

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

The Roundtable on Asylum-Seekers and Refugees Seeking Protection on Account of Their Sexual Orientation and Gender Identity (“Roundtable”) was organized 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.

The discussion was informed by UNHCR’s 2008 Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity and “The Protection of Lesbian, Gay, Bisexual, Transgender and Intersex Asylum-Seekers and Refugees”, a UNHCR Discussion Paper prepared for the event.

Human Rights First submitted a paper entitled, “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”, and the Organization for Refuge, Asylum and Migration (ORAM) provided a report entitled “Rights & Protection of Lesbian, Gay, Bisexual, Transgender & Intersex Refugees and Asylum Seekers Under the Yogyakarta Principles”. Additional relevant writings by participants and others were made available.

Participants included 29 experts from sixteen countries drawn from governments, NGOs, academia, the judiciary and international organizations. A number of UNHCR staff members also attended. The Roundtable allowed for wide-ranging discussion that focused on legal and operational protection challenges encountered by LGBTI asylum-seekers and refugees. It reviewed the international legal framework for protecting LGBTI asylum-seekers and refugees, including the *1951 Convention relating to the Status of Refugees* (“1951 Convention”) and its *1967 Protocol*. The Roundtable examined substantive and procedural issues related to refugee claims based on sexual orientation and gender identity, discussed operational protection gaps and 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 participants worked collaboratively to develop a common understanding about the protection risks and challenges faced by LGBTI asylum-seekers and refugees, as well as the way forward. These summary conclusions are expected to inform UNHCR’s work to build on its existing Guidance Note and produce enhanced Guidelines on International Protection on the topic, issue practical guidance for staff, Governments and other partners, and mainstream LGBTI protection issues across all aspects of work.

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.

A. The International Legal Framework for Protecting LGBTI Asylum-Seekers and Refugees

1. LGBTI persons are entitled to all human rights on an equal basis with others. Participants acknowledged that 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 application and interpretation of the 1951 Convention. States have a duty to protect asylum-seekers and refugees from human rights violations regardless of their sexual orientation and gender identity and regardless of their legal status as asylum-seekers and refugees.
2. The 2007 Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity (“YP”) provide an important basis for ensuring human rights protection to LGBTI individuals, including in the refugee context. Participants recognized that cross-fertilization between human rights law and refugee law could be strengthened, and supported the use and dissemination of the YP as a legal, practical and advocacy tool in the asylum context. It was acknowledged that UNHCR endorses and uses the YP and participants recommended UNHCR to consistently incorporate the YP into its legal guidelines and other operational staff guidance. Participants also discussed the importance of advocating for the adoption of the YP by other UN bodies, States and NGOs.

B. Multiple Discrimination and Non-Conformance to Expected Gender Roles

3. An understanding of the multiple forms of harm and discrimination experienced by LGBTI persons throughout the displacement cycle was recognized as vital for States, NGOs and UNHCR staff. A number of intersecting factors contributing to discrimination experienced by LGBTI asylum-seekers and refugees were identified, including sexual orientation, gender identity, age, nationality, race and HIV status. Participants recognized that LGBTI asylum-seekers and refugees often are marginalized and isolated without family support.
4. The relationship between non-conformance to expected gender roles and sexual orientation and gender identity was discussed. Participants emphasized the importance of applying a gender-sensitive analysis to asylum claims based on sexual orientation and gender identity. The issue of evolving identities was also discussed, including the importance of taking into account diverse gender expressions and focusing on the actual circumstances of the individual. It was recommended that UNHCR further clarify the relationship between gendered norms, sexual orientation and gender identity in its future Guidelines.
5. Participants underlined the importance of recognizing violence against LGBTI persons as a form of sexual and gender-based violence (“SGBV”) and for UNHCR to clearly identify issues relating to sexual orientation and gender identity in its SGBV Guidelines. It was agreed that the high rate of SGBV perpetrated against LGBTI

asylum-seekers and refugees results in a heightened need for prevention and response mechanisms for them at several stages of the displacement cycle.

C. Laws Criminalizing Consensual Same-Sex Relations

6. Participants agreed that laws criminalizing consensual same-sex relations pose significant problems for LGBTI asylum-seekers and refugees at every stage of the displacement cycle. Even when these laws are not enforced, their existence often reflects a culture of intolerance toward LGBTI individuals that results in abuse and discrimination. Participants acknowledged that morality laws aimed at public indecency and lewdness are often used disproportionately against LGBTI individuals.
7. Such criminal laws impede the ability of LGBTI persons to access State protection in their home country and make them reluctant to register for asylum and testify truthfully at asylum hearings. Such laws create severe security issues in countries of first asylum and increase the threat of *refoulement*.
8. Participants agreed on the need for a collaborative effort to repeal these laws and to mitigate their effects. Social attitudes may not be in sync with laws after decriminalization and could result in a lingering threat. The importance of developing specific guidance on how to provide protection in countries where these laws still exist was acknowledged. The role of the Office of the High Commissioner for Human Rights in the development of preventive measures to ensure safety for LGBTI individuals in their countries of origin was highlighted.

