



# **THE PROTECTION OF LESBIAN, GAY, BISEXUAL, TRANSGENDER AND INTERSEX ASYLUM-SEEKERS AND REFUGEES**

**Discussion Paper**

**Prepared for a UNHCR Roundtable on Asylum-Seekers and Refugees Seeking Protection  
on Account of Their Sexual Orientation and Gender Identity,  
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## I. INTRODUCTION

1. In many parts of the world, individuals are subject to serious human rights abuses because of their real or perceived sexual orientation and gender identity. Lesbian, gay, bisexual, transgender and intersex (“LGBTI”) persons have been able to obtain international protection in some countries but not in others. The growing number of asylum claims based on sexual orientation and gender identity, coupled with a heightened awareness of the multiple vulnerabilities faced by LGBTI asylum-seekers and refugees in all stages of the cycle of displacement, has prompted an increased focus on these issues.

2. Over the past years, the treatment of sexual minorities has received increasing attention within the UN system, among States and in academic writing. A greater tolerance for people with diverse sexual orientations and gender identities has been observed in several parts of the world. Although the situation has worsened in some areas, much progress has been made in a relatively short period of time. Several States have recognised the need to end the abuse of LGBTI people and introduced specific legislation and policies for their protection, including in the asylum procedures. UNHCR, for its part, is developing legal and operational guidance,<sup>1</sup> providing training to staff and working to mainstream the protection of sexual minorities into its programmes. Partnerships with NGOs have been formed and continue to develop.

3. To further build on these efforts UNHCR will host a Roundtable on Asylum-Seekers and Refugees Seeking Protection on Account of Their Sexual Orientation and Gender Identity in Geneva on 30 September and 1 October 2010. The purpose of this paper is to inform the discussions at the Roundtable. The paper aims to provide an overview of terminology in this area, briefly outline the existing legal and policy framework, highlight the protection gaps for LGBTI asylum-seekers and refugees at various stages of the displacement cycle and describe issues that are unique to each of the sexual minority subsets. It concludes with summary observations.

4. In preparing this paper, UNHCR solicited input through a questionnaire (hereafter “Questionnaire”) from a range of NGOs, academics, legal practitioners and others with experience in the legal and operational side of the refugee protection regime (hereafter “Respondents”).<sup>2</sup> UNHCR would like to thank all of the organizations and individuals who contributed their comments on the paper.

## II. IDENTIFICATION OF TERMS USED

5. Both the UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity and the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity<sup>3</sup> (hereafter “Yogyakarta Principles”), include definitions of relevant terms such as “sexual orientation,” “gender identity,” “lesbian,”

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<sup>1</sup> UNHCR, *Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity*, 21 November 2008 (hereafter “UNHCR Guidance Note”), available at <http://www.unhcr.org/refworld/docid/48abd5660.html>.

<sup>2</sup> UNHCR staff also met and spoke informally to many knowledgeable persons to obtain additional input.

<sup>3</sup> *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity*, March 2007, (hereafter “Yogyakarta Principles”), available at [http://www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm).

“gay,” “bisexual” and “transgender.”<sup>4</sup> LGBTI individuals also are sometimes referred to under the umbrella term “sexual minorities.” While the need to develop a consistent terminology is important when addressing issues related to sexual orientation and gender identity,<sup>5</sup> there is significant social and cultural variance as to what terms are used in different areas of the world. Individuals self-identify using varied language, and that language keeps evolving.<sup>6</sup>

6. Given the importance of using non-offensive terminology and understanding the concepts used by and about LGBTI individuals, UNHCR has developed a Glossary of Sexual Orientation and Gender Identity-Related Terms (“Glossary”) that is closely modeled on the *Media Reference Guide* developed by the Gay & Lesbian Alliance Against Defamation (“GLAAD”)<sup>7</sup> and the definitions in the Yogyakarta Principles. The Glossary is attached hereto as an Annex and will be modified as necessary.

7. Increasing attention has been drawn recently to the existence of “intersex” individuals. Intersex is a condition of having sexual anatomy that is not considered standard for a male or a female. Intersex is also an umbrella term covering differences of sex development, which can consist of diagnosable congenital conditions in which development of chromosomal, gonadal or anatomic sex is atypical.<sup>8</sup> Many people consider an intersex condition to be a medical disorder treatable with surgery and counseling. For others, being intersex is a matter of gender identity. Debate exists as to whether and in what circumstances intersex individuals should be grouped together with LGBT persons.

### III. THE LEGAL AND POLICY FRAMEWORK

8. The human rights guarantees contained in international legal instruments are part of the protection framework for LGBTI asylum-seekers and refugees and are complementary to those contained in the 1951 *Convention relating to the Status of Refugees* (“1951 Convention”) and its 1967 *Protocol*.<sup>9</sup> According to the Yogyakarta Principles, “international human rights law affirms that all persons, regardless of their sexual orientation or gender identity, are entitled to full enjoyment of all human rights, and the application of existing human rights entitlements should take account of the specific situations and experiences of people of diverse sexual orientations

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<sup>4</sup> Ibid., Introduction and Preamble recitals 4 and 5.

<sup>5</sup> Michael O’Flaherty and John Fisher, “*Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles*” (2008), *Human Rights Law Review*, Vol. 8, No. 2, 207–48, at 232, available at <http://hrlr.oxfordjournals.org/cgi/reprint/8/2/207>.

<sup>6</sup> For instance, the word “homosexual” was commonly used to describe both gay men and lesbians for many years but is now often considered to be offensive. See UNHCR Guidance Note, above footnote 1, para. 6.

<sup>7</sup> See GLAAD, *Media Reference Guide*, available at <http://www.glaad.org/page.aspx?pid=373>.

