

***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*

## Summary

In all regions of the world people continue to flee their homes on account of their sexual orientation or gender identity. Criminal sanctions in over seventy countries, as well as pervasive homophobia, which is often fueled by political and civil leaders, generate this forced exile. Often faced with limited resources, lesbian, gay, bisexual, transgender or intersex (LGBTI) persons may have no choice but to flee to asylum states where homophobia is as pervasive as the environments which they initially fled. As they seek safe refuge, LGBTI refugees and asylum seekers face a number of specific protection problems which hinder their ability to access fair asylum or refugee status determination procedures, as well as protection and assistance measures. LGBTI refugees endure discrimination as they navigate asylum systems, many of which require them to register with national authorities who may either consider consensual same-sex conduct a crime or harbor homophobic attitudes. They may also experience bias-motivated violence (often referred to as hate crime), including sexual violence, as a cause of flight or while in countries of first asylum. While all refugees and asylum seekers experience challenges in seeking protection and often have limited access to assistance, the intersection of identities – of being an asylum seeker or refugee as well as a lesbian or gay man, transgender woman or man or intersex person – produces a “double marginality,” which can lead to profound isolation and marginalization,<sup>1</sup> rendering LGBTI refugees in many instances invisible and unable to access support and resources.

Recently a number of States and the UN refugee agency – UNHCR – have taken steps to address some of the protection challenges facing LGBTI refugees, including by affirming that persecution related to sexual orientation or gender identity can constitute a valid basis for an asylum claim. While States retain the primary responsibility to protect refugees, UNHCR also plays a critical role in protecting refugees due to its protection mandate, as well as its current role as one of the largest adjudicators of asylum claims worldwide and as a principal provider of humanitarian assistance to those fleeing conflict.

Given its functions, this paper focuses on UNHCR’s response to the protection needs of LGBTI refugees and asylum seekers. UNHCR has taken some important steps to protect LGBTI refugees, including through the issuing of guidance notes on the adjudication of LGBTI claims and developing case studies of LGBTI persons for use in its regular staff training activities. In addition UNHCR will soon convene a *Roundtable on Asylum-Seekers and Refugees Seeking Protection on Account of their Sexual Orientation and Gender Identity*, which is designed to address gaps in policy and practice in this area. This step is particularly welcome. While UNHCR has taken these and other steps to address the protection needs of LGBTI refugees, a number of significant gaps remain which should be addressed as UNHCR moves forward with these efforts, including:

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<sup>1</sup> Timothy J Randazzo, “Social and Legal Barriers: Sexual Orientation and Asylum in the United States,” in *Queering Migration*, eds. Eithne Luibheid and Lionel Cantu, Jr. (Minneapolis: University of Minnesota Press) 2005, p. 38.

- **Inadequate recognition of LGBTI persons as a category of persons with particular needs** – UNHCR’s primary tools to identify at-risk individuals and specific needs within refugee populations – including the Heightened Risk Assessment Tool; the Age, Gender, Diversity Mainstreaming (AGDM) framework; and the Participatory Assessment Tool – contain limited reference to sexual orientation or gender identity as a basis of vulnerability, thereby limiting the ability of UNHCR and partner staff to identify and recognize the protection needs of LGBTI refugees, which may include the need for resettlement or protection from sexual or other violence;
- **An absence of practical guidance to ensure LGBTI refugees and asylum seekers are protected in practice** – UNHCR has acknowledged the need for this kind of practical guidance. The guidance, after it has been developed and disseminated, should provide practical suggestions and measures to ensure that LGBTI refugees are able to access refugee status or asylum procedures as well as assistance and protection programming. Implementation of such guidance would also require regular monitoring of LGBTI refugee protection concerns by UNHCR country offices supported by UNHCR headquarters;
- **Inconsistencies in current protection guidance with regard to sexual orientation and gender identity** – Current UNHCR guidance on a wide range of protection issues, such as the protection of women and girls, includes limited and sometimes unclear and confusing references to sexual orientation or gender identity, reflecting a lack of clarity on the protection needs of LGBTI persons and how UNHCR should respond.

These gaps are particularly concerning given that many LGBTI refugees may face renewed persecution as they flee to host States which either criminalize same-sex conduct or where homophobia is pervasive, causing LGBTI refugees to remain underground or to fear disclosing their sexual orientation or gender identity as part of their asylum claim. While the spirit of UNHCR’s current guidance and assessment tools is inclusion for all without distinction, the absence of specific guidance to ensure LGBTI refugees are protected in practice undermines the protection of a highly vulnerable group. UNHCR interventions are also limited due to a lack of effective and regular monitoring and data collection in this area, and limited headquarters oversight of UNHCR’s response at the field level to LGBTI refugee protection issues. As a result of these and other gaps outlined in this paper, responses to the needs of LGBTI refugees initiated by UNHCR, NGOs or States are varied, *ad hoc*, or non-existent.

As UNHCR moves forward with its response to LGBTI refugees, it should implement the recommendations outlined in this paper to enhance the ability of LGBTI refugees to actually access asylum procedures, resettlement, and other crucial assistance and protection measures including protection from violence. Key recommendations to UNHCR, which are further elaborated in the last section of this paper, include:

- **Develop specific and practical guidance on protecting LGBTI persons of concern and ensure its full implementation.** Such guidance should be tailored to specific regions and be

developed in close partnership with civil society groups including refugee rights groups and those who work with sexual minorities in different parts of the world. This guidance should cover the range of the displacement cycle – from identification to the durable solution phase – and seek to ensure LGBTI refugees are able to access services and support on the basis of equality and with dignity;

- **Provide adequate technical resources and support to ensure field offices respond in a consistent manner to the protection needs of LGBTI persons of concern.** This support should include regular monitoring, training, missions, and best-practice workshops with relevant stakeholders;
- **Review and revise as necessary existing UNHCR guidelines and tools to identify LGBTI refugees as a category of persons with specific needs and vulnerabilities.** Such tools and guidance include UNHCR’s AGDM Framework, the Heightened Risk Assessment Tool, and the Specific Needs Codes; and
- **Partner with local human rights groups, including LGBTI groups, to work with and extend services to LGBTI refugees in their communities and countries as a means to support community-based protection.**

Recommendations are also provided to donor and resettlement States below.

Section I of this paper introduces the situation of LGBTI people worldwide and explains why they may opt to flee their home countries. Section II outlines examples of specific protection gaps experienced by LGBTI refugees. Section III discusses UNHCR’s response to the protection needs of LGBTI refugees. The paper concludes with a detailed set of recommendations to both UNHCR and States.<sup>2</sup>

## I. Introduction

In all regions of the world people are subject to persistent and pervasive violations of their human rights due to their real or perceived sexual orientation or gender identity.<sup>3</sup> The violations, which include extra-

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<sup>2</sup> Human Rights First wishes to thank the many individuals who provided useful comments to this paper. Individuals include Mark Bromley, Council Chair, Council on Global Equality; Dale Buscher, Director of Protection, Women’s Refugee Commission; Elizabeth Drew, Special Assistant to the Assistant Secretary, Bureau of Population, Refugees and Migration, U.S. Department of State; and staff from UNHCR’s Division of International Protection.

