

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, Switzerland, 30 September - 1 October 2010

UNHCR organized a Roundtable on Asylum-Seekers and Refugees Seeking Protection on Account of Their Sexual Orientation and Gender Identity (“Roundtable”) in response to the growing need to identify and address protection gaps in the treatment of lesbian, gay, bisexual, transgender and intersex (“LGBTI”) asylum-seekers and refugees in all stages of the displacement cycle.

A number of writings informed the discussion, including UNHCR’s 2008 Guidance Note on the topic and a UNHCR Discussion Paper prepared for the event.¹ Human Rights First submitted a paper,² as did the Organization for Refuge, Asylum and Migration (ORAM).³

Participants included 29 experts from sixteen countries drawn from governments, NGOs, academia, the judiciary and international organizations, as well as a number of UNHCR staff. The Roundtable allowed for wide-ranging discussion and examined, in particular, substantive and procedural issues related to refugee claims based on sexual orientation and gender identity. It reviewed the international legal framework for protecting LGBTI asylum-seekers and refugees. It further discussed operational protection challenges particular to lesbian, gay, bisexual, transgender and intersex asylum-seekers and refugees as separate groups and heard from several States and NGOs about good practices and current initiatives.

The following summary conclusions do not necessarily represent the individual views of each participant or UNHCR, but reflect broadly the understandings that emerged from the discussion. These conclusions will, *inter alia*, be useful in furthering UNHCR’s work in this domain.

General considerations

1. LGBTI persons are entitled to all human rights on an equal basis with others. These rights are enshrined in international human rights and refugee law instruments. States have a duty to protect asylum-seekers and refugees from human rights violations regardless of their sexual orientation and gender identity.
2. The human rights principle of non-discrimination in relation to sexual orientation and gender identity is applicable in the refugee context, including in regard to the

¹ UNHCR, *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, 21 November 2008; and UNHCR, *The Protection of Lesbian, Gay, Bisexual, Transgender and Intersex Asylum-Seekers and Refugees*, 22 September 2010.

² Human Rights First, *Persistent Needs and Gaps: the Protection of Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Refugees: an Overview of UNHCR’s Response to LGBTI Refugees and Recommendations to Enhance Protection*, 30 September, 2010.

³ ORAM, *Rights & Protection of Lesbian, Gay, Bisexual, Transgender & Intersex Refugees and Asylum Seekers Under the Yogyakarta Principles*, September, 2010.

interpretation and application of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (“1951 Convention”). It is also important to recall the historical context in which the 1951 Convention was drafted. It was common knowledge after World War II that people had been persecuted by the Nazi regime because of their LGBT background.

3. The 2007 *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* (“YP”) set out the human rights protection framework as applicable to LGBTI individuals, including in the refugee context. Cross-fertilization between human rights law and refugee law could be strengthened by using the YP as a legal, practical and advocacy tool also in the refugee context.
4. An understanding of the multiple forms of harm and discrimination experienced by LGBTI persons throughout the displacement cycle is vital in order for States, NGOs and UNHCR staff to adequately respond. A number of intersecting factors contribute to discrimination experienced by LGBTI asylum-seekers and refugees, including their sexual orientation, gender identity, age, nationality, race and HIV status. LGBTI asylum-seekers and refugees are often marginalized and isolated without family or community support. UNHCR’s Age, Gender and Diversity Mainstreaming approach can be usefully employed, particularly its diversity element, in reaching out to, and enhancing the protection of, LGBTI individuals.
5. The relationship between non-conformance to expected gender roles and sexual orientation and gender identity is a central element in the harm experienced by LGBTI persons. A gender-sensitive analysis must be applied in protection claims based on sexual orientation and gender identity. Full account needs to be taken of diverse gender expressions, evolving identities and the actual circumstances of the individual.
6. Violence against LGBTI persons can be considered a form of sexual and gender-based violence (“SGBV”). Anecdotal evidence indicates a high prevalence of SGBV perpetrated against LGBTI persons. Steps are required to ensure effective prevention and response mechanisms for them, both specifically and as part of broader efforts to mainstream and elevate gender issues.

