

UNHCR's Views on Asylum Claims based on Sexual Orientation and Gender Identity

Using international law to support claims from LGBTIQ+ individuals seeking protection in the U.S.

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The United Nations High Commissioner for Refugees (UNHCR) has long recognized the specific protection needs of lesbian, gay, bisexual, transgender, intersex, and queer (LGBTIQ+) individuals and those who are perceived as holding such identities.¹ This note articulates UNHCR's views on LGBTIQ+ asylum claims, highlights particular issues which may arise under such claims, and provides guidance on how to use UNHCR's views in assisting asylum seekers in the United States. It is generally applicable to claims with a sexual orientation or gender identity component from all over the world.

The persecution of people because of their sexual orientation and gender identity is not a new phenomenon and a growing number of claims on this basis has necessitated greater awareness among decision-makers of the specific experiences of LGBTIQ+ asylum seekers as well as a deeper examination of the legal questions involved. UNHCR works to understand and address the unique protection concerns of LGBTIQ+ individuals and has produced country-specific asylum eligibility guidelines that discuss their specific risk profiles.² The resources detailed at the end of this document expand upon the discussion.

I. Relevance of International Refugee Law in the United States

The 1951 Convention and its 1967 Protocol³ are the key international instruments governing the protection of refugees. The United States is a signatory and party to the 1967 Protocol, and therefore is

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." 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). While the "applicability of 'sexual and gender minorities' as an accurate descriptor of *intersex persons* is disputed," as some people consider being intersex to be a treatable medical disorder and others consider medical intervention to violate bodily integrity and human rights, "'LGBTIQ+' is used here to describe all persons of concern to UNHCR who seek protection based on their diverse [sexual orientation, gender identity, gender expression, and sex characteristics], as the needs and protection risks experienced by forcibly displaced intersex people are often similar to those experienced by forcibly displaced LGBTQ people." UNHCR, *LGBTIQ+ Persons in Forced Displacement and Statelessness: Protection and Solutions – Discussion Paper*, ¶¶ 11-12 (June 2021) [hereinafter LGBTIQ+ Discussion Paper].

² See, e.g., UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, U.N. Doc. HCR/EG/AFG/18/02, at 88-90 (Aug. 30, 2018), <https://www.refworld.org/docid/5b8900109.html>; UNHCR, *International Protection Considerations with Regard to People Fleeing the Republic of Iraq*, U.N. Doc. HCR/PC/IRQ/2019/05_Rev.2, at 100-106, (May 2019), <https://www.refworld.org/docid/5cc9b20c4.html>; UNHCR, *"We Keep It in Our Heart" – Sexual Violence Against Men and Boys in the Syria Crisis* (Oct. 2017), <https://www.refworld.org/topic,50ffbce40,50ffbce454,5a128e814,0,UNHCR,,.html>; UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka*, U.N. Doc. HCR/EG/LKA/12/04, at 35-37 (Dec. 21, 2012), <https://www.refworld.org/docid/50d1a08e2.html>; UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Eritrea*, U.N. Doc. HCR/EG/ERT/11/01_Rev.1, at 29-30 (Apr. 20, 2011), <https://www.refworld.org/docid/4d4fe0ec2.html>; UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Guatemala*, U.N. Doc. HCR/EG/GTM/18/01, at 49-50 (Jan. 2018), <https://www.refworld.org/docid/5a5e03e96.html>; UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Honduras*, U.N. Doc. HCR/EG/HND/16/03, at 56-57 (July 27, 2016), <https://www.refworld.org/docid/579767434.html>; UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador*, U.N. Doc. HCR/EG/SLV/16/01, at 38-39 (Mar. 15, 2016), <https://www.refworld.org/docid/56e706e94.html> [hereinafter El Salvador Eligibility Guidelines]; UNHCR, *Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico*, at 27-30 (2015), available at <http://www.unhcrwashington.org/womenontherun> [hereinafter Women on the Run].