<sup>3</sup> Consistent with the definitions specified in the *Yogyakarta Principles*, for the purposes of this paper, sexual orientation “is understood to refer to each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender.” Gender identity “is understood to refer 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 (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.” A group of 29 human rights experts, *The Yogyakarta Principles, Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, March 2007, pp. 6.

judicial killings, torture and ill-treatment, arbitrary detention, sexual assault and rape, invasions of privacy, denial of healthcare, housing, education, employment, and non-recognition of personal relationships “constitute a global and entrenched pattern of serious concern.”<sup>4</sup> LGBTI people also experience serious levels of bias-motivated violence, including sexual violence.<sup>5</sup> In 76 countries, these violations are afforded legitimacy by laws which criminalize consensual same-sex practices, and in five of those countries same-sex practice is punished by the death penalty.<sup>6</sup> These laws are reinforced by political leaders who publicly condemn same-sex practice or remain silent in the face of serious abuses or discrimination experienced by the LGBTI community.<sup>7</sup> For example, in Malawi, where same-sex conduct is illegal, the President of Malawi stated, after pardoning a gay man and transgender woman for committing “gross indecency and unnatural acts” by publicly celebrating their engagement to be married, “[W]e don’t condone marriages of this nature. It’s unheard of in Malawi and it’s illegal.” He continued: “[T]hese boys committed a crime against our culture, our religion and our laws.”<sup>8</sup> In Zimbabwe, where same-sex acts are also illegal, President Robert Mugabe this year stated that “those who engage in homosexual behavior are just crazy.”<sup>9</sup> Previously President Mugabe has compared homosexuals to pigs and dogs and stated that homosexuality “degrades human dignity.”<sup>10</sup> Similar remarks have been made by political and civil leaders around the world,<sup>11</sup> advancing a societal acceptance of hatred,

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Human rights violations on account of gender identity and sexual orientation have been widely documented by groups including Human Rights First, Human Rights Watch and Amnesty International, see respectively, <http://www.humanrightsfirst.org/discrimination/pages.aspx?id=87>, [www.hrw.org/lgbt](http://www.hrw.org/lgbt) and <http://www.amnesty.org.uk/content.asp?CategoryID=876>. Also see, Michael O’Flaherty and John Fisher, “Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles,” *Human Rights Law Review*, 8:2 (2008), pp. 208-214.

<sup>4</sup> Ibid., A group of 29 human rights experts, *The Yogyakarta Principles*, March 2007, pp. 6.

<sup>5</sup> Human Rights First, *2008 Hate Crime Survey* (New York: Human Rights First, 2008), pp. 125.

<sup>6</sup> The five countries which maintain the death penalty for same-sex practice are: Iran, Mauritania, Saudi Arabia, Sudan and Yemen and parts of Somalia and Nigeria. The 76 countries which penalize same-sex acts include countries from all regions of the world, see Daniel Ottoson, “State-sponsored Homophobia: A world survey of laws prohibiting same-sex activity between consenting adults,” An ILGA Report (Brussels: ILGA, 2010), p. 4. While these laws may not be enforced, their existence provides legitimacy to homophobic campaigns, encouraging violence against LGBT people, see Sebastian Maguire, “The Human Rights of Sexual Minorities in Africa,” *California Western International Law Journal*, 35:1 (2004) pp. 5-6.

<sup>7</sup> While the terms lesbian, gay, bisexual, transgender and intersex are used in this paper, Human Rights First recognizes that some view these terms as controversial and exclusive to different varieties of people who maintain intimate same-sex relations. Yet the terms do connote same-sex attractions and relationships and this paper is concerned with people who face persecution because of these acts, regardless of their self-proclaimed or imputed identity. The LGBT acronym is also a useful political organizing tool, see, for example, Jenni Millbank, “The Role of Rights in Asylum Claims Based on Sexual Orientation,” *Human Rights Law Review* 4:2 (2004) p. 193.

<sup>8</sup> “Malawi frees jailed gay couple,” *The Guardian*, May 29, 2006, available at <http://www.guardian.co.uk/world/2010/may/29/malawi-frees-jailed-gay-couple> (accessed September 13, 2010).

<sup>9</sup> Human Rights Watch, “[Zimbabwe: Drop Charges Against Rights Defenders](http://www.hrw.org/en/news/2010/05/30/zimbabwe-drop-charges-against-rights-defenders),” news release, May 30, 2010, available at <http://www.hrw.org/en/news/2010/05/30/zimbabwe-drop-charges-against-rights-defenders> (accessed September 13, 2010).

<sup>10</sup> Ibid.

<sup>11</sup> Amnesty International, “Crimes of hate, conspiracy of silence: Torture and ill-treatment based on sexual identity,” June 2001, <http://www.amnesty.org/en/library/info/ACT40/016/2001> (accessed September 20, 2010); Maguire, “Human Rights of Sexual Minorities,” p. 6.

discrimination, and violence against people with diverse gender and sexual identities.<sup>12</sup> Faced with insurmountable obstacles to societal and familial acceptance, many of those with diverse gender or sexual identities live in constant fear and isolation,<sup>13</sup> driving them to search for safe and secure refuge outside of their national borders.

## II. Gaps in Protection for LGBTI Refugee and Asylum Seekers

As LGBTI persons flee, they face particular gaps in protection which impede their access to asylum as well as to service provision. While all refugees and asylum seekers experience challenges in protection and limited access to assistance, the intersection of identities – of being an asylum seeker or refugee as well as a lesbian or gay man, transgender woman or man or intersex person – produces a “double marginality,” causing “profound isolation and marginalization from support and resources.”<sup>14</sup> Barriers to asylum procedures and services vary depending on the local and national context in which the person applies for refugee protection or asylum. Distinct challenges may also exist for lesbian, gay, bisexual, transgender or intersex asylum seekers and refugees as distinct groups that are separate from one another. Hence while the experiences of LGBTI asylum seekers and refugees certainly varies, a number of common protection gaps exist which must be addressed globally. These gaps include:

- **Access to asylum:** Many refugee-hosting countries, such as Tanzania, Uganda, Kenya, Lebanon and many others, maintain laws which criminalize same-sex acts.<sup>15</sup> Thus, refugees claiming asylum on the basis of their sexual orientation or gender identity in any of these countries could also be admitting to “illegal behavior,” exposing them to immediate risk of further persecution in the country of asylum. For example, in Uganda, where homosexual acts are criminalized and LGBTI activists are subject to abuses by the government,<sup>16</sup> a service provider who treats refugees who experience sexual violence told Human Rights First that “it is impossible to seek asylum because you are gay in Uganda, because even gay Ugandans are illegal.”<sup>17</sup> This comment illustrates the limitations in requesting and receiving refugee status on the basis of sexual orientation in such contexts. Even in countries where same-sex conduct is legal, such as Turkey,<sup>18</sup> general hostility towards sexual

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<sup>12</sup> Ibid, Amnesty International, p. 3. O’Flaherty and Fisher, “Sexual Orientation, Gender Identity,” pp. 208-214.

<sup>13</sup> Ibid, O’Flaherty and Fisher, “Sexual Orientation, Gender Identity,” p. 214.

<sup>14</sup> Timothy J Randazzo, “Social and Legal Barriers: Sexual Orientation and Asylum in the United States,” in *Queering Migration*, eds. Eithne Luibheid and Lionel Cantu, Jr. (Minneapolis: University of Minnesota Press) 2005, p. 38.

<sup>15</sup> Ottoson, “State-sponsored Homophobia,” pp. 12-26. UNHCR provides the following refugee statistics for the countries named: Tanzania, 118,731; Uganda 127,345; Kenya, 358,928; Lebanon, 50,300, UNHCR 2009 Global Trends, Statistical Online Population Database, <http://www.unhcr.org/statistics.html> (Accessed September 23, 2010).

<sup>16</sup> See generally, U.S. Department of State, 2009 Human Rights Report for Uganda, March 11, 2009, available at: <http://www.state.gov/g/drl/rls/hrrpt/2009/af/135982.htm> (accessed September 23, 2010).