<sup>8</sup> See the Accord Alliance website, which contains information on intersex, available at <http://www.accordalliance.org>. See also Advocates for Informed Choice which provides legal advocacy for children with intersex condition; the website is available at <http://aiclegal.org/>.

<sup>9</sup> See further UNHCR *Guidance Note*, above footnote 1, generally and para. 9 and footnotes thereto, and International Commission of Jurists (ICJ), *Sexual Orientation, Gender Identity and Human Rights Law Practitioners Guide No 4*, 2009, at 25, available at [http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal\\_Documentation&id=22929](http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=22929).

and gender identities.”<sup>10</sup> The right to non-discrimination is essential for the international protection of LGBTI asylum-seekers and refugees.<sup>11</sup>

9. It is well established that the 1951 Convention must be interpreted and applied in a non-discriminatory way.<sup>12</sup> This includes recognising that sexual orientation and gender identity are factors that can influence or dictate the form of persecution or harm suffered and the reasons for this treatment.<sup>13</sup> The Yogyakarta Principles specifically state that “everyone has the right to seek and enjoy in other countries asylum from persecution, including persecution related to sexual orientation and gender identity.”<sup>14</sup>

10. Despite the growing acknowledgment that people with diverse sexual and gender identities are entitled to protection under international human rights instruments, including the 1951 Convention, most LGBTI individuals are still far from being able to fully exercise their rights. International and national courts have found that laws criminalizing same-sex relations between consenting adults are at variance with international legal standards, resulting in such laws being repealed in a number of countries. They nevertheless remain in force in many places, hindering the ability of LGBTI people to live freely.

#### **IV. IDENTIFICATION OF PROTECTION CHALLENGES**

11. This section seeks to identify some of the main challenges relating to the protection of LGBTI individuals throughout the cycle of displacement. It is based on existing writings as well as information collected by UNHCR in 2010 in response to the Questionnaire and in discussion with many individuals. As the following will show, some protection risks are unique to sexual minorities, some are shared with other minority groups or individuals at heightened risk, yet other risks are similar to those faced by refugees at large.

##### **A. Causes for displacement and multiple discrimination**

12. In many parts of the world, LGBTI persons face discrimination and abuse based on their sexual orientation and gender identity. They may be exposed to physical and sexual violence, including rape, torture, honour crimes and murder at the hands of authorities and private actors. They may be inappropriately treated or denied access to health care and other social services, including housing, education, and employment and, in some instances, arbitrarily detained.<sup>15</sup>

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<sup>10</sup> Yogyakarta Principles, above footnote 3, Preamble.

<sup>11</sup> *UNHCR Guidance Note*, above footnote 1, para. 9 and footnote 12 thereto. See also, O’Flaherty and Fisher, above footnote 5, discussing the application of human rights law to people of diverse sexual and gender identities in practice related to United Nations human rights treaties.

<sup>12</sup> The Preamble of the 1951 Convention reiterates the principle that “human beings shall enjoy fundamental rights and freedoms without discrimination.” The *UNHCR Guidance Note* recognizes that the human rights concept of non-discrimination in relation to sexual orientation and gender identity is applicable in the refugee status determination context.

<sup>13</sup> See further, UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1(A)(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/02/01, 7 May 2002, paras. 16–17, available at <http://www.unhcr.org/publ/PUBL/3d58ddef4.pdf>.

<sup>14</sup> Yogyakarta Principles, above footnote 3, Article 23.

<sup>15</sup> See O’Flaherty and Fisher, above footnote 5, 208–214.

13. Laws criminalizing consensual same sex relations still exist in some 76 countries (including imposition of the death penalty in five countries), and can exacerbate the ill treatment of LGBTI persons and perpetuate negative stereotypes and stigma.<sup>16</sup> Such laws can lead to impunity for crimes committed against LGBTI individuals and prevent them from accessing State protection and asylum systems in many States. LGBTI persons often must hide their true identities, making them invisible and dehumanizing them. They frequently are shunned and abused by their communities and families, leading to social isolation and helplessness.

14. The maltreatment of sexual minorities is closely related to their lack of conformity with traditional gender norms, which is often seen as threatening to the heterosexual majority.<sup>17</sup> The intersection between gender, sexual orientation and gender identity needs to be better addressed and understood as it is often at the heart of harm perpetrated against LGBTI individuals.<sup>18</sup>

15. Although the term “gender-based violence” has mainly been used to describe violence against women and girls, it can also be understood in a broader sense to encompass violence against women and men because of how they experience and express their gender and sexuality.<sup>19</sup> The violence is triggered where LGBTI individuals are seen as not behaving according to societal norms which dictate what is “proper” to men and to women, and they may be insulted, assaulted or killed for their appearance, manner or dress.

## **B. Flight, arrival and initial settlement**

16. Many LGBTI persons are forced to flee their country of origin to avoid persecution. Due to the particular circumstances related to sexual orientation and gender identity, LGBTI asylum-seekers and refugees face multiple forms of discrimination not experienced by other refugee communities. During flight and after arrival in countries of asylum and settlement, LGBTI individuals often continue to be subject to the same abuse from which they fled.

17. On arrival to the country of asylum, reports indicate that some LGBTI persons have no adequate access to information about how and where they can claim asylum. Respondents also reported that LGBTI asylum-seekers and refugees often feel unable to approach or discuss their situation with designated authorities. They frequently perceive that authorities or other actors have no experience or exposure to LGBTI issues, and may, additionally, be unable or unwilling to protect them.

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<sup>16</sup> See International Lesbian, Gay, Bisexual, Trans and Intersex Association (“ILGA”), *State-Sponsored Homophobia: a World Survey of Laws Prohibiting Same-sex Activity Between Consenting Adults*, May 2010, available at [http://old.ilga.org/Statehomophobia/ILGA\\_State\\_Sponsored\\_Homophobia\\_2010.pdf](http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2010.pdf).