³ U.N. General Assembly, *Convention Relating to the Status of Refugees*, 19 U.S.T. 6259, 189 U.N.T.S. 137 (July 28, 1951) [hereinafter 1951 Convention]; U.N. General Assembly, Protocol relating to the Status of Refugees, GA Res. 2198 (XXI), UN GAOR, 21st Sess., U.N. Doc. A/RES/2198 (Dec. 6, 1966) [hereinafter 1967 Protocol].

bound to comply with the obligations deriving from the Protocol as well as, by incorporation, articles 2-34 of the 1951 Convention,⁴ and it has incorporated the substantive provisions of the Protocol into U.S. domestic law.⁵ U.S. law, based on the 1951 Convention and the 1967 Protocol, defines a refugee as someone who is outside of his or her country of nationality 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 future persecution “on account of race, religion, nationality, membership in a particular social group, or political opinion.”⁶

U.S. courts have an obligation to construe U.S. statutes in a manner consistent with international obligations whenever possible.⁷ In their efforts to fulfill that duty, U.S. courts have relied on UNHCR guidance, especially the Handbook on Procedures and Criteria for Determining Refugee Status (hereinafter Handbook),⁸ in assessing refugee claims—including those based on sexual orientation or gender identity⁹—and have recognized that UNHCR’s analysis provides significant direction in understanding issues in refugee law.¹⁰ The U.S. Supreme Court, for instance, has “consistently turned [to UNHCR] for assistance in interpreting [U.S.] obligations under the Refugee Convention.”¹¹ Thus, UNHCR guidance can serve as a critical tool in evaluating and resolving the diverse, evolving interpretative questions related to the refugee definition that continue to arise, including in the United States.

While international law can be used to support and advance an individual’s claim to asylum in the United States, UNHCR recognizes that an asylum seeker may need to highlight affirmatively relevant international legal standards to receive individualized consideration by U.S. courts and authorities in a particular case. Therefore, advocates and asylum seekers may wish to submit relevant materials, such as UNHCR’s

⁴ 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. I, ¶¶ 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 refugee definition 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).

⁵ Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

⁶ 8 U.S.C. § 1101(a)(42).

⁷ *Murray v. The Charming Betsy*, 6 U.S. 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 U.S. 421, 436-37 (1987) (finding “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 The UNHCR Handbook was prepared at the request of the Member States of the Executive Committee of the High Commissioner’s Programme, including the United States, to provide guidance to governments in applying the terms of the Convention and Protocol. See UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection, U.N. Doc. HCR/1P/4/ENG/REV.4, at 9 (2019) [hereinafter Handbook].

⁹ See *Doe v. Attorney General*, 956 F.3d 135, 154 (3d Cir. 2020) (citing UNHCR Guidelines on Sexual Orientation and Gender Identity to explain that “forcing to hide or suppress a core component of one’s identity is an oxymoron”); *Kaur v. Wilkinson*, 986 F.3d 1216, 1225 (9th Cir. 2021) (citing UNHCR Guidelines on the Protection of Refugee Women and the UNHCR Handbook for the Protection of Women and Girls to explain the psychological effects of sexual assault); *Clemente-Giron v. Holder*, 556 F.3d 658, 664-65 (8th Cir. 2009) (J. Wollman, dissenting) (citing to UNHCR Guidelines on the Protection of Refugee Women to emphasize the impact of sexual assault on a survivor’s ability to disclose her abuse and her credibility).

¹⁰ *INS v. Cardoza-Fonseca*, 480 U.S. 421, n.22 (1987) (“The Handbook provides significant guidance in construing the Protocol . . . [and] has been widely considered useful in giving content to the obligations that the Protocol establishes.”).

¹¹ *N-A-M v. Holder*, 587 F.3d 1052, 1061-62 (10th Cir. 2009) (Henry, C.J. concurring) (citing Supreme Court cases where the Court turned to UNHCR guidance materials for assistance in interpreting U.S. obligations under the Refugee Convention); see also *INS v. Cardoza-Fonseca*, 480 U.S. 421, 438-39 (1987) (“In interpreting the Protocol . . . we are further guided by the analysis set forth in the Office of the United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status.”); *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 949 (9th Cir. 2007) (stating that the Court views the UNHCR Handbook as “persuasive authority in interpreting the scope of refugee status under domestic asylum law”) (internal quotation marks omitted).

Guidelines on International Protection or Eligibility Guidelines,¹² to be included in the record when applicable. These sources are cited throughout the document and compiled thematically in the last section.

II. Forms of Persecution and Common Risk Profiles Related to Sexual Orientation or Gender Identity

a. Harms Experienced by LGBTIQ+ Individuals

Asylum claims of individuals with diverse sexual orientations and gender identities may present questions regarding the persecution component of the refugee definition. The Handbook provides that a threat to life or freedom or other serious human rights violations on account of race, religion, nationality, political opinion or membership of a particular social group constitutes persecution.¹³ Certain physical, sexual, and psychological harms—including but not limited to domestic or family violence, rape, psychological abuse, harmful traditional practices, and punishment for transgression of social mores¹⁴—may constitute persecution.¹⁵ 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.