<sup>17</sup> Human Rights First telephone interview with medical doctor in private practice in Kampala, June 16, 2008. A Ugandan refugee lawyer also stated that it would be highly unlikely that the Ugandan government would grant asylum to a refugee fleeing persecution based on sexual orientation or gender identity, Human Rights First interview, Head, Legal Aid and Counselling Department, Refugee Law Project, Uganda, June 24, 2008.

<sup>18</sup> See generally, ORAM & Helsinki Citizens Assembly (HCA), *Unsafe Haven*, available at: <http://oraminternational.org/sites/default/files/pdf/Unsafe%20Haven%20Final.pdf> (accessed September 23, 2010).

minorities contributes to the isolation of LGBTI refugees which may also prevent them from lodging asylum claims based on sexual orientation or gender identity;

- **Biased adjudicators, civil society groups, UN staff and refugees:** On occasion negative biases among service providers, adjudicators and UNHCR staff can impinge on the ability of LGBTI asylum seekers to access services as well as fair asylum proceedings. LGBTI asylum seekers in different parts of the world, including in the United States, the United Kingdom and elsewhere, are sometimes asked inappropriate questions by adjudicators.<sup>19</sup> For example, in the U.K. and Australia, asylum adjudicators have characterized homosexual identity in highly stereotyped terms, such as “flaunting, displaying, advertising,” as well as even “‘inviting’ persecution.”<sup>20</sup> In Uganda, Turkey and Jordan, LGBTI refugees have also reported negative experiences with UNHCR staff in refugee status determination interviews.<sup>21</sup> LGBTI refugees may also experience discrimination by other refugees on account of homophobic attitudes, which can lead to violence or limited access to safe shelter in settings such as detention, refugee camps and urban areas. Due to these multiple forms of discrimination, LGBTI refugees may be reluctant to reveal their sexual orientation or gender identity to national authorities or UN staff, especially if they are fleeing persecution from governments due to their sexual orientation or gender identity.<sup>22</sup> Withholding of such information in asylum determination procedures can cause asylum adjudicators to question the credibility of LGBTI applicants, and has resulted in the rejection of asylum claims based on sexual orientation.<sup>23</sup> As LGBTI refugees may not be comfortable speaking about their sexual orientation due to concerns about discrimination and potential isolation, their access to asylum may also be restricted in States that have asylum filing deadlines such as the United States.<sup>24</sup>
- **Detention:** LGBTI refugees can face particular difficulties if detained. These refugees can face discrimination, harassment, and even violence from others who are held in jails or detention centers. In the U.K., for example, while many asylum seekers are detained,<sup>25</sup> according to the U.K. Lesbian and Gay Immigration Group (UKLIG), “LGBT asylum seekers face a real risk of being abused and

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<sup>19</sup> For example, see United Kingdom Lesbian and Gay Immigration Group (UKLIG), *Failing the Grade: Home Office Initial Decisions on Lesbian and Gay Claims for Asylum*, April 2010, 4–5, available at <http://www.uklig.org.uk/docs/Failing%20the%20Grade%20UKLIG%20April%202010.pdf> (accessed September 23, 2010).

<sup>20</sup> These quotes from asylum decisions in the UK and Australia, quoted from Jenni Millbank, “From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom” (2009) 13 *International Journal of Human Rights* 391–414, 7.

<sup>21</sup> In Uganda, see Refugee Law Project, note 31 below. In Turkey, see ORAM & HCA, pp. 15. In Jordan, see Iraqi Refugee Assistance Project (IRAP) interviews with LGBTI Iraqi refugees, on file with Human Rights First.

<sup>22</sup> Amnesty International, “Crimes of Hate,” p. 49.

<sup>23</sup> Dereck McGhee, *Homosexuality, Law and Resistance* (London: Routledge, 2001) p. 65; Amnesty International, “Crimes of Hate,” pp. 49, 50.

<sup>24</sup> See Victoria Neilson & Aaron Morris, “The Gay Bar: The Effect of the One-Year Filing Deadline on Lesbian, Gay, Bisexual, Transgender, and HIV-Positive Foreign Nationals Seeking Asylum or Withholding of Removal,” 8 *New York City Law Review* 233, 263 (2005).

<sup>25</sup> Information Centre about Asylum Seekers and Refugees, “Detention of Asylum-Seekers in the UK,” Briefing, 2007, <http://www.icar.org.uk/11797/briefings/detention-of-asylum-seekers.html> (accessed September 22, 2010).

harassed because of their sexuality or gender identity...For example, transmen are being detained in...a female-only detention center; [and] gay men are forced to live with other detainees from their country of origin who often hold the same homophobic views as the society they are escaping from.”<sup>26</sup> Detention illustrates the double marginality experienced by LGBTI refugees: detention is a difficult experience for all asylum seekers and refugees and in certain instances may constitute a violation of international refugee and human rights law.<sup>27</sup> For LGBTI refugees and asylum seekers, the experience of detention is exacerbated by the discrimination and abuse which they may endure on account of their sexuality or gender identity;

- **Sexual violence:** While international programs and policies exist to address sexual violence in conflict settings, these are conceptualized to focus almost exclusively on women and girls, resulting in a lack of response to men and boys who endure sexual violence,<sup>28</sup> regardless of their sexual orientation. Negative stigma attached to homosexuality hinders the response to male victims of sexual violence, as in many contexts, any sexual contact between men is considered to be an indicator of homosexuality,<sup>29</sup> provoking homophobic reactions from service providers. For example, after being interviewed by female UN refugee protection officers who were not adequately trained to handle or evaluate male rape cases, a Congolese refugee man in Uganda who was raped on multiple occasions stated: “They believed rape is not done to men. When you explain this problem, people don't listen ... I had the bad luck of being interviewed by female protection officers who were unable to grasp that I was raped.”<sup>30</sup> Gaps in this area are particularly important to address as often LGBTI individuals are often purposefully attacked through sexual violence in an effort to “punish” them for transgressing sexual roles or stereotypes. Incidents, such as those in Iraq, where gay men had their anuses glued shut, are not random acts of violence but targeted acts of hate intended to intimidate LGBTI people and spread fear;<sup>31</sup>
- **Bias-related violence:** Violence motivated by hatred and prejudice based on sexual orientation and gender identity continues to cause people to flee as well as creating hardships for LGBTI refugees in countries of first asylum. In contexts such as Turkey and Iraq,<sup>32</sup> LGBTI asylum seekers and refugees

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<sup>26</sup> United Kingdom Lesbian and Gay Immigration Group, “UKLGIG win funding to assist detained LGBT asylum seekers,” news release, June 6, 2008, available at: [http://www.uklgig.org.uk/docs/press/pr\\_9.6.08.htm](http://www.uklgig.org.uk/docs/press/pr_9.6.08.htm) (accessed September 23, 2010).

<sup>27</sup> See Guy Goodwin-Gill and Jane McAdam, *Refugee in International Law* (Oxford: Oxford University Press, 2007), p. 463.

<sup>28</sup> See generally Wynne Russell, “Sexual violence against men and boys,” in *Forced Migration Review 27* (2007) pp. 22-23.

<sup>29</sup> See generally Sandesh Sivakumaran, “Male/Male Rape and the ‘Taint’ of Homosexuality,” in *Human Rights Quarterly 27* (2005), p.127.

<sup>30</sup> Refugee Law Project, Makerere University, “Gender Against Men,” Video documentary, available at <http://www.forcedmigration.org/video/gender-against-men/> (accessed September 23, 2010).

<sup>31</sup> Human Rights First is grateful to Mark Bromley for his insight and suggestions on this point. Violence in Iraq was documented by Human Rights Watch, see below footnote.

