



# Representing LGBTI Asylum-Seekers: Leveraging International Law to Strengthen Asylum Claims

April 2017

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## Discussion Points



- o Introduction of speakers;
- o Discussion of UNHCR and international law guidance on LGBTI asylum claims;
- o Current issues and strategies for representing LGBTI asylum-seekers in U.S. proceedings;
- o Hypothetical case example.

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## UNHCR in the United States

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## UNHCR: Protection of LGBTI Asylum-Seekers

### UNHCR's work on protection of LGBTI asylum-seekers in the U.S.:

- o Identifying root causes of migration through **research** and **public reports**
- o Protecting access to territory and asylum through **advocacy & confidential reporting**
- o Identifying protection challenges in accessing territory/asylum through **monitoring**
- o Advocating and supporting use of **alternatives to detention (ATDs)**
- o Offering interpretive guidance on the refugee definition from a LGBTI perspective through **strategic litigation**

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## Women on the Run

- o **Purpose:** To learn directly from women why they left their homes and to assess the severity of the international protection situation;
- o **Scope:** Based on 160 interviews with women from NTCA countries and Mexico who were either recognized as refugees or who had been found to have a credible or reasonable fear of persecution;
- o **Findings specific to LGBTI individuals seeking protection:**
  - o Paramilitary, rebel groups, and so-called "gangs" in particular may target LGBTI individuals.
  - o Where non-State entities inflict harm on an LGBTI person (either in collaboration with the State or police, or where State protection is unavailable), the person qualifies for refugee protection.
  - o Families and communities may threaten serious harm on LGBTI individuals, and this can constitute persecution where (as is often the case) there is no meaningful State protection.
  - o Transgender persons may be at heightened risk.

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## International Refugee Law in the U.S. Context

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## U.S. Legal Framework

### International Treaties

- o U.S. acceded to the 1967 Protocol in 1968
  - o The Protocol incorporates the substantive provisions of the 1951 Convention

### Domestic Legislation

- o Refugee Act of 1980: Enacted by Congress to bring the U.S. into conformance with the 1967 Protocol

## How to Use UNHCR Interpretive Guidance

### Courts look to UNHCR guidance and reports for:

- o Interpretation of the refugee definition
- o Guidance on interpreting specific legal questions
- o Evidence of country conditions in the asylum seekers country of origin

### UNHCR Guidance Includes:

- o UNHCR Handbook
- o UNHCR Guidelines on International Protection
- o UNHCR Eligibility Guidelines
- o UNHCR reports

## UNHCR Guidance on LGBTI Asylum Claims

### Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity

- o International human rights law protecting equality and non-discrimination;
- o Common forms of persecution in LGBTI claims, including discrimination, sexual violence, and laws criminalizing same-sex relations;
- o Interpreting religion, PSG, and political opinion in LGBTI claims as grounds to refugee protection.

## UNHCR LGBTI Discussion Paper

- o Discussion of protection gaps for LGBTI asylum-seekers and refugees at various stages of the displacement cycle;
- o Particular challenges faced by LGBTI persons of concern, including continued discrimination and lack of understanding of the complexities encompassed within the concept of gender identity;
- o Discussion of the existence and effect of laws criminalizing same-sex relations on LGBTI asylum claims;
- o Detention of LGBTI asylum-seekers in the country of asylum and heightened risk of further abuse.

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## UNHCR Eligibility Guidelines

### Eligibility Guidelines for Honduras & El Salvador

- o "Discrimination against individuals of diverse sexual orientation and/or gender identities **is reportedly widespread in Honduras** and such persons have consistently been targeted for abuse, assaults and murder by the security forces, the gangs and other organized criminal groups, and other sectors of society."
- o In **El Salvador**, violence against LGBTI persons is "reportedly widespread" and "such persons have consistently been targeted for attacks and murder by the gangs and other sectors of society, including by the police and other public authorities."
- o **Both Honduran and Salvadorian gangs** are "reported to possess a strong macho ethos, which reportedly expresses itself on an everyday basis through their virulent hatred and ill-treatment of persons based on their perceived sexual orientation and/or gender identity."
- o In both El Salvador and Honduras "**transgender** individuals, in particular **transwomen**, are reported to be at particular risk of violence."