Specific considerations

Laws Criminalizing Consensual Same-Sex Relations

7. Laws criminalizing consensual same-sex relations pose significant problems for LGBTI asylum-seekers and refugees. Morality laws aimed at public indecency and lewdness are also often used disproportionately against LGBTI individuals. Even when these laws are not enforced, their existence often reflects and promotes a culture of intolerance toward LGBTI individuals which can result in abuse and discrimination.

8. Such criminal laws impede the ability of LGBTI persons to access State protection in their countries of origin. Even after decriminalization, social attitudes may not be in sync with the law and this could result in a lingering threat. There is often a lack of appropriate State response to reports of abuse in States both with and without such criminal laws. In countries of asylum, such laws can impede the access of LGBTI persons to international protection. They can also increase security risks, including of *refoulement*, and the exploitation of LGBTI asylum-seekers and refugees.
9. It is important to develop specific guidance on how to provide protection in countries where these laws still exist. UN Country Teams, including the Office of the High Commissioner for Human Rights, have a role to play in promoting measures to ensure safety for LGBTI individuals in their countries of origin.

Refugee Claims Relating to Sexual Orientation and Gender Identity

10. The wording of Article 1A(2) of the 1951 Convention presents particular challenges in the adjudication of refugee claims based on sexual orientation and gender identity. Although claims made by LGBTI individuals have gained recognition under “membership of a particular social group”, other grounds, such as political opinion, are yet to be further explored. The diversity of issues involved in these claims must be taken into account to avoid gender blindness and reliance on stereotyped perceptions. The particular issues arising in claims made by transgender, bisexual and intersex applicants need to be better addressed.
11. Just as the so-called “discretion” argument has been held not to be a valid reason to deny refugee protection in other types of refugee claims, it likewise has no validity in sexual orientation or gender identity cases. Similarly, the concept of Internal Flight Alternative should not be relied upon where it involves concealment or “recloseting” to be safe.
12. Laws criminalizing same-sex relations in countries of origin can be persecutory *per se*. Even if these laws are not regularly enforced, they can nevertheless give rise to a well-founded fear of being persecuted because of the context they create. A holistic assessment of the legislation and the legal system is required. It is unreasonable to demand that claimants first seek State protection when their country of origin maintains such laws.
13. Establishing State failure to protect against harm perpetrated by private actors is often a complex task in LGBTI claims. The presence of NGOs and human rights organizations focused on these issues in the country of origin should not be relied upon as evidence of, or as a substitute for, State protection.
14. Many claimants are not able to corroborate their fear of persecution due to lack of LGBTI-specific country information. Collecting reliable data for each of the LGBTI groups poses, however, a major challenge. States, experienced NGOs, human rights

agencies and other sources can work together more effectively to provide relevant country of origin information.

15. A culture of bias against LGBTI persons can hinder effective access to international protection. Authorities in countries of asylum, UNHCR and NGOs must work to ensure that reception and interview environments provide a safe zone which allows the applicant to present a narrative without fear. It is also important that LGBTI asylum-seekers are informed about their right to claim asylum based on sexual orientation and gender identity.
16. Mental health and psychological issues, including internalized homophobia and feelings of shame, can be a significant impediment to accessing asylum procedures. LGBTI asylum-seekers and refugees often have a higher suicide risk and may have suffered sexualized violence and other trauma. The provision of LGBTI-sensitive mental health services early on in the asylum process may be necessary to help them present their claims.
17. A superficial understanding of what it means to be LGBTI as well as an absence of cross-cultural understandings of sexuality and gender can lead to negative credibility determinations. A lack of appreciation of the difficulty claimants have in discussing their experiences around sexual orientation or gender identity, especially when they have endured SGBV, can result in important elements of the claim being overlooked.
18. There is an unfortunate prevalence of insensitive and inappropriate questioning, and in some cases invasive testing, on the part of some adjudicators. At the same time, interview techniques are needed to detect those without valid claims. Effective and LGBTI-sensitive interview tools and techniques as well as sustained and specific training for adjudicators, interpreters and legal advisors, tailored to the specific cultural, legal and social environment, need to be developed to address these challenges. It would be particularly helpful if States would keep detailed statistics on LGBTI asylum claims.