<sup>32</sup> On Turkey, see ORAM & HCA, pp. 18-19. In relation to Iraq, see generally Human Rights Watch, *They Want Us Exterminated, Murder, Torture, Sexual Orientation and Gender in Iraq*, (New York: Human Rights Watch, 2009).

report either experiencing violence as a reason for flight or in asylum states. Violent incidents in Turkey have reportedly caused LGBTI refugees to fear leaving their homes,<sup>33</sup>

- **Inconsistent protection policy and inadequate programming:** While various asylum States and UNHCR recognize that sexual orientation or gender identity can form the basis of an asylum claim,<sup>34</sup> current gaps in UNHCR policy and programming limit the ability of LGBTI refugees and asylum seekers to be identified for the purposes of protection and resettlement. For example, while the current policy is being revised, LGBTI issues are not reflected in UNHCR’s current Resettlement Handbook, which contains UNHCR’s primary resettlement guidance.<sup>35</sup> In addition, UNHCR’s primary identification tools, such as the Age, Gender, Diversity Mainstreaming (AGDM) framework, do not include protection concerns related to sexual orientation or gender identity as a basis of vulnerability requiring an intervention on behalf of UNHCR. UNHCR’s recently released *Policy on Refugee Protection and Solutions in Urban Areas* also does not include reference to LGBTI refugee protection concerns. While these issues are further discussed at length below, they are noted here to indicate the limited awareness of among, and training provided to UNHCR staff on sexual orientation and gender identity. In addition, the absence of normative tools which include LGBTI protection issues – which could provide a foundation for stronger protection – makes it difficult to develop protection and resettlement programming. As a result, responses to the needs of LGBTI refugees initiated by UNHCR, NGOs or states are varied, *ad hoc* or most often non-existent;
- **Insufficient mechanisms to address protection of LGBTI refugees who face imminent harm and hence require emergency or urgent resettlement:** While LGBTI refugees are resettled from different contexts, LGBTI and other refugees who face life-threatening protection risks in countries of first asylum have limited means of escape due to:
  - the small number of emergency resettlement spaces available globally and significant processing delays in facilitating emergency or urgent resettlement on the part of UNHCR and resettlement States,<sup>36</sup>
  - the fact that UNHCR’s Emergency Transit Facilities are not yet able to accommodate refugees with particular protection needs, such as those who flee on account of their sexual orientation or gender identity.<sup>37</sup>

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<sup>33</sup> Ibid, ORAM & HCA, *Unsafe Haven*.

<sup>34</sup> UNHCR, *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, November 21, 2008 (hereafter “*UNHCR Guidance Note*”), available at <http://www.unhcr.org/refworld/docid/48abd5660.html> (accessed September 22, 2010), p. 6.

<sup>35</sup> UNHCR, *Resettlement Handbook* (Geneva: UNHCR, November 2004).

<sup>36</sup> These concerns are further elaborated in UNHCR, *Information Note and Recommendations from UNHCR: Emergency Resettlement and the Use of Temporary Evacuation Transit Facilities* (Geneva: UNHCR, July 2010).

<sup>37</sup> This issue was recently highlighted by 31 members of the U.S. Congress and a group of U.S. civil society groups in separate letters to the U.S. Secretary of State, see respectively

<http://gillibrand.senate.gov/newsroom/press/release/?id=54a4bd55-8f6c-41d6-b100-45c453a7585d> and

<http://www.humanrightsfirst.org/asylum/pdf/20100331-NGO-letter-LGBTI-refugees.pdf>.

### **III. UNHCR's Response to the Protection of LGBTI Refugees**

While States maintain a primary responsibility to protect refugees and asylum seekers as they flee persecution, UNHCR also plays a critical role in protecting refugees and asylum seekers. International refugee law obligates States to cooperate with UNHCR in matters related to the application of the 1951 Convention.<sup>38</sup> On the basis of its Statute, UNHCR itself also provides international protection to refugees.<sup>39</sup> For example, UNHCR is one of the largest adjudicators of individual refugee claims in the world – in 2009, UNHCR staff received some 119,000 asylum applications, which represents a 62% increase compared to 2008 and accounts for 13% of refugee claims worldwide.<sup>40</sup> UNHCR also provides humanitarian assistance to some 34 million refugees and other persons of concern worldwide.<sup>41</sup> Given that UNHCR is present in 110 countries, its protection mandate and operations place UNHCR at the core of refugee protection.<sup>42</sup> Hence it is imperative that UNHCR ensure its operations and staff are inclusive of and responsive to the needs of LGBTI refugees and asylum seekers.

In recent years, UNHCR has taken important steps to improve protection for LGBTI refugees. These steps primarily relate to issuing guidance or case studies on the protection of LGBTI refugees. Human Rights First welcomes these steps, which are outlined below, as they collectively affirm the particular vulnerabilities of LGBTI refugees and asylum seekers. At the same time, some gaps in normative guidance still remain and a number of existing guidelines remain inconsistent or problematic with regard to LGBTI issues. The important steps that UNHCR has already taken include:

- Affirmation that persecution on account of sexual orientation and gender identity may constitute an asylum claim based on either political opinion or membership in a particular social group;<sup>43</sup>
- Issuing a *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*.<sup>44</sup> This note is particularly useful as it highlights a number of LGBTI experiences which should be taken into account when assessing claims based on sexual orientation and gender identity, including that:
  - LGBT applicants may have limited evidence to demonstrate past persecution as a result of implicit or explicit hostility, discrimination or criminal sanctions, recognizing that

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<sup>38</sup> Article 35, 1951 Convention Relating to the Status of Refugees, 21 July 1951, 189 UNTS 150.

<sup>39</sup> UN General Assembly, UNHCR Statute of the Office of the UNHCR, General Assembly Resolution 428 (V) of 14, December 1950, available at <http://www.unhcr.org/3b66c39e1.html> (accessed September 24, 2010).

<sup>40</sup> UNHCR, *2009 Global Trends: Refugees, Asylum-Seekers, Returnees, Internally Displaced and Stateless Persons* (Geneva, UNHCR, June 15, 2010), available at <http://www.unhcr.org/4c11f0be9.html> (accessed September 24, 2010).

<sup>41</sup> UNHCR, “About Us,” <http://www.unhcr.org/pages/49c3646c2.html> (accessed September 24, 2010).

<sup>42</sup> Gil Loescher, “The UNHCR and World Politics: State Interests vs. Institutional Autonomy,” *International Migration Review* 35:1 (2001) 33.

<sup>43</sup> UNHCR, “Advisory Opinion by UNHCR to the Tokyo Bar Association,” September 3, 2004, and UNHCR, *Guidance Note*.

<sup>44</sup> UNHCR, *Guidance Note*.

- sexual minorities are forced to live in hiding and hence remain invisible in certain contexts;<sup>45</sup>
- Sexual orientation is a fundamental part of human dignity;<sup>46</sup>
  - LGBTI applicants may “come out” in countries of first asylum and that these individuals may qualify for refugee status if they can demonstrate a well founded fear of future persecution should they return;<sup>47</sup>
- Submitting advisory opinions and amicus curie briefs which affirm that sexual orientation and gender identity may constitute a valid asylum claim, and more recently, challenging discretion-based reasoning – the assumption that LGBTI applicants can return to their home countries and conceal their sexuality to avoid harm;<sup>48</sup>
  - Issuing a lengthy bibliography of documents relating to sexual orientation and gender identity relevant to international refugee protection;<sup>49</sup>
  - Including a case study highlighting the experience of LGBTI people in the context of refugee status determination as well as including a similar case study as part of UNHCR’s training on its Code of Conduct. This case study, involving rumors in a UNHCR office about a staff members’ sexual orientation, outline how to address such a situation in a sensitive manner and where to go for additional resources and support;
  - Development of a “Concept Matrix” which “ identifies concrete measures required for improving the protection of LGBTI refugees, asylum-seekers and other persons of concern, including in the areas of refugee status determination, policy development and research, practical protection measures, durable solutions and staff development.”<sup>50</sup> This Matrix was developed collaboratively with civil society partners, and assigns different UNHCR divisions and NGOs to work together on projects, policy revisions and practical guidance with the goal of improving protection for LGBTI refugees and asylum seekers.