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## UNHCR Eligibility Guidelines

### Identified Risk Profile for El Salvador and Honduras

"Depending on the particular circumstances of the case, UNHCR considers that individuals of diverse sexual orientations and/or gender identities may be in need of international refugee protection on the basis of their membership of a particular social group, or on the basis of other Convention grounds. It should be emphasized that individuals of diverse sexual orientations and/or gender identities cannot be expected to change or conceal their identity in order to avoid persecution."

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## History

- Homosexuality was a ground of inadmissibility to the US until 1990
- First successful asylum claim based on sexual orientation was in 1994
- HIV remained a health-related ground of inadmissibility to the US until 2010

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## US Asylum Process

- **Affirmative Applications** (not in removal proceedings)
  - USCIS (part of DHS)
  - Asylum Officer
- **Defensive Applications** (in removal proceedings)
  - EOIR (part of DOJ)
  - Immigration Judge

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## INA 101(42)(A)

“[A]ny person who is outside any country of such person’s nationality . . . and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of **persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.**”

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## Elements of Asylum

- Well-founded fear of
- Persecution
- On account of
- Race, religion, nationality, political opinion, membership in a particular social group (PSG)

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## Persecution

- **"Serious Harm"**
  - Physical harm
  - Sexual harm
  - Psychological harm (not all circuits)
  - Extremely severe discrimination
  - Arrests, detentions, imprisonment
  - Death threats
- Look at cumulative harm

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## Persecution in LGBT Cases

- **Types of harm may be same or a little different**
  - Psychological harm, isolation, stigma
  - Amplified by pervasive discrimination (in all areas of life: school, work, home)
  - DV in same-sex relationships
  - Prosecution with disproportionate sentence
- **Sexual harm is common**
  - Building trust with the client
  - Not being judgmental

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## Hypo 1: Persecution?

- Jennifer is a transgender woman from Honduras. She was at a gay club there that was raided by police. The police arrested her and took her to the local jail, where she was detained without charge for several days. While she was detained, two police officers and an inmate sexually abused her.

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## Hypo 2: Persecution?

- Jorge is a 19-year-old gay man from El Salvador. He never came out in El Salvador because he was afraid of what would happen. But people suspected he was gay. He was constantly teased at school and called names. His teachers did nothing to stop this. Twice, when he was in high school, gang members threatened that they would "make him a man," but he was never physically harmed. He's been "out" since he entered the US six months ago.

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## Medical and Psychological Evaluations

- **Medical:**
  - Physical injuries/scars consistent with types of harm reported by applicant (corroboration)
- **Psychological**
  - Helps show that harm rises to the level of persecution
  - PTSD, depression, anxiety/panic disorder, substance abuse, cognitive deficits (attention, concentration, memory), sleep disorders, somatization, disassociation, amnesia

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## Well-Founded Fear

- Subjective fear
    - Credible testimony, declaration
  - Objective fear
    - Country conditions reports
    - Expert testimony
    - Corroborating declarations and evidence
    - Past incidents that don't rise to the level of persecution
- 10% chance of future persecution is enough!

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## Well-Founded Fear

- Past persecution establishes a rebuttable presumption of well-founded fear
- Gov't can rebut by showing:
  - Fundamental change in circumstances
  - Internal relocation

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## Hypo 3: Well-founded fear?

- Ameer is a bisexual man from Malaysia. While married to a woman, he was in a secret relationship with another man there for 10 years. No one ever found out about his same-sex relationship.
- Sodomy (but not homosexuality) is a crime in Malaysia punishable by 20 years in jail and flogging.

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## Prosecution vs. Persecution

- Is the law generally applicable?
- Is the law equally or unequally enforced?
- How does the persecutor view those who violate the law?
- Does the law impose unduly harsh punishment?
- How does compliance with the law affect the applicant's life with respect to the protected characteristic?

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## Hypo 4: Well-founded fear?

- Anna is a lesbian from Russia. When her family found out she was gay, they forced her to see a doctor who tried to "cure" her of her lesbianism. She was hospitalized against her will and subjected to electro-shock therapy for several weeks.
- Afterwards, she began using drugs and attempted suicide by overdosing.