<sup>17</sup> See Nicole LaViolette “UNHCR Guidance Note on Sexual Orientation and Gender Identity: a Critical Commentary”, (2010), 22 Int’l J. Refugee L. 173–208, at 183, available at <http://ijrl.oxfordjournals.org/cgi/content/short/22/2/173?rss=1>.

<sup>18</sup> Ibid., at 182–183.

<sup>19</sup> Human Rights Watch has defined gender-based violence as “violence directed against a person on the basis of gender or sex. Gender-based violence can include sexual violence, domestic violence, psychological abuse, sexual exploitation, sexual harassment, harmful traditional practices, and discriminatory practices based on gender.” See Human Rights Watch, “*They Want Us Exterminated: Murder, Torture, Sexual Orientation and Gender in Iraq*” 2009, (hereafter “*They Want Us Exterminated*”), available at <http://www.unhcr.org/refworld/docid/4a8953f52.html>.

## ***i. Registration***

18. Registering an asylum claim may sometimes prove difficult for LGBTI persons. Reports of abusive treatment by other asylum-seekers at and near reception centres and insensitive treatment at the hands of employees during registration and screening have been documented.<sup>20</sup> This can make the asylum process intimidating and less accessible for LGBTI persons who are already hesitant to come forward with their claim.

19. Many LGBTI asylum-seekers have difficulty revealing their true sexual orientation or gender identity when lodging an asylum claim. In some countries where same-sex relations are criminalized, asylum-seekers are forced to deny their real reason for claiming asylum or face arrest or persecution in the country of asylum. Several Respondents cited this as a pressing concern.

## ***ii. Refugee Status Determination***

20. The majority of industrialized countries recognize that sexual minorities may be eligible for refugee status under the 1951 Convention and its 1967 Protocol.<sup>21</sup> However, lack of systematic and comprehensive data on the number and types of claims makes it difficult to assess the overall recognition rate. Reports show that practices vary and that some jurisdictions are more restrictive than others. The proportion of gay men seeking asylum is generally higher than lesbian women, while comparatively few claims are made by bisexual and transgender individuals. Intersex applicants account for an even smaller proportion of claims.

21. Many Respondents commented that some adjudicators and lawyers lack a sufficient understanding of what sexual identity actually entails, believing that sexual orientation only relates to sexual acts and ignoring the fact that sexual identity is a much broader concept that includes being able to meet a partner, engage in a same-sex relationship, socialize and express one's sexuality without fear of experiencing harm.<sup>22</sup> As reflected in a number of asylum-decisions and education efforts, there is a growing awareness that sexual orientation is something much more than just a sexual act.

22. Similarly, there is often a lack of understanding of the complexities encompassed within the concept of gender identity and the varied experiences of transgender and intersex people. Another related issue is a failure of some adjudicators to understand the link between transgression of gender-related norms and claims of persecution based on sexual orientation and gender identity. Respondents agreed that specific training for adjudicators and lawyers handling LGBTI asylum claims is necessary to address these concepts.

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<sup>20</sup> See Helsinki Citizens' Assembly-Turkey and Organization for Refuge, Asylum and Migration, *Unsafe Haven: the Security Challenges Facing Lesbian, Gay, Bisexual and Transgender Asylum Seekers and Refugees in Turkey*, June 2009, 14–15, (hereafter "*Unsafe Haven*") available at <http://oraminternational.org/sites/default/files/pdf/Unsafe%20Haven%20Final.pdf>.

<sup>21</sup> See *UNHCR Guidance Note*, above footnote 1, para. 32 and footnotes thereto. UNHCR has also received reports of successful asylum claims being made by intersex persons and their families, particularly in the United States.

<sup>22</sup> See United Kingdom Lesbian and Gay Immigration Group ("UKLGIG"), *Failing the Grade: Home Office Initial Decisions on Lesbian and Gay Claims for Asylum*, April 2010, 4–5, available at <http://www.uklgig.org.uk/docs/Failing%20the%20Grade%20UKLGIG%20April%202010.pdf>.

23. One concern raised by several Respondents is the lack of detailed, specific, gender-related and up to date country of origin information needed to support an asylum claim. Often, there is a dearth of accurate country information in the most repressive countries, where LGBTI individuals seek to remain invisible and discussion of their existence and the abuses they suffer is suppressed. An unrealistic evaluation of information indicating that a country is taking steps to eradicate discriminatory or persecutory practices against LGBTI individuals has also been presented as an issue.

24. Continued use of the “discretion” requirement, under which asylum applicants are expected to hide their sexual orientation or gender identity, was also identified as an area of concern.<sup>23</sup> Although some States have rejected the discretion argument as grounds to deny an asylum claim, as exemplified by the recent judgment of the Supreme Court of the United Kingdom,<sup>24</sup> this line of reasoning continues to be used in some countries.

25. Perhaps the most prevalent issue raised by Respondents is the existence and effect of criminal laws prohibiting same-sex consensual relations between consenting adults. In relation to asylum claims, adjudicators can be reluctant to appreciate that such laws can be persecutory *per se*, and that applicants may be able to demonstrate a well-founded fear of persecution even if laws criminalizing same-sex relations are not enforced with any regularity.<sup>25</sup> Additionally, the existence of such laws (including public decency laws used against same-sex couples), whether enforced or not, impede the ability of LGBTI persons to access State protection.<sup>26</sup> Some jurisdictions have found that the applicant ought not to be required to show that s/he has sought State protection in such situations.

