

UNHCR Asylum Lawyers Project
October 2016

UNHCR's Views on Asylum Claims based on Sexual Orientation and/or Gender Identity
Using international law to support claims from LGBTI individuals seeking protection in the US

In recent years, the United Nations High Commissioner for Refugees (UNHCR) has issued several interpretive instruments recognizing the specific protection needs of lesbian, gay, bisexual, transgender and intersex (LGBTI) individuals.¹ This note details UNHCR's views in regards to the analysis of LGBTI claims and particular issues which may arise under such claims, and provides guidance on how to use such views in assisting asylum-seekers in the United States. The accompanying materials in this packet expand on this discussion.

The persecution of people because of their sexual orientation and gender identity is not a new phenomenon. It is only in more recent years that a growing number of asylum claims have been made by LGBTI individuals. This has necessitated greater awareness among decision-makers of the specific experiences of LGBTI asylum-seekers and a deeper examination of the legal questions involved.

I. Relevance of International Refugee Law in the United States

The 1951 Convention and its 1967 Protocol are the key international instruments governing the protection of refugees. The U.S. is a party to the 1967 Protocol² and has incorporated the substantive provisions of the Protocol into U.S. domestic law.³

U.S. courts have expressly relied on UNHCR interpretations and especially the Handbook on Procedures and Criteria for Determining Refugee Status (hereinafter Handbook)⁴ in assessing refugee claims, and have recognized that UNHCR's "analysis provides significant guidance for issues of refugee law."⁵ The U.S. Supreme Court has "consistently turned [to UNHCR] for assistance in interpreting our obligations

¹ UNHCR has adopted the following definitions: "A lesbian is a woman whose enduring physical, romantic, and/or emotional attraction is to other women. Gay is often used to describe a man whose enduring physical, romantic, and/or emotional attraction is to other men, although the term can be used to describe both gay men and lesbians. Bisexual describes an individual who is physically, romantically, and/or emotionally attracted to both men and women. Transgender describes people whose gender identity and/or gender expression differs from the sex they were assigned at birth. The term intersex covers bodily variations with regard to culturally established standards of maleness and femaleness, including variations at the level of chromosomes, gonads, and genitals." See UNHCR, *Protecting Persons with Diverse Sexual Orientations and Gender Identities: A Global Report on UNHCR's Efforts to Protect Lesbian, Gay, Bisexual, Transgender and Intersex Asylum-Seekers and Refugees* (2015).

² The *1967 Protocol* binds parties to comply with the substantive provisions of Articles 2 through 34 of the *1951 Convention* with respect to "refugees" as defined in Article 1A(2) of the *1951 Convention*. *1967 Protocol*, Art. 1, ¶¶ 1–2. The *1967 Protocol* universalizes the refugee definition in Article 1 of the *1951 Convention*, removing the geographical and temporal limitations. *Id.*, ¶¶ 2–3. The United States acceded to the *1967 Protocol* in 1968, thereby binding itself to the international refugee protection regime and the definition of a refugee in the *1951 Convention*. H.R. Conf. Rep. No. 96–781, at 19 (1980), reprinted in 1980 U.S.C.C.A.N. 160; H.R. Rep. No. 96–608, at 9 (1979); S. Exec. Rep. No. 14, 90th Cong., 2d Sess., 4 (1968).

³ Refugee Act of 1980, Pub. L. No. 96–212, 94 Stat. 102.

⁴ The UNHCR Handbook was prepared by this Office at the request of the Member States of the Executive Committee of the High Commissioner's Programme, including the United States, in order to provide guidance to governments in applying the terms of the Convention and Protocol. See Handbook, 1 para. IV.

⁵ *INS v. Cardoza-Fonseca*, 480 U.S. 421, N. 22 (1987).

under the Refugee Convention.”⁶ In addition, under U.S. jurisprudence, U.S. courts have an obligation to construe U.S. statutes in a manner consistent with U.S. international obligations whenever possible.⁷

To complement and expand on the interpretive guidance in the *Handbook*, UNHCR began issuing *Guidelines on International Protection* in 2002. As is relevant here, in 2012 UNHCR issued the *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* [hereinafter *Sexual Orientation Guidelines*]. The *Sexual Orientation Guidelines* offer substantive and procedural guidance on the determination of refugee status of individuals on the basis of their sexual orientation or gender identity.