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<sup>45</sup> Ibid, paragraph 4.

<sup>46</sup> Ibid, paragraph 8.

<sup>47</sup> Ibid, paragraph 2.

<sup>48</sup> UNHCR, “Advisory Opinion to the Tokyo Bar Association,” and UNHCR, *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department - Case for the first intervener (the United Nations High Commissioner for Refugees)*, April 19, 2010, available at <http://www.unhcr.org/refworld/type,AMICUS,,IRN,4bd1abbc2,0.html> (accessed September 22, 2010).

<sup>49</sup> UNHCR, *Selected Documents Relating to Sexual Orientation and Gender Identity Relevant to International Refugee Protection*, October 2009, available at: <http://www.unhcr.org/refworld/docid/4ae99c582.html> (accessed September 22, 2010).

<sup>50</sup> UNHCR-NGO Partnership Concepts: Summaries of Projects & Goals Pertaining to Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Refugees & Asylum-seekers, 2010-2012.

While these measures are important steps, significant gaps remain in UNHCR's response to LGBTI refugees. First, existing UNHCR guidance is either inconsistent or insufficient as it relates to the protection needs of LGBTI refugees and asylum seekers. Second, guidance which provides practical suggestions to ensure that LGBTI refugees are able to access services and asylum procedures has yet to be developed. Finally, UNHCR does not yet provide sufficient technical support or capacity to ensure that the guidance it has developed in this area is implemented at the field level.

### *Inconsistent or insufficient UNHCR Guidance*

As noted above, UNHCR's *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity* (hereafter the Note) serves a number of important purposes in relation to the adjudication of asylum claims. Yet the Note is problematic for a number of reasons. First, it fails to fully account for international human rights norms in relation to sexual orientation and gender identity. The Note, for example, does not fully recognize the norms set out in the *Yogyakarta Principles* (hereafter the Principles), which were developed by a group of leading human rights experts and "affirm binding international legal standards with which all States must comply."<sup>51</sup> Principle 23 affirms that everyone has the right to seek and enjoy asylum from persecution, including persecution related to sexual orientation and gender identity. The Principles also recommend that States ensure that no policy or practice discriminates against asylum seekers on the basis of their sexual orientation and gender identity,<sup>52</sup> and that UNHCR ensure that no person is discriminated against on the basis of sexual orientation or gender identity in relation to the receipt of humanitarian assistance or the determination of refugee status.<sup>53</sup>

A number of States have already referred to the Principles in official interventions in the Human Rights Council,<sup>54</sup> and the Organization of American States, in a unanimous resolution which condemned human rights violations of LGBT people, noted the importance of the Principles.<sup>55</sup> While UNHCR's Note draws upon the Principles in numerous instances, it does not recognize or acknowledge the specific principles on asylum and refugee protection exist noted above. As UNHCR looks to revise or update its Note, it should include specific reference to the Principles on asylum and refugee protection as well as review other critiques put forward by academic experts.<sup>56</sup>

Of further concern is the lack of discussion on the steps UNHCR will take to ensure access to asylum for LGBTI refugees. In the Note UNHCR states that "where an individual is seeking asylum in a country where same sex relations are criminalized, such laws can impede his or her access to asylum procedures or deter the person from presenting his or her LGBT experiences as part of the claim to refugee status. In

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<sup>51</sup> A group of 29 human rights experts, *The Yogyakarta Principles*, March 2007, p. 7.

<sup>52</sup> Ibid, Principle 23 (b), pp. 27.

<sup>53</sup> Ibid, Additional recommendation G, 32, pp. 32.

<sup>54</sup> O'Flaherty and Fisher, "Sexual Orientation, Gender Identity," pp. 238-242.

<sup>55</sup> Human Rights Watch, "OAS Adopts Resolution to Protect Sexual Rights," news release, June 6, 2008, available at <http://hrw.org/english/docs/2008/06/06/colomb19049.htm> (accessed July 5, 2008).

<sup>56</sup> See for example, Nicole LaViolette, "UNCHR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: A Critical Commentary," 22 *International Journal of Refugee Law* L.713.

such situations, it may be necessary for UNHCR to become directly involved in the case.”<sup>57</sup> While it is certainly positive that UNHCR acknowledges the link between sanctions which criminalize same-sex acts and access to asylum, UNHCR does not state what practical steps it would take to ensure LGBTI refugees have fair and equal access to asylum procedures, besides indicating that they may become involved. Outlining steps for UNHCR to ensure LGBTI applicants are able to access asylum procedures is essential, especially given that over seventy countries worldwide criminalize same-sex acts. As noted above, a number of these countries host large numbers of refugees.

Similar gaps are found in other UNHCR protection documents. For example, UNHCR’s *Handbook for the Protection of Women and Girls* (hereafter the *Handbook*),<sup>58</sup> provides a lack of uniform guidance in relation to sexual orientation and gender identity. The *Handbook* identifies women and girls who “oppose social norms,” including through their sexual orientation, as well as those who “change gender roles” as factors which put them at greater risk.<sup>59</sup> Yet it is not entirely clear from the *Handbook* what type of risk, such as isolation, arises when women oppose social norms through their sexual orientation.<sup>60</sup> Categories of risk are listed, including sexual and gender-based violence, yet there is no mention of violence which may stem from sexual orientation or gender identity.<sup>61</sup> The *Handbook* does state that lesbian women and girls may be exposed to serious rights violations and multiple forms of discrimination on account of their gender and sexual orientation,<sup>62</sup> yet, in the section on UNHCR’s protection response, sexual orientation or gender identity is only mentioned as a possible ground for asylum.

The *Handbook*’s absence of steps that UNHCR staff should take to ensure that protection responses account for the needs of LGBTI refugees is somewhat surprising, as the section begins with a paragraph acknowledging that individuals must benefit equally from protection responses, without distinction of any kind.<sup>63</sup> Sexual orientation or gender identity are not listed as a possible ground of discrimination, and a footnote to the paragraph states that the grounds of discrimination are taken from Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) and Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Yet the note does not mention the fact that the bodies which supervise the implementation of these treaties have interpreted them to also prohibit sexual orientation-based discrimination.<sup>64</sup> Similarly, while the *Handbook* includes a single

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<sup>57</sup> UNHCR, *Guidance Note*, paragraph 22.

<sup>58</sup> UNHCR, *UNHCR Handbook for the Protection of Women and Girls*, January 2008, pp. 71, available at <http://www.unhcr.org/refworld/docid/47cfc2962.html> (accessed September 24, 2010).

<sup>59</sup> UNHCR, *The Handbook*, pp. 67, 68.

<sup>60</sup> The *Handbook* states that women and girls who oppose social norms are at greater risk relating to “civil status or situation in society,” very broad terms which are not clarified, UNHCR, *The Handbook*, p. 68.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*, p. 71.

<sup>63</sup> *Ibid.*, p. 103.