26. Many LGBTI asylum claims arise due to persecution perpetrated by the victim’s own family, neighbours, work colleagues or other non-state actors. Crimes committed in the name of honour, rape, domestic violence, incest and forced marriages are often perpetrated by non-state actors against LGBTI persons who fail to conform to expected roles.<sup>27</sup> These harms often occur in the home or outside of public view. If the State criminalizes same-sex relations, contacting authorities for protection is especially difficult.<sup>28</sup> A better appreciation and discussion of the

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<sup>23</sup> See 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, at 392, available at <http://www.informaworld.com/smpp/content~db=all?content=10.1080/13642980902758218>.

<sup>24</sup> UNHCR filed an amicus brief in the case to put its views on the discretion issue before the Court. See *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department - Case for the first intervener (the United Nations High Commissioner for Refugees)*, 19 April 2010, available at <http://www.unhcr.org/refworld/type.AMICUS,,IRN,4bd1abbc2,0.html>.

<sup>25</sup> See *UNHCR Guidance Note*, above footnote 1, paras. 17–22 and footnotes thereto.

<sup>26</sup> *Ibid.*

<sup>27</sup> See, for instance, Victoria Neilson, “Homosexual or Female? Applying Gender-Based Asylum Jurisprudence to Lesbian Asylum Claims” (2005), 16 Stanford Law and Policy Review 417, discussing lesbians and private harm; and Nicole LaViolette, above footnote 17, at 196–199.

<sup>28</sup> See National Center for Lesbian Rights, “The Challenges to Successful Lesbian Asylum Claims”, 6–7, available at [http://www.nclrights.org/site/DocServer/challenges\\_lesbian\\_asylum\\_cases.pdf?docID=1142](http://www.nclrights.org/site/DocServer/challenges_lesbian_asylum_cases.pdf?docID=1142). See also Nicole LaViolette, above footnote 17, at 196–199.



difficulty of establishing a lack of State protection in cases involving private actor harm is necessary.<sup>29</sup>

27. In States recognizing asylum claims by LGBTI applicants, claims related to sexual orientation, gender identity and expression are mostly accepted under the 1951 Convention ground “membership of a particular social group” (“MPSG”).<sup>30</sup> The ability of bisexual and intersex applicants to make claims under this 1951 Convention ground is, however, not as well established. One concerning trend raised by Respondents in regard to U.S. asylum claims is the potential requirement that LGBTI applicants need to show that they are a member of a group with “social visibility”.<sup>31</sup> This requirement is troublesome for all MPSG claimants, but is particularly grave for LGBTI individuals, given the fact that most sexual minorities conceal their true identity to avoid adverse attention, thereby trying to remain as “socially invisible” as possible.<sup>32</sup> The relevance of the other Convention grounds enumerated in the 1951 Convention, such as political opinion and religion, have not yet been fully explored in jurisprudence and warrant further discussion.

28. Another area of concern is the use of the Internal Flight Alternative (IFA) by adjudicators to deny asylum claims made by LGBTI persons.<sup>33</sup> This argument is sometimes used to reject claims without being properly analyzed by adjudicators, who may assume that a LGBTI person can safely return to a larger city or different area of the country where s/he is not known, without any country of origin or other information supporting such a claim.

29. Same-sex partners and spouses of LGBTI refugees are recognised as family members for the purposes of family reunification by several States, provided that the relationship is stable or “marriage-like”. Others restrict the notion of “family” to opposite sex spouses, while some require official proof of partnership or cohabitation from the country of origin. These requirements are especially difficult to meet for LGBTI refugees from countries which prohibit such relationships.

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<sup>29</sup> Ibid.

<sup>30</sup> *UNHCR Guidance Note*, above footnote 1, para. 32 and footnotes thereto. See also, International Commission of Jurists (ICJ), *Sexual Orientation, Gender Identity and Human Rights Law Practitioners Guide No 4*, 2009, at 131–133, discussing gender expression and identity-related claims and, for instance, *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department*, above footnote 25.

<sup>31</sup> Nicole LaViolette, above footnote 17, at 191. See also, Fatma Marouf, “*The Emerging Importance of ‘Social Visibility in Defining a ‘Particular Social Group’ and its Potential Impact on Asylum Claims Related to Sexual Orientation and Gender*” (2008), 27 *Yale Law and Policy Review* 47–106, at 78–88.

<sup>32</sup> UNHCR has made several court interventions before United States Courts in this regard. See, e.g., *Rivera-Barrientos v. Holder, United States Attorney General: Brief of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Petitioner*, 18 August 2010, No. 10–9527, available at: <http://www.unhcr.org/refworld/docid/4c6cdb512.htm>; and *Valdiviezo-Galdamez v. Holder, Attorney General. Brief of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of the Petitioner*, 14 April 2009, available at: <http://www.unhcr.org/refworld/docid/49ef25102.html>.

<sup>33</sup> See *UNHCR Guidance Note*, above footnote 1, para. 33. See also, UKLGIG above footnote 22, at 5, discussing its findings that 68% of the initial asylum decision denials of lesbian and gay claimants in the United Kingdom included an assertion by the Home Office that the claimants could relocate to another area of countries, such as Jamaica, an island nation with a reputation for wide-spread prejudice against LGBTI individuals.

## *Procedural Issues*

30. Respondents and relevant literature report incidents of bias and invasive questioning by interviewers, a lack of confidentiality and privacy in the interview itself and use of insensitive or prejudiced interpreters in interview procedures.<sup>34</sup>

31. Respondents reported widely about the culture of disbelief associated with asylum claims based on sexual orientation and gender identity.<sup>35</sup> One reason cited for this trend is a misplaced reliance by interviewers on stereotypical images of how LGBTI persons act without regard to regional and cultural differences.<sup>36</sup> Also, many Respondents recounted how difficult it is for LGBTI asylum applicants to reveal their sexual orientation or gender identity and their experiences during the first asylum interview. Some asylum authorities have acknowledged these challenges and made provisions not to disadvantage the applicant for late submission of the sexual orientation aspects of the claim. One Respondent reported that some applicants exaggerate or fabricate their claims based on inept advice or in a misguided belief that doing so will help their case. These factors place adjudicators in a difficult position when trying to judge the credibility of an applicant's claim.