D. The 1951 Convention and Refugee Claims Relating to Sexual Orientation and Gender Identity: Legal Issues

9. The continuing problematic nature of several substantive issues regarding the treatment of refugee claims based on sexual orientation and gender identity was recognized. While claims made by LGBTI individuals have gained recognition under the “membership of a particular social ground”, other grounds are yet to be further explored. Relatively fewer claims are made by transgender, bisexual and intersex applicants and the particular issues arising in such claims are not well understood. Participants noted that efforts to improve refugee determination procedures needed to take into consideration the diversity of issues involved in sexual orientation and gender identity-related claims.
10. Participants acknowledged the difficulty and complexity of establishing State failure to protect against harm perpetrated by private actors in this context, the often false reliance on presence of NGOs and human rights organizations in the country of origin as a substitute for State protection and misuse of the Internal Flight Alternative as a means to avoid persecution, concealment or “recloseting” to be safe. It was agreed that the “discretion” argument is no more valid in sexual orientation or gender identity than in other types of refugee claims.

11. Participants recognized that laws criminalizing same-sex relations in countries of origin can be persecutory per se and that even if these laws are not regularly enforced they nevertheless create a hostile atmosphere for LGBTI individuals. Participants noted the value of a holistic assessment of the legislation and the legal system, and that too narrow a focus on whether such laws are enforced or not is unproductive. The futility of the requirement that claimants first seek State protection when their country of origin maintains such laws was acknowledged.
12. The procedural aspects of refugee status determination also were acknowledged to present many challenges, and participants identified as foremost the lack of accurate, detailed and LGBTI-specific country information necessary for establishing an asylum claim. Participants noted that a lack of country information impedes the ability of LGBTI claimants to prove that they experienced persecution or have a well-founded fear of being persecuted. The value of States working with experienced NGOs, human rights agencies and other sources to improve country information and for States to allow claimants to review and provide relevant country information if they are able to do so was also noted.
13. Participants recognized that access to asylum procedures for LGBTI persons in countries with laws criminalizing same-sex relations or a culture of strong bias against LGBTI persons remains a problem. Some claimants are harassed by other refugees in reception areas and LGBTI persons can fear approaching authorities. Participants recommended that UNHCR and NGOs work to educate asylum-seekers about the ability to make an asylum claim based on sexual orientation and gender identity and assure that the reception and interview environment provides a comfort zone which allows the applicant to present a narrative without fear.
14. The prevalence of mental health issues, including internalized homophobia and feelings of shame, was noted as a significant impediment to accessing asylum procedures. It was also acknowledged that LGBTI asylum-seekers and refugees often have a higher suicide risk, suffer sexualized violence and other trauma. Participants agreed that the provision of mental health services to help them present their claims and successfully navigate the asylum process is vital.
15. Some participants noted a rise in negative credibility determinations due to a superficial understanding among some adjudicators of what it means to be LGBTI and a lack of appreciation of the difficulty claimants have in discussing their experiences around sexual orientation or gender identity, especially when many LGBTI claimants have endured SGBV. A prevalence of insensitive and inappropriate questioning, and in some cases invasive testing, on the part of adjudicators exists. At the same time, the need for interview techniques that can eliminate those without valid claims was raised.
16. It was recognized that additional steps should be taken to rectify challenges in refugee determination procedures. Participants emphasized the need for more

effective and LGBTI-sensitive interview tools and techniques, sustained and specific training for staff, including interpreters. The necessity for tailoring training to different regions and taking into consideration specific cultural and legal environments was underlined. States were also encouraged to keep specific statistics on these asylum claims.

Protection in the Cycle of Displacement: Flight, Arrival, Initial Settlement/First Country of Asylum

17. Participants commented extensively on the many challenges experienced by LGBTI asylum-seekers and refugees in flight, upon arrival and in initial settlement. Problems include discrimination, abuse, sexual violence and exploitation, crimes committed in the name of honour, isolation from community and family, a lack of education and economic opportunity, forced marriage, insufficient access to safe housing, being forced to resort to sex work, lack of access to health care and *refoulement*. It was recognized that LGBTI asylum-seekers and refugees are also subject to a high rate of physical and sexual abuse in detention.
18. In the operational context, laws criminalizing same-sex relations in countries of asylum increase the security risks and exploitation of LGBTI asylum-seekers and refugees and contribute to a climate of impunity for crimes committed against LGBTI individuals. A lack of appropriate State response to reports of abuse was noted in States both with and without such criminal laws.
19. Participants recommended that more attention should be placed on protecting LGBTI asylum-seekers and refugees from these risks and observed that further efforts are needed to ensure that they receive non-discriminatory and appropriate services from States, UNHCR and NGOs. Emphasis should be placed on 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.
20. The importance of providing safe and appropriate accommodation was discussed. Scattered site housing was generally considered a better option than safe houses which risk becoming unsafe if identified as LGBTI accommodation. Participants acknowledged that gender-segregated housing does not work for all and suggested to draw on best practices outside the asylum context to improve housing conditions for transgender asylum-seekers and refugees.
21. Participants called for field training programs for States, UNHCR staff and NGOs that are sensitive to sexual orientation and gender identity to be developed and implemented. It was recommended that NGOs should address bias towards LGBTI persons in their own operations and develop programs that educate staff and address LGBTI asylum-seeker and refugee needs.
22. UNHCR was encouraged to further develop operational guidelines and tools to better address the protection needs of this group. Participants acknowledged that existing

operational guidelines are being revised and new tools are being created as LGBTI concerns are mainstreamed into all UNHCR practices.