<sup>64</sup> The Human Rights Committee (HRC), for example, which monitors implementation of the ICCPR, found that sexual orientation should be included in the category of ‘sex’ found in Article 2 (equal enjoyment of rights in the ICCPR) and Article 26 (equal protection of the law), and that laws which criminalize homosexual conduct violate Article 17 of the ICCPR, which protect the right to privacy, see Communication No. 488/1992, (UN HRC, 1994), para 8.7. The HRC has further upheld these

reference to *The Yogyakarta Principles*,<sup>65</sup> it does not elaborate upon the Principles which are relevant to refugee protection.<sup>66</sup>

UNHCR's Heightened Risk Identification Tool (hereafter the HRIT) also lacks guidance with regard to the protection of LGBTI refugees.<sup>67</sup> The HRIT was developed to "enhance the identification of persons at risk by asking a series of questions to a person of concern."<sup>68</sup> The HRIT is meant to be used by UNHCR staff to determine specific needs and risks through a series of questions. While the HRIT explicitly states that it is "important to ensure an age, gender and diversity sensitive approach to reach out to and identify the risks of all individuals, including... lesbian, gay, bisexual, transgender or intersex (LGBTI) individuals," the HRIT does not list sexual orientation or gender identity as a specific category of risk.<sup>69</sup>

The HRIT further states that UNHCR staff can be assisted in determining who will be interviewed through using UNHCR's "participatory assessments," and UNHCR's database *proGres*, which includes standardized Specific Needs Codes – codes assigned to persons at risk or with specific needs.<sup>70</sup> This too is problematic for LGBTI refugees, as UNHCR's Participatory Assessment Tool does not include any reference to sexual orientation or gender identity.<sup>71</sup> Similarly, the Specific Needs Codes do not include any reference to gender identity. The codes do include a single reference to sexual orientation in a list of reasons as to why someone may be at risk because of "marginalization from society or community."<sup>72</sup> However, sexual orientation or gender identity are not explicitly identified as potential sources of vulnerability. This gives rise to concern given the protection gaps noted above and the fact that the Specific Needs Codes are "UNHCR's primary standardized tool" to address "the specific needs of persons of concern."<sup>73</sup> While the number of LGBTI refugees may be small, they do have specific protection needs and in certain circumstances may be most vulnerable, and hence in need of support from UNHCR.

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principles in subsequent cases, see *Joslin v. New Zealand*, Communication No. 902/1999, (UN HRC, 2001); *Young v. Australia*, Communication No. 941/2000 (UN HRC, 2003). For additional information, including more recent adjudications, see 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* (Geneva, ICJ: April 2010).

<sup>65</sup> UNHCR, *The Handbook*, p. 72.

<sup>66</sup> For a description of the relevant principles, see page 12 of this paper.

<sup>67</sup> UNHCR, *The Heightened Risk Identification Tool (User Guide)*, June 2010, Second Edition, available at <http://www.unhcr.org/refworld/docid/46f7c0cd2.html> (accessed September 24, 2010).

<sup>68</sup> *Ibid*, p. 3.

<sup>69</sup> *Ibid*, p. 7. The categories listed include: Older people, children and adolescents, women and girls at risk, legal and physical protection, and health and disability.

<sup>70</sup> *Ibid*, p. 5.

<sup>71</sup> See page 17 for a discussion of how LGBT protection concerns are included in UNHCR's Participatory Assessment Tool.

<sup>72</sup> UNHCR, *Guidance on the Use of Standardized Specific Needs Codes*, June 10, 2009, p. 9, on file with Human Rights First.

<sup>73</sup> UNHCR, Inter-Office Memorandum, No. 030/2009, paragraph 1, June 19, 2009, on file with Human Rights First.

## *Protection in Practice – a Persistent Gap*

From the above analysis, it is clear that LGBTI refugees are not recognized as a group of persons with specific needs or protection concerns. The lack of guidance to ensure LGBTI refugees are protected in practice through, for example, ensuring access to asylum procedures or assistance programming, is also evident. While UNHCR has begun to recognize this gap, it remains unclear how this gap will be fully addressed.

A number of recent UNHCR reports and other documents acknowledge the lack of programming for LGBTI refugees. In an evaluation of UNHCR's work in responding to and preventing sexual and gender based violence (SGBV), a recent UNHCR-commissioned report acknowledged that the “absence of an appropriate guiding policy on how to address and respond to violence against lesbian, gay, bisexual and transgendered people of concern (LGBT) remains a serious problem reflecting once more how LGBTs suffer from an unequal situation in comparison to heterosexual people of concern.”<sup>74</sup> The evaluation continued:

“Initiatives targeting LGBT survivors of SGBV have often been impaired by deficits in knowledge and attitudes of humanitarian staff. For instance, it is not unusual for care providers to ‘justify’ their (non-) actions through expressing disgust at gay sexuality or gay masculinities. A less visible form of neglecting the needs of LGBT is found when violence and discriminatory behavior against lesbians, gays, bisexuals and transgenders (LGBT) is often ignored in discussions on gender-based violence within UNHCR. The neglect of SGBV against and between men leads to further marginalization of LGBT survivors of SGBV. Few of UNHCR's activities deal with the scope or nature or the psychosocial consequences. *In summary, one can say that prevention or response programs for LGBT survivors of SGBV are virtually non-existent in most operations.*”<sup>75</sup> (Emphasis added).

To address this gap, the evaluation calls for UNHCR to “adopt a policy that would explicitly recognize the needs of lesbian, gays, bisexuals and transgenders (LGBT) and incorporate these issues in its policy, strategies and guidelines. Given the extraordinary level of stigmatization of the issue, prevention strategies should prioritize awareness-raising activities in host and refugee communities and among UNHCR staff.”<sup>76</sup> To date, such a policy has not been adopted.

UNHCR's draft SGBV Strategy also recognizes that “UNHCR's programs have tended to focus on sexual violence against women, while other forms of violence and groups at particular risk (such as...LGBT persons), have been less comprehensively addressed.”<sup>77</sup> The Strategy positively recognizes

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<sup>74</sup> UNHCR, “Evaluation of UNHCR's Efforts to Prevent and to respond to Sexual and Gender Based Violence” (Geneva: UNHCR, October 2008), p. 22, paragraph 63.

<sup>75</sup> Ibid, pp. 22-23.

<sup>76</sup> Ibid, p. 25.

<sup>77</sup> UNHCR, Draft, “Addressing Sexual and Gender Based Violence in Situations of Forced Displacement: UNHCR Strategy 2010-2015,” p.5.

“SGBV against LGBT persons of concern” as a specific programmatic category and affirms that a “Guidance note and/ or tool for UNHCR and NGO staff shall be developed on [the] protection of, and the creation of safe environments for, LGBT persons of concern.”<sup>78</sup> It further states, among other initiatives such as training and staff-awareness activities, that “LGBT persons of concern shall be included in all programming activities as per the AGDM framework... UNHCR will work to ensure there is also sufficient focus on the “D”, the diversity component, of AGDM.”<sup>79</sup>

### *The AGDM and its scope for inclusion of LGBTI protection concerns*

In addition to the SGBV Strategy, UNHCR’s “Concept Matrix,” which outlines collaborative projects to address needs of LGBTI refugees referred to above, also states as a goal that “LGBTI persons of concern are included in all protection and programming activities of UNHCR and its partners as per the Age, Gender, and Diversity Mainstreaming (AGDM) framework.”<sup>80</sup> Yet as elaborated below, in its current form the AGDM framework is not yet appropriate or suitable for this task.