32. Establishing a valid claim in this atmosphere, especially without adequate country of origin or other information to corroborate the account, is a significant challenge. Several Respondents emphasized the need for interview tools and techniques that incorporate sexual minority perspectives,<sup>37</sup> and staff training and mainstreaming of issues related to claims based on sexual orientation and gender identity. The need for a better understanding of the difficulties in gathering evidence to support claims based on sexual orientation and gender identity and strategies for gathering evidence also arose in Respondents' comments. Improved interview techniques and reliance on the applicant's self-identification can help reduce the need for such evidence. Initiatives are underway to develop such interview and questions tools.

33. The use of tests, such as the "plethysmography" and "vaginal photoplethysmograph", to ascertain whether the applicant is gay or lesbian is of particular concern. These methods use instruments attached to the genitals in an attempt to test for sexual arousal. This type of invasive testing raises several human rights, human dignity and ethical concerns, including the rights to privacy and bodily integrity. Due process rights are also threatened as the reliability of such tests are highly questionable.

### ***iii. Detention and physical security***

34. Detention of LGBTI asylum-seekers and refugees in the country of transit or asylum exposes them to a heightened risk of further abuse, including sexual assault.<sup>38</sup> Transgender

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<sup>34</sup> *Unsafe Haven*, above footnote 20, at 14.

<sup>35</sup> See Laurie Berg and Jenni Millbank, "Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants" (2009), *Journal of Refugee Studies*, Vol. 22, No. 2, 195–223, at 217, available at <http://jrs.oxfordjournals.org/content/22/2/195.short>.

<sup>36</sup> *UNHCR Guidance Note*, above footnote 1, para. 36.

<sup>37</sup> See generally Berg and Millbank, above footnote 35, discussing the need to establish and present a narrative of sexual identity early in the claim process to avoid credibility problems.

<sup>38</sup> For instance, the Concluding Observations of the UN Committee Against Torture expressed concern about reliable reports of immigration detainees in the United States being subject to sexual assault in detention, with

detainees can be kept in isolation (or placed in a population that does not reflect their gender identity) and denied access to critical medical care such as hormonal therapy. Refugees and asylum-seekers who have medical issues relating to their HIV status may have particular medical needs that are not being met in detention, or could be subject to discrimination due to their HIV status. As other detained asylum-seekers and refugees, access to LGBTI detainees by lawyers and other supportive persons is often denied or made more difficult by the fact that the detention centre is in a remote location. Lack of access to legal and other support increases the likelihood of *refoulement* as the claimant's ability to make a viable claim is compromised by detention.

35. One of the most prevalent protection issues raised in literature and by Respondents is the physical safety of LGBTI persons during the asylum process. Reports show that many are attacked and harassed by local people and other asylum-seekers and refugees.<sup>39</sup> Incidents of violence, detention and *refoulement* are typically higher in countries where same-sex relations are criminalized. Human Rights Watch recently reported on incidents in which gay men who possessed UNHCR registration documentation were deported from Jordan and Syria back to Iraq.<sup>40</sup>

36. There is also lack of sufficient police protection of LGBTI persons in some host countries, especially where same sex relations are criminalised. LGBTI individuals are reluctant to report abuse for fear of retaliation by their abusers or a belief that police will either not act or will inflict further harm on them. They may fear arrest and detention. The mistreatment by private actors, combined with a lack of protection by authorities, leads to a feeling of isolation and highlights the multiple discrimination this population faces.

37. Security issues for LGBTI persons are reported to exist in both urban settings and camps. For instance, in Turkey, asylum-seekers and refugees are housed in urban settings dispersed widely throughout the country. Local populations in these "satellite cities" tend to be more socially conservative and unwelcoming, leading to a sense of isolation and vulnerability for LGBTI asylum-seekers and refugees placed there.<sup>41</sup> Concern has been raised in some parts of the world as to the ability of authorities to adequately protect LGBTI persons housed in camps and transit centres, with suggestions that special housing arrangements should be made for them.

38. Several Respondents listed long waiting times for completion of the asylum process as a significant protection issue, exacerbating the security issues and multiple discrimination LGBTI asylum-seekers and refugees may encounter. This is a concern that LGBTI asylum-seekers and refugees share with many other groups at heightened risk. Respondents encouraged UNHCR to accelerate its processes and better apply its Heightened Risk Identification Tool ("HRIT") and related procedures from the time of registration so those applicants at greatest risk can have their claims processed more quickly. As NGOs often are the first point of contact for many individual LGBTI claimants, NGOs have an important role to play in preparing case files and referring individuals to UNHCR and other actors for protection and assistance.

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"persons of differing sexual orientation" being especially vulnerable. UN Committee Against Torture, Concluding Observations: United States of America, CAT/C/USA/Co/2, July 2006.

<sup>39</sup> *Unsafe Haven*, above footnote 20, at 18–20.

<sup>40</sup> *They Want Us Exterminated*, above footnote 19, at 54–57.

<sup>41</sup> *Unsafe Haven*, above footnote 20, at 3, 12.

#### ***iv. Access to services***

39. LGBTI asylum-seekers and refugees experience widespread discrimination when accessing housing, employment, education, health and psychological care and other social services in host countries.<sup>42</sup> They may be evicted from their housing and fired from jobs once their sexuality or gender identity is revealed. The frequent lack of any financial support from families or communities results in double marginalization, where the combined effect of being a refugee and being LGBTI is compounded.<sup>43</sup> Without access to a means to support themselves, some LGBTI persons resort to sex work to survive.