Protection in the Cycle of Displacement

19. LGBTI asylum-seekers and refugees experience many risks during flight, arrival and initial settlement. Problems frequently encountered include discrimination, abuse, sexual violence and exploitation, crimes committed in the name of honour, isolation from community and family, a lack of educational and economic opportunities - sometimes leading to being forced to resort to sex work, forced marriage, insufficient access to safe housing, lack of access to health care and *refoulement*. LGBTI asylum-seekers and refugees are also subject to a high rate of physical and sexual abuse in detention. Effective ways of protecting them from these risks need to be developed.
20. Further efforts are needed to ensure that LGBTI asylum-seekers and refugees receive non-discriminatory and appropriate services from States, UNHCR and NGOs. Ensuring environments that are safe and friendly for LGBTI refugees in both camps

and urban settings and, where feasible, allowing the asylum-seeker or refugee to choose where to stay would be important initiatives. Not enough is known about the particular challenges facing LGBTI refugees in camp settings.

21. Provision of safe and appropriate accommodation is essential. Scattered site housing is generally a better option than safe houses, which risk becoming unsafe if identified as LGBTI accommodation. Gender-segregated housing does not work for all and it would be useful to draw on best practices outside the asylum context to improve housing conditions for transgender asylum-seekers and refugees.
22. Culturally appropriate field training programmes for staff of States, UNHCR and NGOs need to be developed and implemented. This would help both to address bias towards LGBTI persons in operations and to develop programmes that better deal with LGBTI asylum-seeker and refugee needs. Partnerships between UNHCR and local human rights groups, including LGBTI groups, are a promising avenue for extending services to LGBTI refugees and supporting community-based protection.

Durable Solutions

23. Intolerance towards LGBTI individuals permeates many countries of first asylum. Resettlement may, therefore, often be the only viable durable solution for LGBTI refugees. Risk assessment and priority processing for resettlement on the basis of vulnerability need to be further developed.
24. The lengthy resettlement process for LGBTI refugees can exacerbate security risks in countries of first asylum. Resettlement countries need to ensure that mechanisms to conduct resettlement on an emergency basis for LGBTI refugees at heightened risk, including transit facilities that are sensitive to the needs of LGBTI refugees, are in place.
25. Resettling LGBTI refugees can be difficult and costly. Some require ongoing mental health care and economic assistance. Transgender and intersex refugees often require medical treatment that many resettlement States do not provide. Discrimination based on sexual orientation and gender identity also exists to varying degrees in resettlement countries, and resettlement agencies are sometimes hesitant, unwilling, or lack the capacity or expertise to provide appropriate services to this group.
26. An applicant's past involvement in sex work can, in some countries, constitute an obstacle to asylum and resettlement. It is important that such activity, which is often coerced, is considered as an indication of vulnerability.
27. When resettling these individuals, States and UNHCR need to take care to place LGBTI refugees in supportive environments with the help of sensitized NGOs and other service providers. LGBTI communities within resettlement countries also need to make a greater effort to help LGBTI refugees integrate more successfully. To

protect the right to family unity, States can adopt policies that recognize partners of LGBTI refugees.

Specific considerations relating to Lesbian, Gay, Bisexual, Transgender and Intersex Asylum-Seekers and Refugees as Separate Groups

28. Lesbians, gays, bisexuals, transgender and intersex persons all experience persecution and discrimination in distinct ways. An understanding of the unique vulnerabilities of each group is important, including in the context of refugee status determination.
 - a. Lesbians may suffer persecution at the intersection of gender and sexual orientation and are exposed more frequently to harm at the hands of private actors. Persecution of lesbians is often not seen as related to a Convention ground as the State is considered not to have any involvement in the harm.
 - b. Gay men tend to live more public lives and are therefore more often exposed to harm by State actors. Sexual and physical violence in detention is a particular concern for gay men.
 - c. Bisexuality as an orientation is not well understood. Because the sexual identity of bisexuals often is considered as fluid or a matter of choice, their asylum claims are frequently dismissed due to lack of credibility and/or reluctance to recognize bisexuality as a protected characteristic under the 1951 Convention.
 - d. Transgender individuals are severely marginalized and often experience sexual violence. Transgender and intersex individuals share common experiences of abuse and harassment because they are seen as not fitting either male or female stereotypes.
 - e. Intersex individuals can be subject to persecution in ways that relate to their non-conformance with gender expectations, although they may not identify as “LGBTI”.