UNHCR’s AGDM framework is the primary vehicle through which needs are identified among persons of concern to UNHCR, which include refugees, asylum seekers, internally displaced and stateless persons and returnees. The goal of the AGDM is to provide a set of tools for UNHCR staff to:

“Systematically analyze how the protection situation and protection interventions impact women, girls, men and boys of different ages and backgrounds. It requires consideration of people’s rights, differential needs and specificities from the outset to ensure that any actions taken promote gender equality, rights for all and equitable outcomes. This applies to all UNHCR activities including policy formulation, legislative drafting, training, protection strategy development, operational planning, program implementation, protection -including assistance - delivery, and monitoring and evaluation.”<sup>81</sup>

To support the AGDM’s use within UNHCR country operations, a Participatory Assessment Tool was introduced which seeks to ensure persons of concern are able to help define the protection work of the particular UNHCR country office. In addition, the AGDM utilizes a “multi-functional team” approach, with different sections of UNHCR offices, including protection and operations, participating in assessments.<sup>82</sup> An assessment typically involves selecting different parts of the refugee population, for example, younger female refugees, older IDP men, and school-age returnees, for separate focus group discussions with UNHCR staff and partners to determine the most important needs, proposed solutions

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<sup>78</sup> Ibid., p. 26.

<sup>79</sup> Ibid., p. 25.

<sup>80</sup> UNHCR-NGO Partnership Concepts, p. 9.

<sup>81</sup> UNHCR, *Changing the Way UNHCR Does Business? An Evaluation of the Age, Gender and Diversity Mainstreaming Strategy, 2004-2009*, Pre-Publication Edition (Geneva: UNHCR, June 2010), p. 17.

<sup>82</sup> UNHCR, “Mainstreaming Age, Gender and Diversity in UNHCR Operations, 2005-2007,” p.2, on file with Human Rights First.

to those needs, and then to have those needs and proposed solutions be used as a basis for programming. An Accountability Framework was also introduced which requires UNHCR country offices to complete yearly AGDM exercises and submit subsequent reports to UNHCR headquarters.<sup>83</sup> The roll out of the AGDM has had a number of successes, some of which include:

- Raised awareness of differences among persons of concern – those who participated in assessments report that the exercise of breaking up into age, gender, and other groups has proved to be educational and promotes greater awareness of diverse protection problems;<sup>84</sup>
- Enhanced visibility of persons of concern to national authorities, UNHCR and civil society actors;<sup>85</sup> and
- Strengthened community capacity – when used appropriately, the participatory assessments which are followed by action, can serve to empower populations of concern.<sup>86</sup>

Yet the AGDM faces serious obstacles when it comes to addressing the protection needs of LGBTI persons of concern. First, the AGDM framework includes very limited reference to sexual orientation and gender identity.<sup>87</sup> While sexual orientation or gender identity could fit into the “D” or ‘diversity’ category, this possibility is not suggested or articulated. Of critical importance is the AGDM’s Participatory Assessment Tool, which is “*the* key assessment tool in UNHCR,”<sup>88</sup> yet it makes no reference to sexual orientation or gender identity.<sup>89</sup> This lack of inclusion is particularly problematic as the Participatory Assessment Tool does include a breakdown of specific populations to target, and LGBTI persons are not included, suggested, or referenced.

Even if language addressing LGBTI protection issues were reflected in the AGDM framework, the implementation of AGDM is fraught with challenges. A number of recent UNHCR documents have identified challenges including:

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<sup>83</sup> Ibid, p. 7.

<sup>84</sup> UNHCR, *Changing the Way UNHCR Does Business*, p. 29.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

<sup>87</sup> The only reference to sexual orientation in the AGDM documents is found in the “Facilitators Guide for the Workshop on Participatory Assessment in Operations: Age, Gender and Diversity Analysis” which includes several possible activities and “plenary session questions,” which list sexual orientation as a possible discussion topic for the Workshop.

<sup>88</sup> UNHCR, *Changing the Way UNHCR Does Business*, p. 3.

<sup>89</sup> Notably, the Participatory Assessment Tool’s “Mapping Diversity” section that states “communities should be broken down according to age, sex, ethnicity, caste/clan, religion, socio-economic status, level of education, whether urban or rural, and any other social distinction, in order to gain a representative sample of the different people who live in the operational context.” Sexual orientation and gender identity are left out from this list, see UNHCR, “The UNHCR Tool for Participatory Assessment in Operations,” July 2005, p. 12, on file with Human Rights First.

- Lack of Official Policy or Vision – UNHCR lacks an “official policy on AGDM that clearly defines the concept, preventing any misinterpretation.”<sup>90</sup> Furthermore the “AGDM does not have the weight of official UNHCR policy, nor has any clear vision been laid out that states what UNHCR will look like and be able to do once AGD mainstreaming is complete;”<sup>91</sup>
- Lack of Follow up on Participatory Assessments – There is “limited follow-up with persons of concern” and little “feedback to the community on what UNHCR has done with the information supplied” as part of the Participatory Assessments;<sup>92</sup>
- Inadequate funding and support of the AGDM at the field level – There is a “lack of staff and funding for AGDM” at the field level<sup>93</sup> and a “lack of staff and funds are commonly cited among the most important factors that have hindered greater progress on the AGDM strategy, at field and country levels;”<sup>94</sup>
- Lack of Senior Leadership and Commitment to Mainstreaming – There is “insufficient attention and investment provided by senior management to ensure the sustainability of the mainstreaming aspect of the AGDM strategy, in the sense of building the staffing profile, training, orientation, performance appraisal systems that will ensure that gains made to date are not lost with time.”<sup>95</sup> Moreover, as UNHCR concludes, “the commitment of senior management to AGDM has been variable” and largely dependent on the “personal convictions of individual country representatives, rather than a systematic agency-wide approach to mainstreaming;”<sup>96</sup>
- Lack of Consistent Technical Advice and Support – Oversight from UNHCR headquarters to field offices has been inadequately resourced. For example, the UNHCR “section that is required to provide technical support to the field on AGDM...no longer has the means to visit the field, with travel funds equivalent to 1.5 international trips per year.”<sup>97</sup>
- Inherent Cultural Barriers and Intolerance Among Local Populations and UNHCR Staff – No matter how inclusive the AGDM policy becomes, “[o]perations struggling with deeply entrenched age, gender and cultural issues that translate into rights violations on a large scale in resource poor environments have not received the technical support or financial resources to put

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<sup>90</sup> UNHCR, “Age, Gender and Diversity Mainstreaming,” Executive Committee of the High Commissioner’s Programme, Standing Committee, 48<sup>th</sup> Session, EC/61/SC/CRP.14, May 31, 2010, p. 3, available at <http://www.unhcr.org/4c0526c69.html> (accessed September 23, 2010).

<sup>91</sup> UNHCR, *Changing the Way UNHCR Does Business*, p.2.

<sup>92</sup> UNHCR, “Age, Gender and Diversity Mainstreaming,” p 3.

<sup>93</sup> UNHCR, “Age, Gender and Diversity Mainstreaming,” p. 3.

<sup>94</sup> UNHCR, *Changing the Way UNHCR Does Business*, p. 4.

<sup>95</sup> Ibid, pp. 22-23.

<sup>96</sup> UNHCR, “Age, Gender and Diversity Mainstreaming,” p. 4.

<sup>97</sup> UNHCR, *Changing the Way UNHCR Does Business*, p. 23.

in place targeted actions on a scale required to resolve these issues.”<sup>98</sup> This is of particular concern when it comes to LGBTI persons of concern given the pervasive homophobia which exists in many contexts where UNHCR operates.