An applicant for asylum may have been subjected to various harms that do not each independently rise to the level of persecution but which “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.’”¹⁶ In addition, because past persecution is not a prerequisite to refugee status, applicants seeking to establish that their fear is well-founded “need not show that the authorities knew about his or her [or their] sexual orientation and/or gender identity before he or she [or they] left the country of origin.”¹⁷ Further, individuals also can demonstrate their fear by showing that there is a pattern or practice of persecution of LGBTIQ+ individuals in their country that is systemic, pervasive, or organized.¹⁸

A non-exhaustive list of LGBTIQ+-related harms is detailed further, below:

- **Physical violence**, such as beatings or assaults, may constitute persecution.¹⁹ Transgender individuals and others with diverse gender identities or expressions are at particular risk of physical harm if they self-represent in public.²⁰

¹² See, e.g., Gender Guidelines; 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*, U.N. Doc. HCR/GIP/12/09 (Oct. 23, 2012) [hereinafter *Sexual Orientation and Gender Identity Guidelines*]; El Salvador Eligibility Guidelines.

¹³ Handbook, ¶ 51.

¹⁴ Gender Guidelines, ¶ 3.

¹⁵ See UNHCR, *Note on Certain Aspects of Sexual Violence against Refugee Women*, U.N. Doc. EC/1993/SCP/CRP.2 (1993).

¹⁶ Handbook, ¶ 53.

¹⁷ *Sexual Orientation and Gender Identity Guidelines*, ¶ 18.

¹⁸ 8 C.F.R. § 1208.13(b)(2)(iii)(A); *Ngure v. Ashcroft*, 367 F.3d 975, 991 (8th Cir. 2004) (“A pattern or practice of persecution must be systemic, pervasive, or organized.”) (citation omitted).

¹⁹ LGBTIQ+ Discussion Paper, ¶¶ 17, 18.

²⁰ LGBTIQ+ Discussion Paper, ¶ 18.

- **Sexual violence** encompasses rape, forced sterilization, and forced pregnancy, among other harms, and may constitute persecution.²¹ Trafficking for the purposes of forced prostitution or sexual exploitation is considered a form of torture and cruel, inhumane or degrading treatment, and it also may constitute persecution.²² Lesbians, bisexual women, and transgender persons are at particular risk of experiencing harms “that restrict autonomy in decision-making about sexuality, reproduction and family life.”²³
- **Psychological violence** may constitute persecution.²⁴ This might include serious forms of humiliation, intimidation, harassment, threats, verbal abuse, isolation from family and friends, and other practices that cause or result in mental or emotional harm.²⁵
- **Efforts to change an individual’s sexual orientation, gender identity, or sex characteristics** by force or coercion—such as forced institutionalization, forced sex-reassignment surgery, forced electroshock therapy, and forced drug injection or hormonal therapy—“may constitute torture, or inhuman or degrading treatment, [] implicate other serious human rights violations, including the rights to liberty and security of the person,”²⁶ and would generally reach the threshold of persecution.²⁷ Similarly, non-consensual medical and scientific experimentation constitutes torture or inhuman or degrading treatment under international law.²⁸ Intersex individuals may be forced to undergo involuntary sex reassignment surgery that amounts to genital mutilation.²⁹
- **Laws criminalizing same-sex relations** are discriminatory and violate international human rights norms.³⁰ Such laws are persecutory where individuals prosecuted under them face the death penalty, prison terms, or severe corporal punishment.³¹ Even when rarely enforced, such laws may create an oppressive environment for LGBTIQ+ individuals by generating a threat of prosecution, providing the basis for blackmail or extortion, and hindering LGBTIQ+ individuals from seeking and obtaining State protection.³²
- **Penalties or punishment for non-compliance of a law or policy** that are disproportionately severe relative to the alleged transgression and general laws that are selectively applied and enforced against LGBTIQ+ individuals in a discriminatory manner may constitute persecution.³³ Even in a

²¹ The UNHCR Executive Committee “strongly condemns persecution through sexual violence” and “supports the recognition as refugees of persons whose claim to refugee status is based upon a well-founded fear of persecution, through sexual violence, for reasons of race, religion, nationality, membership of a particular social group or political opinion.” UNHCR Exec. Comm., *Conclusion on International Protection No. 73 on Refugee Protection and Sexual Violence* (1993), <https://www.refworld.org/docid/5a2ead6b4.html>; see also UNHCR, *Sexual and Gender-Based Violence Against Refugees, Returnees, and Internally Displaced Persons: Guidelines for Prevention and Response*, at 109 (May 2003), <https://www.refworld.org/docid/3edcd0661.html>.

²² Gender Guidelines, ¶18.