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## Psychological consequences

- Identity development
- Internalized homophobia
- Sexual functioning
- Self esteem
- Minimization of history of violence (e.g. due to disassociation/amnesia or rejection of identity as victim to cope)

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## Additional Burdens on LGBT Persons

- Impact of traumatic events may be exacerbated by prior history of abuse, especially in childhood
- LGBT persons often abused within families, blamed for shame to the family, and deprived of support in the face of persecution

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## Nexus – “on account of”

- Under REAL ID Act (2005), protected grounds must be a “**central reason**” for the persecution
- Nexus can be established by
  - Direct evidence
  - Circumstantial evidence

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## Nexus: Examples of Direct Evidence

- Persecutor warned applicant to stop behavior/activity
- Persecutor's statements (e.g. about applicant's sexuality, derogatory slurs)
- Laws prohibiting/punishing homosexual activity

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## Nexus: Circumstantial Evidence

- Persecutor has harmed others who share applicant's characteristic
- Proximity in time (e.g. of arrest, beating) to activity related to person's sexual orientation/gender identity
- Country conditions reports showing how people with that characteristic are viewed

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## Hypo 5: Nexus?

- In Mexico, Leticia lived with her female partner, Juana. They had a turbulent relationship. When Juana was angry or jealous, she often became physically and verbally abusive toward Leticia. Juana beat Leticia and called her names like "stupid slut."
- What if Leticia tells you that Juana was also physically abusive towards her younger sister and brothers, none of whom are gay?

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## Nexus

### • No punitive or malignant intent required

- Hypo about Russia lesbian and conversion therapy
- Female genital mutilation (FGM)

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## 5 Protected Grounds

- Race
- Nationality
- Religion
- Political Opinion
- Membership in a Particular Social Group

Multiple grounds may apply!

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## Membership in a PSG

- **Immutable characteristic**
  - Can't change or should not have to change because fundamental to identity
- **Particularity**
  - Boundaries of group are clearly defined
  - Can determine who is in and out of the group
- **Social distinction**
  - Society in home country sees group as distinct
  - Not literal visibility

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## Examples of PSGs

- **Sexual orientation** ("homosexuals," "gay men," "lesbians")
- **Gender identity** ("transgender individuals")
- **Gender plus:** "Married women who are unable to leave the relationship"
- **Family membership**
- **Former occupation, status, or experience**

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## Political Opinion

- Opinions about feminism, gender roles
- Opinions about LGBT rights

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## Actual vs. Imputed

- **Actual** – you actually belong to the group
- **Imputed** – people think you belong to the group (doesn't matter whether you actually do)

*Imputed homosexuality is common in cases involving transgender individuals*

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## Credibility

- Real ID Act give IJs broad discretion in what to consider in making credibility determinations!
  - Inconsistencies
  - Plausibility
  - Detail
  - Nonresponsive answers
  - Demeanor

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## Credibility Challenges

- Is the person really LGBT?
- Is the person's story real? (Violence can be extreme in LGBT cases)
- Stereotypes about LGBT individuals can get in the way

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## Hypo 6: Credibility

- Aziz is a 25-year-old man from Egypt who says he was entrapped by an undercover Egyptian police officer on a gay dating website, arrested, and brutally tortured at the police station.
- Inconsistencies:
  - How many officers tortured him (3 vs. 4)
  - Name of dating website where they met
- Demeanor:
  - Doesn't make eye contact, looks nervous
- Detail:
  - Doesn't remember what undercover officer was wearing when they met for a "date," or what day/time they met. He does give the name of the café where they met.

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## Hypo 7: Credibility

- Dembe is a woman from Uganda. She is married to a man but says she is bisexual. She had one romantic relationship with a woman many years ago but has never sex with a woman. She has never gone to any gay bars or clubs and does not participate in any LGBT organizations or events. She has a very feminine appearance, has been married for 10 years, and has two children with her husband.