Good Practices and Initiatives

29. There already exist many good practices and initiatives which are aimed at improving refugee status determination procedures, including, in some States, specialized training for adjudicators and statistical tracking techniques for LGBTI asylum claimants. Sensitization training and service provision in asylum and resettlement countries are other positive examples.

30. UNHCR will continue to develop, revise and apply legal and practical guidance related to sexual orientation and gender and mainstream LGBTI concerns into all its practices. UNHCR will further examine its internal human resource policies and provide guidance to staff members and managers to ensure diversity and fairness for LGBTI staff. This will also allow UNHCR to better comprehend, protect and assist LGBTI asylum-seekers and refugees.
31. States, NGOs, academics and international organizations are encouraged to continue and expand these efforts, encourage others to do so, and collectively work together to improve the lives of LGBTI asylum-seekers and refugees.

UNHCR
November 2010

List of Participants*

Irem ARF, Helsinki Citizens' Assembly – Turkey, Istanbul, Turkey

Valentine AUDATE, Office of the Commissioner General for Refugees and Stateless Persons, Belgium

Jesse BERNSTEIN, Human Rights First, Washington DC, USA

Gunhild BOLSTAD, Norwegian Ministry of Justice and the Police, Norway

Mark BROMLEY, Council for Global Equality, Washington DC, USA

Chris DOLAN, Refugee Law Project, Makerere University Faculty of Law, Kampala, Uganda

Elizabeth DREW, Department of State, USA

Justus EISFELD, Global Action for Trans* Equality, New York, NY, USA

Johan FICK, Permanent Mission of South Africa to the UN Office in Geneva

John FISHER, ARC International, Geneva, Switzerland

Neil GRUNGRAS, Organization for Refuge, Asylum and Migration, San Francisco, CA, USA

Luke HARDY, International Association of Refugee Law Judges, Independent Merits Review Panel, Australia

Mark HETFIELD, Hebrew Immigrant Aid Society, New York, NY, USA

Sabine JANSEN, COC Netherlands, Amsterdam, Netherlands

Allison JERNOW, International Commission of Jurists, Geneva, Switzerland

Todd LARSON, International Gay and Lesbian Human Rights Commission, New York, NY, USA

Nicole LAVIOLETTE, University of Ottawa Faculty of Law, Canada

Phoebe LING, Permanent Mission of Australia to the UN Office in Geneva

Grusa MATEVZIC, Hungarian Helsinki Committee, Budapest, Hungary

Jenni MILLBANK, University of Technology Sydney, Australia

Mitsuaki MIZUNO, Permanent Mission of Japan to the UN Office in Geneva

Julie MORIN, Immigration and Refugee Board of Canada, Canada

Victoria NEILSON, Immigration Equality, New York, NY, USA

Paulina POLOWNIAK, Commissioner for Human Rights, Council of Europe, Strasbourg, France

Barbara PORIZKOVA, Judge, the Supreme Administrative Court, Czech Republic

Scott PORTMAN, Heartland Alliance for Human Needs & Human Rights, Chicago, USA

Ellen SELVIK, Norwegian Directorate of Immigration, Norway

Katya SOMOHANO, Mexican Commission of Refugees, Mexico

Anne Mwangi WAMBUGU, HIAS Refugee Trust of Kenya, Nairobi, Kenya

For UNHCR, Gregory GARRAS, Laura Milliken GRAY, Janice Lyn MARSHALL,
Pierfrancesco Maria NATTA, Fadela NOVAK, Margo RAYMENT, Karl STEINACKER, Gisela
THÄTER, Davide TORZILLI, Barbara TREVIRANUS, Volker TÜRK, Carolin Spannuh
VERMA.

* Institutional affiliation given for identification purposes only.