²³ Sexual Orientation and Gender Identity Guidelines, ¶ 23.

²⁴ Sexual Orientation and Gender Identity Guidelines, ¶ 33; UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, U.N. Doc. HCR/GIP/09/08, ¶ 33 (Sept. 22, 2009) [hereinafter *Child Guidelines*].

²⁵ Sexual Orientation and Gender Identity Guidelines, ¶ 33; *Child Guidelines*, ¶ 33.

²⁶ Sexual Orientation and Gender Identity Guidelines, ¶ 21.

²⁷ Sexual Orientation and Gender Identity Guidelines, ¶ 21; see also *Pitcherskaia v. INS*, 118 F.3d 641, 646-47 (9th Cir. 1997) (holding that involuntary treatment and confinement, including forced institutionalization, electroshock treatments, and drug injections, even if administered to “cure” a supposed illness due to the applicant’s sexual orientation, may constitute persecution).

²⁸ U.N.G.A., *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, art. 7 (Dec. 19, 1966).

²⁹ LGBTIQ+ Discussion Paper, ¶ 19.

³⁰ Sexual Orientation and Gender Identity Guidelines, ¶ 26.

³¹ Sexual Orientation and Gender Identity Guidelines, ¶ 26.

³² Sexual Orientation and Gender Identity Guidelines, ¶ 27.

³³ Sexual Orientation and Gender Identity Guidelines, ¶ 29.

country without laws that criminalize same-sex relations, “public morality or public order laws (loitering, for example) may be selectively applied and enforced against LGBTIQ+ individuals in a discriminatory manner, making life intolerable for the claimant, and thus amounting to persecution.”³⁴

- **Harmful traditional practices, social norms, and values**, such as the concept of family “honor,” may be at the core of LGBTIQ+ claims.³⁵ Family or community disapproval may manifest itself in the form of threats of serious physical violence, or even murder, committed in the name of honor and may constitute persecution.³⁶ Forced or underage marriage, forced pregnancy and/or marital rape, as well as harmful ritual purification ceremonies, are other forms of persecution often used as a means of denial or to “correct” non-conformity.³⁷
- **Severe or cumulative instances of discrimination or restrictions on the exercise of human rights** may constitute persecution.³⁸ This may be so, for instance, when the combined effect of discriminatory measures lead to consequences of a “substantially prejudicial nature, . . . e.g., serious restrictions on [the] right to earn [a] livelihood, [the] right to practice [] religion, or [on one’s] access to normally available educational facilities.”³⁹ LGBTIQ+ individuals are often unable to fully exercise their human rights—including inheritance, custody, visitation rights for children and pension rights; freedom of expression, association and assembly; and various economic and social rights, such as those related to housing, education, and health care.⁴⁰ The cumulative effect of such restrictions may rise to the level of persecution.⁴¹

While LGBTIQ+ individuals may be able to avoid persecution by concealing or being “discreet” about their sexual orientation or gender identity, this does not warrant denying an individual refugee status, as a person cannot be required to conceal their identity, opinions, or characteristics.⁴² Even if applicants successfully hid their sexual orientation or gender identity in the past, their circumstances may change and there is always a risk of their sexual orientation or gender identity being exposed.⁴³ Moreover, masking one’s identity may itself cause serious psychological harm that may rise to the level of persecution.⁴⁴ Decision-makers must therefore consider what predicament the applicant would face if he, she, or they were returned to their country of origin.⁴⁵

³⁴ Sexual Orientation and Gender Identity Guidelines, ¶ 29.

³⁵ Sexual Orientation and Gender Identity Guidelines, ¶ 23.

³⁶ Sexual Orientation and Gender Identity Guidelines, ¶ 23.

³⁷ Sexual Orientation and Gender Identity Guidelines, ¶ 23; LGBTIQ+ Discussion Paper, ¶ 19.

³⁸ Handbook, ¶ 54; Sexual Orientation and Gender Identity Guidelines, ¶ 17.

³⁹ Handbook, ¶ 54.

⁴⁰ Sexual Orientation and Gender Identity Guidelines, ¶ 24.

⁴¹ In the United States, “economic persecution” is defined as “[nonphysical] harm or suffering . . . such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing employment, or other essentials of life.” *In re T-Z*, 24 I&N Dec. 163, 171 (BIA 2007) (internal citations omitted); see also *Kadri v. Mukasey*, 543 F.3d 16, 18-20 (1st Cir. 2008) (remanding to BIA to assess economic persecution claim where applicant, based on his sexual orientation, was forced to voluntarily resign from his position as a hospital doctor, paid only \$10 per month because he was not assigned patients, and, after filing a lawsuit against the hospital, pressured by the judge to disclose his sexual orientation).