International law can be a helpful tool to support an individual’s claim to refugee status. However, in order for international law to be considered, it must be part of the record. Therefore, please be advised to submit documentation of international law, such as UNHCR’s *Guidelines on International Protection* or *Eligibility Guidelines*,⁸ before the record when applicable to your client’s case.

II. Analysis of Claims based on Sexual Orientation and/or Gender Identity

Article 1(A)(2) of the Convention and Article 1 of the Protocol define a refugee as a person who:

“Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality, and being outside the country of his former habitual residence . . . is unable or, owing to such fear, is unwilling to return to it.”

The U.S. incorporated this definition into domestic immigration law through the Refugee Act of 1980.⁹ Under this definition, individuals seeking refugee status must demonstrate that: (1) they are outside of their country of nationality or former habitual residence; (2) they fear persecution (the "subjective element"); (3) such fear of persecution is well-founded (the "objective" element); (4) such persecution is "for reasons of race, religion, nationality, membership of a particular social group or political opinion"; and (5) owing to such fear, they do not wish to return to their country of nationality or former habitual residence. A majority of the analysis for LGBTI claims arises under the third (well-founded fear of persecution) and fourth (the causal link- “for reason of”) elements. Thus, the discussion will focus on these issues.

⁶ *N-A-M v. Holder*, 587 F.3d 1052, 1061-62 (10th Cir. 2009) (Henry, C.J. concurring) (citing cases).

⁷ *Murray v. The Charming Betsy*, 6 US 64, 80 (1804) (“[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”). See also *INS v. Cardoza-Fonseca*, 480 US 421, 436-7 (1987) (The U.S. Supreme Court found “abundant evidence” that Congress intended to conform the definition of refugee and the asylum law of the U.S. “to the United Nation’s (sic) Protocol to which the United States has been bound since 1968.”).

⁸ See e.g., UNHCR, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, October 2012, available at <http://www.unhcr.org/509136ca9.pdf> [hereinafter *Sexual Orientation Guidelines*]; UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador*, March 2016, available at <http://www.refworld.org/docid/56e706e94.html>.

⁹ Pub. L. No. 96-212, 94 Stat. 102.

a. Well-Founded Fear of Persecution

An asylum-seeker must show that his or her fear is well-founded. One of the chief issues posed by the refugee claims of LGBTI individuals is whether the harm or fear they have experienced constitutes persecution. According to the Handbook, a threat to life or liberty or other serious human rights violation for reasons of one of the five grounds listed in the 1951 Convention/1967 Protocol always amounts to persecution.¹⁰ Thus, where individuals can show that they have experienced, or have good reason to fear, serious violations of their human rights on account of their sexual orientation or gender identity, such acts amount to persecution. In addition, an applicant for asylum may have been subjected to various measures not in themselves amounting to persecution, but “if taken together, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on ‘cumulative grounds.’”¹¹

As recognized in the *Sexual Orientation Guidelines*, discrimination is often a common element in the experiences of LGBTI individuals. As in other refugee claims, discrimination will amount to persecution where measures of discriminations, individually or cumulatively, lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on the right to earn one’s livelihood or access to available educational facilities.¹² An analysis of the cumulative effect of discrimination is to be made by reference to reliable, relevant, and up-to-date country of origin information.

Threats of serious abuse and violence are also common in LGBTI claims. Physical, psychological, and sexual violence, including rape, would generally meet the threshold level required to establish persecution.¹³ In addition, laws criminalizing same-sex relations, depending on the individual and contextual circumstances of the case, may rise to the level of persecution.¹⁴

Persecution normally relates to acts by the authorities of a country. However, where serious discriminatory acts are committed by segments of the population (“non-State actors”), these acts will also amount to persecution if the government knowingly tolerates the behavior, or if it is unwilling or unable to provide effective protection.¹⁵ State protection would normally neither be considered available nor effective, for instance, where the police fail to respond to requests for protection or the authorities refuse to investigate, prosecute or punish (non-State) perpetrators of violence against LGBTI individuals with due diligence.¹⁶

Finally, when assessing country conditions evidence under this analysis, it is important to consider how to weigh evidence of improving conditions in an LGBTI asylum-seekers country of origin. Although LGBTI individuals the world over continue to suffer from serious human rights abuses, some countries have taken steps towards positive change. In this regard, UNHCR reiterates that, under the 1951 Convention and the 1967 Protocol, the question is not whether some progress is being made or whether some protections exist. Rather, the question is whether the State is either unable or unwilling in law and in practice to provide effective protection against persecution and serious harm to LGBTI individuals. As discussed in the *Sexual*

¹⁰ Handbook at para. 51.