40. LGBTI individuals who are HIV positive can suffer the double stigma of being a sexual minority and living with HIV. This can create barriers to accessing critical HIV prevention and care services.

#### ***v. Staff attitudes***

41. Many Respondents reflected that some NGOs and other service providers in host countries may be reluctant to help LGBTI asylum-seekers and refugees in certain country contexts. Some reasons given include the conservative attitudes of NGOs and lack of understanding of issues relating to sexual orientation and gender identity. Sometimes, agencies themselves have a policy on assisting LGBTI persons but their front line staff (or country staff) was found to be prejudiced and unwelcoming. A lack of assistance from NGOs was reported to be especially problematic in some countries that have laws criminalizing same-sex conduct. In these situations, even where NGOs desire to assist LGBTI asylum-seekers and refugees, they risk antagonizing authorities if they do so.

42. Adverse attitudes and/or lack of understanding of the dynamics and risks associated with persons making claims based on sexual orientation and gender identity were also reported. UNHCR recognizes this problem within its own agency and is taking steps to mainstream LGBTI issues into its existing policy and procedures in the field. For instance, sexual minorities are addressed in the HRIT, and UNHCR's Age, Gender and Diversity Mainstreaming ("AGDM") strategy is being updated to reflect LGBTI persons under the "diversity" subheading.

### **C. Durable solutions**

43. Durable solutions for refugees include voluntary repatriation, local integration and resettlement to a third country.<sup>44</sup> UNHCR uses its HRIT to assist with determinations regarding which durable solution is appropriate for refugees.

44. The protection risks discussed in this Paper reveal that prejudice against LGBTI individuals is deeply entrenched both in laws and in people's minds in many societies. A durable and fundamental change in the treatment of sexual minorities may therefore not be expected in the foreseeable future and voluntary repatriation may not be a viable option for most LGBTI refugees.

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<sup>42</sup> See generally, *ibid.*, detailing the experience of LGBTI asylum-seekers and refugees in Turkey.

<sup>43</sup> *Ibid.*, at 21–22.

<sup>44</sup> Refugee resettlement in another country is recognized by UNHCR as both a durable solution and a protection tool.

45. Respondents raised at length the protection gaps for LGBTI asylum-seekers and refugees in countries of first asylum, showing the limited availability of local integration in many cases. Resettlement in a third country may be the most likely scenario for many LGBTI refugees who have sought protection. Further efforts are needed to identify and address the risk factors that could potentially indicate resettlement as the only viable option for some LGBTI refugees, including through the use of the revised HRIT and referral mechanisms.

46. Many Respondents agreed that the resettlement process often is too lengthy, although some LGBTI refugees have been resettled within a matter of weeks. UNHCR works with a number of States to resettle LGBTI refugees in urgent need, in particular from countries of asylum which do not accept such cases under their national asylum procedures and/or punish same sex relations by law. Some Respondents indicated that referral systems for resettlement do not generally have provisions addressing the specific needs of LGBTI individuals or households. Some countries do not have any provisions for resettling refugees with a same-sex partner.

47. One final concern is the treatment of LGBTI refugees once they are resettled. Apart from facing the same challenges as other refugee groups who arrive in a foreign land, LGBTI refugees can sometimes suffer additional marginalization based on their sexual orientation and gender identity. The trauma experienced by LGBTI refugees and the absence of family support makes them especially vulnerable and frequently in need of psychological help. Moreover, transgender and intersex refugees often require medical assistance that they may be unable to receive in the resettlement country for a variety of reasons, including cost. One Respondent commented that, due to lack of awareness and foresight, refugees may be resettled to locations where negative biases on sexual orientation and gender identity could result in services that are not supportive or appropriate for LGBTI refugees or even hostile treatment from local residents.

## **V. PARTICULAR RISKS FOR LGBTI PERSONS AS DISTINCT GROUPS**

48. Nearly all Respondents commented on the specific protection issues related to the different positions of lesbian, gay, bisexual, transgender and intersex persons. LGBTI persons can suffer abuses in similar ways, but they also exist as distinct groups with unique experiences. Their experiences can differ due to age, gender, sexual orientation and the particular region of the world in which they live. An understanding of the dynamics associated with sexual orientation and gender identity-related persecution and asylum claims will continue to evolve as more information on LGBTI asylum-seekers and refugees becomes available.

49. In relation to lesbians, the multiple discrimination borne of being a foreigner, female and lesbian was raised. Women's generally inferior economic and social status makes it harder for them to flee persecution in their country of origin, to access asylum processes, and protect and support themselves in a new country. Single women living alone are particularly vulnerable to suspicion and attack.<sup>45</sup> As other women, lesbians also have been unable to access State protection when they are abused by family members because incidents of domestic violence are not pursued by authorities in the country of origin. Because harm against lesbians is often at the hand of private actors, it sometimes tends to be considered a personal problem or, at best, a common crime, that is not related to a Convention ground. A lack of reliable country information

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<sup>45</sup> *UNHCR Guidance Note*, above footnote 1, at para. 15.

on lesbians promotes the idea that they are not subject to persecution. Asylum claims made by lesbians tend to have lower recognition rates than those made by gay men.<sup>46</sup>

50. Gay men have difficulty disclosing incidents of sexual violence experienced in their home countries, which inhibits their ability to make a viable claim for asylum. They may be disbelieved by adjudicators if they do not fit the stereotype of what a gay man should look like, or if they were previously married. Masculine gay men may also be disadvantaged if adjudicators believe they would not be recognized as gay if returned to their country of origin.