E. Protection in the Cycle of Displacement: Durable Solutions

23. It was noted that due to the intolerant environment towards LGBTI individuals that permeates many first asylum countries, resettlement may often be the only viable durable solution for LGBTI refugees. Participants were concerned that the resettlement process for LGBTI refugees can be lengthy, which exacerbates the security risks they face in countries of first asylum. Further development of risk assessment and priority processing for resettlement on the basis of vulnerability was recognized as vital to their protection.
24. Several participants noted that resettling LGBTI refugees is difficult and can be costly. Many have a past history of abuse which requires ongoing mental health care and economic assistance. Transgender and intersex refugees often require medical treatment that many resettlement States do not provide. It was recognized that discrimination based on sexual orientation and gender identity still exists to varying degrees in resettlement countries, and resettlement agencies are sometimes hesitant or unwilling to provide appropriate services to this group.
25. Participants expressed concern that an applicant's past involvement in sex work can constitute an obstacle to asylum and resettlement in some countries, and underscored the importance of regarding such past activity as an indication of vulnerability rather than as a bar to entry or resettlement.
26. There was agreement that UNHCR, States and NGOs must address underlying biases towards LGBTI refugees and carefully examine options when resettling this group. Care should be taken to place LGBTI refugees in supportive environments with the help of sensitized NGOs and other service providers. Participants recommended States to adopt policies that recognize partners of LGBTI refugees for the purposes of family reunification and protect their right to family unity.

F. Issues Particular to Lesbian, Gay, Bisexual, Transgender and Intersex Asylum Seekers and Refugees as Separate Groups

27. Lesbians, gays, bisexuals, transgender and intersex persons all experience persecution and discrimination in distinct ways. Participants reported, for example, that lesbians suffer persecution at the intersection of gender and sexual orientation and are exposed more frequently to harm at the hands of private actors. It was noted that gay men tend to live more public lives and are therefore more often exposed to State-sponsored harm, including sexual abuse. The heightened risk of LGBTI youth, especially effeminate young men in unequal power-relations with their partners or authority figures, being exposed to abuse was highlighted. It was recognized that asylum claims made by bisexuals are often dismissed due to lack of credibility and a lack of understanding of bisexuality as an orientation. Participants also noted that

transgender individuals are severely marginalized and often experience sexual violence. Transgender and intersex individuals share in common experiences of abuse and harassment because they are seen as not fitting either male or female stereotypes. Although they may not identify as “LGBTI”, like LGBT persons, intersex individuals can be subject to persecution in ways that relate to their non-conformance with gender norms.

28. Participants noted that an understanding of the unique vulnerabilities of each group is important in all stages of the displacement cycle. In particular, better comprehension and inclusion of bisexual, transgender and intersex issues in the asylum context is necessary.

G. Sharing and Expanding Good Practices

29. Several State and NGO participants shared good practices and initiatives in which they are involved that are improving refugee status procedures, including providing specific training and statistical tracking techniques for LGBTI asylum claimants. Efforts relating to sensitization training and service provision in asylum and resettlement countries were also discussed.
30. Participants appreciated UNHCR’s commitment to continue updating, developing and applying legal and practical guidance related to sexual orientation and gender identity. They called on UNHCR to 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 allow UNHCR to better comprehend, protect and assist LGBTI asylum seekers and refugees.
31. Participants encouraged States, NGOs, academics and international organizations to continue and expand these efforts, encourage others to do so, and share the burden of systematically and practically improving the lives of LGBTI asylum-seekers and refugees.

List of Participants*

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

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

Elizabeth DREW, Department of State, USA

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

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

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

Julie MORIN, Immigration Refugee Board, Canada

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

Katya SOMOHANO, Mexican Commission of Refugees, Mexico

Ellen SELVIK, Norwegian Directorate of Immigration, Norway

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

Allison JERNOW, International Commission of Jurists, Geneva, Switzerland

Nicole LAVIOLETTE, University of Ottawa Faculty of Law, Canada

Jenni MILLBANK, University of Technology Sydney, Australia

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

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

Jesse BERNSTEIN, Human Rights First, Washington DC, USA

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

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

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

John FISHER, ARC International, Geneva, Switzerland

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

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

Sabine JANSEN, COC Netherlands, Amsterdam, Netherlands

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

Grusa MATEVZIC, Hungarian Helsinki Committee, Budapest, Hungary

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

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

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, Karl STEINACKER, Gisela THÄTER, Davide
TORZILLI, Volker TÜRK, Carolin Spannuth VERMA, Margo RAYMENT, Barbara
TREVIRANUS

* Institutional affiliation given for identification purposes only.