Doors: A Global Survey of NGO Attitudes Towards LGBTI Refugees & Asylum Seekers', June 2012. Available at <http://www.oraminternational.org/images/stories/Publications/oram-opening-doors.pdf>

issues pertaining to the adjudication of claims on the basis of sexual orientation or gender identity, and covers appropriate interviewing techniques. In partnership with ORAM, we are developing further guidance for RSD adjudicators, in order to ensure awareness and appropriate lines of questioning when interviewing LGBTI individuals.

The 2011 Resettlement Handbook provides guidance on the resettlement of LGBTI individuals, which is often the only viable solution in many first-country-of-asylum contexts. UNHCR expedites the resettlement of LGBTI refugees according to their vulnerability, which has in some cases involved emergency resettlement. Although the latest edition of the Heightened Risk Identification Tool addresses the detection of protection risks facing LGBTI individuals, further efforts are needed, including to improve referral mechanisms. We are currently working on a resettlement assessment tool for LGBTI refugees, which will have a checklist and a step-by-step guide intended to assist staff to better reach out to and assess LGBTI refugees in need of resettlement. However, the average processing time for resettlement by States remains long. This impacts adversely on the well-being of LGBTI individuals, who are often in dangerous and difficult situations.

Statistical data and other information

The paucity of available statistics remains an important challenge. The number of LGBTI asylum-seekers and refugees is not known as, due to fear and discrimination, many LGBTI persons do not reveal their true circumstances and do not claim asylum on sexual orientation or gender identity grounds. They usually keep a low profile in order not to attract discrimination and violence from other refugees, the local community or State authorities. As HIAS' study has found, a significant number of asylum-seekers may be unaware that their experience of persecution is a legitimate ground for seeking international protection.

The need for improved country-of-origin information regarding the persecution of sexual minorities and specifically of LGBTI persons is highlighted in HIAS' report and recommendations to UNHCR. We are trying to improve our country-of-origin data in order to close information gaps, for example, on the treatment of LGBTI individuals, implementation of laws criminalizing same-sex relations, and harm by private actors in order to assist in the guidance that we can provide to States and legal practitioners.

Other efforts that UNHCR is engaged in include the referral of LGBTI refugees to emergency shelter, working with LGBTI community groups to ensure a greater appreciation of their needs as well as understanding of how UNHCR can assist them, and improving the environment in UNHCR offices to make them more LGBTI-friendly.

Yet, more needs to be done, and partnership is key.

Partnerships

We need to use all the tools at our disposal in close partnership and send a strong and unambiguous message that any form of discrimination or violence is not permissible. We need to address this from every angle – within the context of a human rights network, together with the Office of the High Commissioner for Human Rights and other UN entities, by addressing this through our work on hate crimes; by discussing this as an issue of diversity and marginalization; by promoting respect for those outside the mainstream; and by working to empower communities. We will only be successful in this endeavour if we work together on this.

Conclusion

Not so long ago, the needs of LGBTI asylum-seekers and refugees were invisible, and events such as this unheard of. We are making progress. This is encouraging but much work lies ahead of us. As long as societies and communities continue to shun, abuse and criminalize LGBTI individuals, refugee protection will be a necessity and, in fact, the only means to realize their fundamental human dignity. It will be doubly important that both the asylum systems and the institutions underpinning them (including UNHCR and NGOs working in partnership) are sensitive to the specific rights and particular needs of LGBTI asylum-seekers and refugees. Our discussions today and tomorrow will assist us all in enhancing much needed understanding and enable us to explore gaps, share good practices and build consensus around improving responses to the protection of LGBTI people. I much look forward to these discussions and, more importantly, their outcomes.