51. Bisexuals face extremely low asylum claim recognition rates and are largely invisible in jurisprudence.<sup>47</sup> Even where applicants self-identify as bisexual, adjudicators tend to analyse these claims within a hetero- or homosexual context. Some adjudicators do not believe bisexuality really exists as a sexual orientation, and feel that bisexuals can return to their countries of origin and elect to be heterosexual, thereby avoiding persecution. They face major credibility issues in asylum procedures if they have had heterosexual partners. There is little country of origin information about bisexuals, which makes it difficult for such applicants to corroborate their claims.

52. Transgender asylum-seekers and refugees suffer multiple discrimination based on their gender identity or gender expression. Respondents reported that transgender persons seem to experience particularly severe marginalization because they are subject to sexual abuse and violence, discrimination, extreme poverty, lack of access to education, health and psychological care, work and housing. It is reported that this marginalization leads many transgender persons to engage in sex work in order to survive. Transgender persons experience difficulties in transit and at borders when their legal documents do not match their identities. This often leads to searches, detention and incidents of abuse. In asylum procedures, transgender persons are often viewed by adjudicators as opportunistic cross-dressers without serious protection needs. As with other groups, a lack of country information exists regarding human rights abuses perpetrated against them. Transgender persons who are involved in medical treatments related to transition suffer from a lack of access to such treatments in transit countries and upon resettlement. Too often, the abusive conditions they endured in their country of origin are replicated in the country in which they are resettled.

53. The difficulties intersex persons face is an evolving topic. Like LGBT persons, they can be subject to persecution for failing to conform to gender norms. In some countries, intersex persons are considered evil and have been subjected to ritual ceremonies. Their families can be persecuted for having an intersex child. Intersex persons may have a need for ongoing medical services or surgical/post surgical assistance that may not be available in transit countries or where they are resettled. They may be forced to endure unwanted surgeries. There appears to be little or no country information available for this group, and a lack of understanding of the dynamics associated with intersex persons and the nature of asylum claims made by them is apparent.

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<sup>46</sup> See generally Victoria Neilson, above footnote 27.

<sup>47</sup> Sean Rehaag, “*Bisexuals need not apply: a comparative appraisal of refugee law and policy in Canada, the United States and Australia*” (2009) *International Journal of Human Rights*, 13:2 415–436, at 420, available at <http://www.informaworld.com/smpp/title~db=all~content=g912655321>.

54. One issue is whether intersex persons are persecuted because they have physical or sexual manifestations of both sexes. Intersex persons could be subject to harm when they publicly transition from one sex to the other, elect to remain in a nonbinary (male or female) gender status, or are subject to involuntary sexual reassignment surgery that could amount to genital mutilation.<sup>48</sup> In such situations, intersex persons may qualify for international protection under the 1951 Convention.

## VI. SUMMARY OBSERVATIONS

55. The observations below seek to summarize the most important and pressing protection concerns identified in this paper in the treatment of LGBTI asylum-seekers and refugees.

- A. LGBTI persons are entitled to all human rights on an equal basis with others. 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. They have the right to live openly as who they are.
- B. An understanding of the multiple forms of harm and discrimination experienced by LGBTI persons throughout the displacement cycle is vital for States, NGOs and UNHCR staff. An appreciation of the relationship between non-conformance to expected gender roles and sexual orientation and gender identity is also key to protecting LGBTI individuals. Lesbians, gays, bisexuals, and transgender and intersex persons all experience persecution and discrimination in distinct ways. An understanding of their unique vulnerabilities is important in all stages of the displacement cycle.
- C. Like LGBT persons, intersex individuals can be subject to persecution in ways that relate to their non-conformance with gender norms. In such situations, intersex persons could be eligible for protection under the 1951 Convention.
- D. More attention should be placed on protecting LGBTI asylum-seekers and refugees during flight and upon arrival in host countries, including from *refoulement*, physical and sexual violence, and crimes committed in the name of honour. More efforts are also needed to ensure that they receive non-discriminatory and appropriate services from States, UNHCR and NGOs. Protection in the field must include an approach that is sensitive to sexual orientation and gender identity.
- E. Laws criminalizing consensual same-sex relations pose significant problems for LGBTI asylum-seekers and refugees throughout the displacement cycle. Even when these laws are not enforced, their existence often reflects a culture of intolerance toward LGBTI individuals. These 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. They create severe security issues for sexual minorities in countries of

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<sup>48</sup> More information on protecting people with intersex conditions against involuntary genital surgeries can be found at the Intersex Society of North America's website, available at <http://www.isna.org/>.

first asylum and increase the threat of *refoulement*. It is important to develop specific guidance on how to provide protection in countries where these laws exist.

- F. Several substantive issues regarding the treatment of refugee claims based on sexual orientation and gender identity remain problematic. 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 and the ability of bisexual and intersex applicants to make claims under this 1951 Convention ground is not well established. The difficulty and complexity in establishing State failure to protect against harm perpetrated by private actors also remains misunderstood, while the use of the “discretion” concept is inappropriate and the Internal Flight Alternative analysis is often misapplied. Anti-homosexuality laws also need to be further analysed.
- G. The procedural aspects of refugee status determination also present many challenges, including a lack of country information, credibility problems for claimants related to a lack of understanding of sexual and gender identity dynamics and insensitive and invasive questioning, and in some cases testing. Long waiting periods for asylum interviews, coupled with inadequate reception conditions, may exacerbate protection risks.
- H. Additional steps need to be taken to rectify protection challenges in both refugee determination procedures and while asylum-seekers await decisions, including providing policy and practical guidance and supporting additional training and education for staff. Such efforts need to take into consideration the diversity of issues involved in sexual orientation and gender identity-related claims and the necessity for tailoring training to different regions.
- I. Due to the intolerant environment that permeates many countries, resettlement is often the only viable durable solution for LGBTI refugees. Further development of risk assessment and resettlement procedures that encompass the multiple discrimination to which LGBTI refugees are subjected is therefore vital to their protection.