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## **Persecutors of LGBT persons**

- Family
- Community
- Police
- Soldiers/military
- School
- Workplace
- Judiciary

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## **Harm by Private Actors**

If the harm is not by the government (e.g. military, police, gov't officials), then must show that government is either **unable or unwilling** to provide protection

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## **Reporting to Police**

• **Did the person report the harm to the police? IF not, why not?**

- Is it futile to report harm against LGBT individuals in country of origin?
- Would reporting put the individual at even greater risk of harm?
  - Harm by the police themselves
  - Retaliation for reporting

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## Hypo 8: Persecutor

- Veronica is a transgender woman from Mexico. As a teenager, she was raped by an uncle and two cousins. As an adult, she was raped by a man she met in a bar. She never reported any of these rapes to the police. She says that she felt too ashamed to report them and also did not think the police would do anything to help her.

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## One-year deadline

- Must normally apply for asylum within one year of entering the United States
- Certain exceptions
  - Changed circumstances
  - Extraordinary circumstances

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## Changes circumstances in LGBT cases

- Recently "coming out" as LGBT
- Recent steps to transition
- Recent HIV diagnosis
- PTSD
- Changed country conditions (e.g. new laws passed, more hostile gov't)

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## Bars to Asylum

- **“Aggravated felony”** conviction
  - defined in INA 101(a)(42)
- **“Particularly Serious Crime”** conviction
  - Includes any aggravated felony conviction by statute, but isn’t limited to that
  - Highly subjective
- **Firm Resettlement** in a third country
- **Persecution of others**

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## Hypo 9: Bars to Asylum

- Zain is a gay man from Iraq. He was convicted of misdemeanor theft and received a suspended sentence of one year. Is he eligible for asylum?
- Amina is a lesbian from Afghanistan. Before arriving in the US, she spent 3 years at a refugee camp in the Netherlands. Is she eligible for asylum?

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## If Barred from Asylum...

- May still qualify for
  - **Withholding of removal** (nonrefoulement obligation)
  - Protection under the **Convention Against Torture**

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## Withholding of Removal

- Must show > 50% chance of future persecution
- Same definition of a "refugee"
- "Particularly serious crime" bar:
  - Aggravated felony with a sentence of 5 years or more is automatically a particularly serious crime that bars withholding of removal

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## Convention Against Torture

- Must show >50% of future torture
- Torture is more severe than persecution
- Torture must be by or with the government's acquiescence
- No nexus to a protected ground needed
- No criminal bars

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## Asylum is Discretionary

- Asylum is ultimately discretionary (IJ can deny asylum based on convictions that don't make the person ineligible)
- Withholding of removal and protection under CAT are *not* discretionary

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## Hypo 10 Asylum, Withholding, CAT

- Salome is a transgender woman from Mexico. She entered the US 3 years ago and now wants to apply for asylum. She has been arrested 5 times for prostitution and convicted twice. She also has a DUI conviction.
- What if she had been convicted for sale of meth and sentenced to 6 years?

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## Detention

- LGBT individuals face unique harm in detention
  - Sexual and physical abuse
  - Inadequate medical and mental health care
  - Isolation/Solitary Confinement

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## Detention

- Creates additional challenges for case:
  - Harder to communicate with clients and build trust
  - Clients often do not present themselves the way they would outside of detention in terms of appearance, behavior that may be relevant to LGBT claim
  - Appear in court by video – less privacy, harder for IJ to see client

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## Case Example

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### Hypothetical: Sara



- Sara, a 24-year-old transgender woman, was born and raised in a rural town in Oaxaca, Mexico. Sara was born biologically male, but began using the name Sara when she was 14-years-old because she always felt that she was more female than male.
- Because of her gender identity, Sara suffered years of relentless abuse from family members that included harassment, sexual assault, and rape. Throughout her childhood, Sara was repeatedly harassed by classmates for her effeminate appearance and behavior.
- At age 16, Sara moved out of her family's home because her father beat her and would not allow her to dress as a woman.
- Despite moving out of her family's home, Sara continued to suffer from abuse. Sara began working at a bar and was raped by one of her customers.
- Following the last attack, Sara fled to the U.S. in search of protection.
- Despite Sara's constant abuse, she never reported these incidents to the police. Sara has stated she was afraid to report to the police after hearing stories of police mistreatment of transgender women.

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