¹¹ *Id.* at para. 53.

¹² *Sexual Orientation Guidelines*, para. 17.

¹³ *Id.* at para. 20.

¹⁴ *Id.* at para. 26-29.

¹⁵ Handbook at para. 65.

¹⁶ *Sexual Orientation Guidelines*, para. 34-37.

Orientation Guidelines:

“Where laws criminalizing same-sex conduct have been repealed or other positive measures have been taken, such reforms may not impact in the immediate or foreseeable future as to how society generally regards people with differing sexual orientation and/or gender identity.”¹⁷

To make this assessment, it is incumbent on adjudicators tasked with making refugee status determinations to take a comprehensive view of multiple independent and reliable sources to understand the situation in an applicant’s country of origin.

b. Establishing the Causal Link- “for reasons of”

In addition to establishing persecution, asylum applicants must also show that their fear of persecution is based on one of the five grounds. In this regard, refugee claims based on sexual orientation and/or gender identity are most commonly recognized under the “membership in a particular social group” ground.¹⁸ According to the Handbook, “a ‘particular social group’ normally comprises persons of similar background, habits or social status.”¹⁹ An asylum-seeker may belong to a social group whose members have a shared identity based on their distinct sexual orientation and/or gender identity.

The Handbook notes that “membership of such a particular social group may be at the root of persecution because ... the very existence of the social group as such is held to be an obstacle to the Government’s policies.”²⁰ For example, in some countries, an individual may be persecuted by classmates, family, police, or other state agents because he or she is perceived as a homosexual and that identity is considered an affront to the religious and moral sensibility of the country. Insofar as the individual claiming asylum shares a common identity with other individuals based on sexual orientation, and insofar as that identity is the reason for their being targeted for persecution, they are properly viewed as members of a particular social group within the meaning of the 1951 Convention and 1967 Protocol refugee definition. As explained in the *Sexual Orientation Guidelines*, “[a]n applicant’s sexual orientation and/or gender identity can be relevant to a refugee claim where he or she fears persecutory harm on account of his or her actual or perceived sexual orientation and/or gender identity, which does not, or is seen not to, conform to prevailing political, cultural or social norms.”²¹

Finally, we note that refugee status adjudicators from several signatories to the 1951 Convention and/or 1967 Protocol, including the United States, have shown a pattern of granting asylum to LGBTI individuals for their membership in a particular social group. In Matter of Toboso-Alfonso, Int. Dec. 3222 (BIA 1990), designated as precedent on 16 June 1994 by the Attorney General, the U.S. Board of Immigration Appeals (BIA) held that a Cuban man, who had been detained, questioned, and subjected to a number of physical examinations by the Cuban authorities because of his status as a gay man, should be granted refugee status based on his membership in a particular social group.

¹⁷ *Id.* at para. 37.

¹⁸ *Id.* at para. 40 (noting that “Other grounds may though also be relevant depending on the political, religious and cultural context of the claim. For example, LGBTI activists and human rights defenders (or perceived activists/defenders) may have either or both claims based on political opinion or religion if, for example, their advocacy is seen as going against prevailing political or religious views and/or practices.”).

¹⁹ Handbook at para. 77.

²⁰ *Id.* at para. 78.

²¹ *Sexual Orientation Guidelines*, para. 13.

Since the designation of Toboso-Alfonso as precedent, the number of precedential LGBTI cases in the United States has more than tripled. The U.S. has recognized LGBTI claims arising under a variety of circumstances and from a wide range of geographical locations, including:

- Lesbians: The 8th Circuit has recognized that homosexuals may constitute a “particular social group” under the statute, and noted that the government’s unwillingness or inability to control a private actor may apply in a lesbian asylum case.²² The 9th Circuit has found that “Russian lesbians” constituted a particular social group, and clarified that persecution does not require showing that actors have the subjective intent to punish the asylum-seeker.²³
- Gay men: Several U.S. courts have granted asylum to individuals on the basis that gay men may constitute a particular social group.²⁴
- Transgender identity: The 9th Circuit granted relief under the Convention against Torture (CAT) to a transgender woman from Mexico, and found that “[t]he unique identities and vulnerabilities of transgender individuals must be considered in evaluating a transgender applicant’s asylum, withholding of removal, or CAT claim.”²⁵
- Gay men with female sexual identities: The 9th Circuit has found that gay men with female sexual identities in Mexico constitute a particular social group because sexual identity and orientation are immutable.²⁶
- Sexual orientation and/or HIV+ status: The 9th Circuit has found that a gay Mexican man with AIDS who was sexually and physically abused by a Mexican police officer was statutorily eligible for asylum.²⁷ The 11th Circuit granted relief under CAT to a HIV+ Haitian male who faced imprisonment in Haiti, finding that he had proven that he would be singled out for abuse amounting to persecution by prison guards because of his AIDS-related mental illness.²⁸

III. Overview of other Issues and Materials

- For more substantive analysis of LGBTI asylum claims, including claims based on other Convention grounds and further discussion of persecution emanating from non-State actors, see:
 - *Guidelines on Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees (Sexual Orientation Guidelines)*, ¶¶12-50

²² *Nabulwala v. Gonzales*, 479 F.3d 972 (8th Cir. 2007).

²³ *Pitcherskaia v. INS*, 118 F. 3d 641, 647 (9th Cir. 1997).

²⁴ See e.g., *Barrios-Aguilar v. Holder*, 386 Fed. Appx. 587, 2010 WL 2725576, 2010 U.S. App. LEXIS 13674 (9th Cir. 2010); *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (holding that “all alien homosexuals” constitute a particular social group); *Samuel Dario Morett v. Gonzales*, No. 05-5450, 190 Fed. Appx 47, 2006 U.S. App. LEXIS 18152, 2006 WL 2022009 (2d Cir. 2006); *Todorovic v. U.S. Attorney General*, 621 F.3d 1318 (8th Cir. 2010).

²⁵ *Avendano-Hernandez v. Lynch*, 800 F.3d 1072 (9th Cir. 2015).

²⁶ *Hernandez-Montiel v. INS*, 225 F.3d 1088 (9th Cir. 2000); *Reyes-Reyes v. Ashcroft*, 384 F.3d 782 (9th Cir. 2004) (reaffirming that a “gay man with a female sexual identity” is a member of a particular social group).

²⁷ *Boer Sedano v. Alberto Gonzales*, 418 F.3d 1082 (9th Cir. 2005).

²⁸ *Jean-Pierre v. U.S. Attorney General*, 500 F.3d 1315 (11th Cir. 2007).

- *UNHCR, Discussion Paper, The Protection of Lesbian, Gay, Bisexual, Transgender and Intersex Asylum-Seekers and Refugees (UNHCR LGBTI Discussion Paper)*
- For a discussion of how to assess internal flight or relocation alternatives, see:
 - *Sexual Orientation Guidelines*, ¶¶51-56
- For further discussion of how to weigh evidence of improving conditions in an LGBTI asylum seeker's country of origin,
 - *Bringas-Rodriguez v. Lynch, UNHCR Amicus Curiae Brief in Support of Petitioner's Petition for Panel Rehearing or Rehearing En Banc* (2016)
- For a discussion of UNHCR's views on "concealment" of sexual orientation and/or gender identity, or use of a "discretion" requirement, see:
 - *Sexual Orientation Guidelines*, ¶¶30-33
 - *UNHCR Intervention before the Supreme Court of the United Kingdom in the case of HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department* (2010)
- For an analysis of whether criminalization of same-sex relations amounts to persecution per se, see:
 - *Sexual Orientation Guidelines*, ¶¶26-29
 - *UNHCR Intervention before the Court of Justice of the European Union in the cases of Minister voor Immigratie en Asiel v. X, Y, and Z* (2013)
- For an analysis of issues related to credibility assessments of LGBTI asylum-seekers, see:
 - *Sexual Orientation Guidelines*, ¶¶62-63
 - *UNHCR's Oral Submission at the Court of Justice of the European Union: Hearing of the case of Minister voor Immigratie en Asiel v. A, B, and C* (2014)
- For a discussion of issues arising under the detention of LGBTI asylum-seekers and refugees, see:
 - *UNHCR LGBTI Discussion Paper*, ¶¶34-44