Division of International Protection  
September 2010



## Annex I. Glossary of Key Sexual Orientation and Gender Identity-Related Terms\*

<b>Bisexual</b>	An individual who is physically, romantically and/or emotionally attracted to both men and women. Bisexuals need not have had equal sexual experience with both men and women. In fact, they need not have had any sexual experience at all to identify as bisexual.
<b>Closeted</b>	Describes a person who is not open about his or her sexual orientation.
<b>Cross-Dressing</b>	To occasionally wear clothes traditionally associated with people of the other sex. Cross-dressers are usually comfortable with the sex they were assigned at birth and do not wish to change it. Cross-dressing is a form of gender expression and is not necessarily tied to erotic activity. A cross-dresser is sometimes referred to as a <i>transvestite</i> .
<b>Coming out</b>	A lifelong process of self-acceptance. People forge a lesbian, gay, bisexual or transgender identity first to themselves and then may reveal it to others. Publicly identifying one's sexual orientation may or may not be part of coming out.
<b>Gay</b>	Used to describe people whose enduring physical, romantic and/or emotional attractions are to people of the same sex (e.g., <i>gay man</i> , <i>gay people</i> ). Often used to describe a man who is sexually attracted to other men, but may be used to describe lesbians as well.
<b>Gender</b>	Refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another. Sex, on the other hand, is a biological determination.
<b>Gender Expression</b>	The external manifestation of one's gender identity, usually expressed through "masculine," "feminine" or gender-variant behavior, clothing, haircut, voice or body characteristics. Typically, transgender people seek to make their gender expression match their gender identity, rather than their birth-assigned sex.
<b>Gender Identity</b>	Refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth. It includes 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.
<b>Heterosexual</b>	A person whose enduring physical, romantic and/or emotional attraction is to people of the opposite sex. Also referred to as being <i>straight</i> .
<b>Homosexual</b>	An outdated clinical term defining a person attracted primarily to people of the same sex. It is considered derogatory and offensive by many gay people. <i>Gay</i> and/or <i>lesbian</i> better describes people who are attracted to people of the same sex.
<b>Homophobia</b>	Fear of lesbians and gay men. <i>Prejudice</i> or <i>Intolerance</i> are usually more accurate descriptions of hatred or antipathy toward LGBTI people.
<b>Intersex</b>	Refers to a condition of having sexual anatomy that is not considered standard for a male or female. Intersex can be used as an umbrella term covering differences of sexual development, which can consist of diagnosable congenital conditions in which development of chromosomal, gonadal or anatomic sex is atypical. The term <i>intersex</i> is not interchangeable or a synonym for <i>transgender</i> .
<b>Lesbian</b>	A woman whose enduring physical, romantic and/or emotional attraction is to other women. Some women prefer to be referred to as <i>gay</i> or <i>gay women</i> .
<b>LGBT or LGBTI</b>	An acronym for "lesbian, gay, bisexual and transgender" persons. Sometimes, persons with intersex conditions are also included, in which case the acronym

	becomes <i>LGBTI</i> .
<b>Outing</b>	The act of publicly declaring (sometimes based on rumor and/or speculation) or revealing another person's sexual orientation without his or her consent.
<b>Queer</b>	Traditionally a pejorative term, <i>queer</i> has been appropriated by some LGBT people to describe themselves.
<b>Sex</b>	The biological classification of people as male or female. At birth, infants are assigned a sex based on a combination of bodily characteristics including: chromosomes, hormones, internal reproductive organs, and genitals.
<b>Sexual Orientation</b>	Refers to each person's capacity for profound emotional, affectational and sexual attraction to, and intimate relations with, individuals of a different gender or the same gender or more than one gender.
<b>Sexual and Gender-Based Violence</b>	Any act of violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to persons on the basis of their sex or gender, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life. Gender-based violence encompasses violence against women and men because of how they experience and express their gender and sexualities.
<b>Sexual Minorities</b>	An umbrella term used to describe persons subject to discrimination and abuse due to their non-conformance with prevailing gender norms. Sometimes used in place of <i>LGBT</i> , or <i>LGBTI</i> .
<b>Sodomy Laws</b>	Laws that were historically used to selectively punish gay men, lesbians and bisexuals. These laws have been struck down in many countries.
<b>Transgender</b>	An umbrella term for people whose gender identity and/or gender expression differs from the sex they were assigned at birth. The term may include but is not limited to: transsexuals, cross-dressers, and other gender-variant people. Transgender people may identify as female-to-male (FTM) or male-to-female (MTF). Transgender people may or may not decide to alter their bodies hormonally and/or surgically.
<b>Transsexual</b>	An older term that originated in the medical and psychological communities. Unlike the term <i>transgender</i> , the word <i>transsexual</i> has a precise medical definition and is considered narrower in scope than <i>transgender</i> .
<b>Transition</b>	A term for the process of altering one's birth sex. This is a complex process that occurs over a long period of time. Transition includes some or all of the following personal, legal and medical adjustments: telling one's family, friends or co-workers; changing one's name and/or sex on legal documents; hormone therapy; and possibly (but not always) one or more forms of surgery.

\* The terminology in this Glossary was adapted from the following sources: Gay & Lesbian Alliance Against Defamation (GLAAD) *Media Reference Guide*, 8<sup>th</sup> edition, May 2010, Glossary of Terms, available at <http://www.glaad.org/document.doc?id=99>, Human Rights Watch, "*They Want Us Exterminated': Murder, Torture, Sexual Orientation and Gender in Iraq*," 2009, Glossary, available at <http://www.hrw.org/node/85050>, and the *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, 2007, available at [http://www.yogyakartaprinciples.org/principles\\_en.pdf](http://www.yogyakartaprinciples.org/principles_en.pdf).