While the spirit of the AGDM seeks to support inclusion of all groups without distinction, without specific guidance on sexual orientation and gender identity which is adequately supported through technical advice and targeted staff training, the AGDM will have limited use for persons of concern who are sexual minorities. UNHCR will also need to assess if the existing categories of populations of concerns listed in the AGDM are appropriate for LGBTI persons. For example, lesbian women may not feel comfortable talking about their protection issues around other women who are heterosexual. Moreover, the existing and serious challenges of implementing the AGDM should also be remembered when advocating that the AGDM be used to address needs of LGBTI persons of concern. Moving forward, UNHCR should include *how* to best incorporate the protection concerns of LGBTI persons as it looks to improve the AGDM process for all persons of concern.

### *Concept Matrix and funding*

As noted above, UNHCR together with NGO partners has developed a “Concept Matrix” which aims to address many of areas where further action is needed to improve protection of LGBTI refugees throughout the displacement cycle. Discussion and engagement between NGOs with relevant expertise and UNHCR staff on the Matrix and its activities have been critical to identifying gaps and generating important project ideas. UNHCR’s receptivity to developing the Matrix has been an important factor in its creation and implementation.

Yet implementation will require resources. In addition, UNHCR’s ownership of the Matrix remains unclear as it is not formally a UNHCR document nor is it publicly available. While the active engagement of NGOs and experts on the Matrix is essential, given UNHCR’s international protection mandate, it should take ownership of the Matrix. UNHCR will need to devote resources to coordinating implementation of the Matrix’s activities and should also appeal to its donors to fund the different projects in the Matrix. Currently, UNHCR’s most recent global appeals and reports do not include reference to the Matrix or to any specific projects or activities related to sexual orientation or gender identity. While some donors will likely not support efforts to ensure protection of LGBTI persons of concern, UNHCR’s most significant and largest donors are supportive of the need to address the protection gaps outlined in this paper. The agency should consider a targeted appeal to a specific group of individual donor states.

### *Conclusion*

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<sup>98</sup> Ibid, p. 5.

Given the protection gaps outlined in this paper, UNHCR should undertake reforms to better include LGBTI refugees and asylum seekers, as well as other persons of concern, in its regular programming and activities. Revising existing policies and tools, as well as developing specific guidelines and protection tools, will lay a foundation for improved protection. Beyond this, additional efforts will be needed to implement guidance at the field level in real terms. The “field” reality will differ and depend largely on the geographical region, which suggests the need for guidance which is context specific and supported by resources for implementation. In undertaking its next steps in this area, UNHCR can draw upon numerous resources, including the advancing international human rights norms on sexual orientation and gender identity, UNHCR’s own experience and lessons learned in implementing the AGDM framework and its rights-based approach, and the growing interest of a number of States in addressing LGBTI concerns from a human-rights perspective.

Human Rights First believes strongly that the below recommendations are achievable and looks forward to supporting and monitoring their implementation.

### ***Recommendations***

#### **To UNHCR:**

*Ensure the ability of LGBTI refugees to access refugee protection, assistance and status determination procedures:*

- Develop specific and practical guidance on *how to actually implement* a protection response which is inclusive of LGBTI persons of concern. Such guidance will need to be tailored to specific regions and be developed in close partnership with a broad range of civil society groups including refugee rights groups as well as those who work with sexual minorities in different parts of the world. This guidance should cover the range of the displacement cycle – from identification to durable solutions – and may include the following elements:
  - Measures UNHCR will take when LGBTI refugees fear applying for asylum due to laws which criminalize same-sex acts and/or negative societal attitudes;
  - Preventive measures which ensure LGBTI refugees are not denied assistance and steps UNHCR can take should discrimination occur;
  - Examples of assistance programming or best practices that are inclusive of the needs of LGBTI refugees;
  - Different types of training activities for UNHCR and partner staff which may be convened in partnership with local rights groups;
  - Appropriate measures which prevent and protect LGBTI persons of concern from all forms of violence; and
  - Measures to ensure UNHCR staff and partners maintain rules of confidentiality in relation to specific individuals or cases.

- UNHCR staff should actively seek to include LGBTI persons of concern in its ongoing and regular assessments including AGDM exercises and participatory assessments. UNHCR headquarters should ensure this becomes a reality through monitoring of field offices;
- Review and revise as necessary existing UNHCR guidelines and tools which are used by UNHCR to capture the needs of vulnerable populations and specific needs. Such tools include:
  - AGDM Framework;
  - Heightened Risk Assessment Tool; and
  - Specific Needs Codes;
- Ensure all future policies include reference to the protection concerns of LGBTI persons of concern;
- Provide adequate technical resources and support to ensure field offices respond in a consistent basis to the protection needs of LGBTI persons of concern. This involves regular monitoring, training, missions, and best-practices workshops with relevant stakeholders;
- Conduct regular training of registration, protection and community service staff on LGBTI refugee protection concerns contextualized according to location. Assign focal points in each regional bureau who can act as sources of information and support as protection concerns arise related to sexual orientation or gender identity;
- UNHCR’s Policy Development and Evaluation Service in collaboration with regional bureaus and NGOs should identify and conduct research in countries where LGBTI refugees face severe protection problems or in regions where LGBTI persons face serious human rights abuses and where there is an absence of information on persons who flee because of these abuses. Regions may include eastern Africa, the Caribbean, Eastern Europe, Central America, the Middle East and Southeast Asia. The goal of producing such a resource would be to identify protection challenges, ways in which to overcome these challenges, and measure responses of all stakeholders including UNHCR; and NGOs;
- Develop a targeted appeal to specific donors for its activities in relation to sexual orientation and gender identity;
- Take on formal ownership of its “Concept Matrix,” and post it – or a revised public version – on its website. UNHCR should continue to work closely with NGOs and other experts to solicit input on the Matrix, and hold regular meetings with NGO partners during the UNHCR-NGO Annual Consultations on implementation of the projects in this Matrix. UNHCR should also promote the involvement of NGOs with specific expertise in the implementation of various projects. Staffing support will surely be required to achieve this;
- Partner with local human rights groups, including LGBTI groups, to work with and extend

services to LGBTI refugees in their communities and countries as a means to support community-based protection.

*Ensure LGBTI refugees with specific and serious protection needs are able to access resettlement*

- Revise resettlement guidance to include protection concerns around sexual orientation/gender identity which warrant resettlement;
- Ensure the Emergency Transit Centers are responsive to and supportive of the needs of LGBTI refugees as well as other refugees who have specific protection needs;
- Increase capacity to identify and process refugees who face imminent risks of harm, including at-risk LGBTI refugees who require resettlement on an urgent or emergency basis;

**To Donor and Resettlement States:**

*Support UNHCR to address needs of LGBTI refugees*

- Provide political and financial support to UNHCR to ensure that different protection guidelines and tools outlined in this paper are revised to adequately address the protection concerns of LGBTI refugees and asylum seekers, and develop new practical guidance;
- Include LGBTI refugee protection concerns in bilateral discussions between governments and with UNHCR, which may involve the sharing of best practices and lessons learned in this area;

*Ensure resettlement programming is responsive to the needs of LGBTI refugees and enhance capacity to expedite the resettlement of those refugees who face imminent harm, including at-risk LGBTI refugees;*

- Support UNHCR to revise its resettlement handbook which currently includes limited reference to sexual orientation or gender identity-based persecution;
- Review guidance provided to those who adjudicate resettlement decisions to ensure they include information about sexual orientation and gender-identity based claims, drawing upon UNHCR's *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*;
- Include concerns of LGBTI refugees in UNHCR Annual Tripartite Consultations on Resettlement;
- Ensure LGBTI refugees are resettled to resettlement sites equipped and willing to facilitate their safe and secure successful integration, including through strengthening the involvement of NGOs and advocates in resettlement allocations processes.