⁴² Sexual Orientation and Gender Identity Guidelines, ¶ 31.

⁴³ Sexual Orientation and Gender Identity Guidelines, ¶ 32.

⁴⁴ Sexual Orientation and Gender Identity Guidelines, ¶ 33. “Feelings of self-denial, anguish, shame, isolation and even self-hatred which may accrue in response an inability to be open about one’s sexuality or gender identity are actors to consider, including over the long-term.” *Id.*

⁴⁵ Sexual Orientation and Gender Identity Guidelines, ¶ 32.

b. Common Risk Profiles of LGBTIQ+ Individuals

While LGBTIQ+ individuals may share some experiences, they may belong to distinct, more specific groups with unique experiences depending on their age, gender, ethnicity, national origin, health status, disability, educational level, and / or the particular region of the world in which they live. This non-exhaustive list lays out common risk profiles and unique vulnerabilities of LGBTIQ+ asylum seekers:

- **LGBTIQ+ youth** may experience unsupportive family, educational, and social circumstances.⁴⁶ Upon discovery of their sexual orientation or gender identity, children may feel the need to suppress or hide it and may experience feelings of shame, which could lead to self-harm.⁴⁷
- **Cisgender gay and bisexual men**, while they may enjoy more mobility, visibility, and social validation in some social contexts, may experience difficulties disclosing incidents of sexual violence in their countries of origin or asylum.⁴⁸ Genetically unrelated men who live together may be scrutinized by landlords and neighbors and could be perceived by others as being gay or bisexual.⁴⁹ Gay and bisexual men who do not present in a stereotypically feminine manner may face credibility challenges when presenting their asylum claims, while those who do may be more likely to face harm in public.⁵⁰
- **Cisgender lesbian and bisexual women** are at an increased risk of experiencing harm such as family and community rejection, assault, corrective rape, and forced heterosexual marriage.⁵¹ Moreover, due to women's generally inferior socioeconomic status, they may also face difficulties fleeing their country of origin, accessing asylum processes, and protecting and supporting themselves in a new country.⁵² Lesbian and bisexual women who do not present in a stereotypical masculine way may face credibility challenges when presenting their asylum claims.⁵³
- **Transgender and gender non-conforming persons** are often extremely vulnerable and severely marginalized. They frequently face discrimination and exclusion from formal education, health care, legal employment, and housing, which may lead some to turn to survival sex work.⁵⁴ They might be physically assaulted in public if they self-represent and are generally at a high risk of experiencing gender-based violence, such as rape, sexual abuse, physical assault, and murder by both State and non-State actors.⁵⁵ At borders and in transit, transgender and gender non-conforming persons may experience difficulties if their legal documents do not match their identities, and as a result, they might be subjected to invasive body searches.⁵⁶ In detention, transwomen who are placed within the general male detainee population are at heightened risk of experiencing physical and sexual abuse.⁵⁷

⁴⁶ UNHCR, *Need to Know Guidance: Working with Lesbian, Gay, Bisexual, Transgender, Intersex and Queer Persons in Forced Displacement*, at 14 (2021), available at <https://www.refworld.org/docid/4e6073972.html> [hereinafter *Need to Know Guidance*].

⁴⁷ *Need to Know Guidance*, at 14.

⁴⁸ LGBTIQ+ Discussion Paper, ¶ 16.

⁴⁹ *Need to Know Guidance*, at 14.

⁵⁰ LGBTIQ+ Discussion Paper, ¶ 16.

⁵¹ LGBTIQ+ Discussion Paper, ¶ 17.

⁵² LGBTIQ+ Discussion Paper, ¶ 17.

⁵³ LGBTIQ+ Discussion Paper, ¶ 17.

⁵⁴ LGBTIQ+ Discussion Paper, ¶ 18.

⁵⁵ LGBTIQ+ Discussion Paper, ¶ 18.

⁵⁶ LGBTIQ+ Discussion Paper, ¶ 18.

⁵⁷ *Sexual Orientation and Gender Identity Guidelines*, ¶ 20.

- **Intersex persons** may face difficulties obtaining protection, as their identity documents may not match their gender or they may not have been issued legal documents at all.⁵⁸ Some intersex persons “may be subjected to [involuntary] early and irreversible surgery in countries of origin to ‘correct’ their anatomy,” which may amount to genital mutilation.⁵⁹ Where parents face difficulties officially registering their intersex child or obtaining a birth certificate, the child may not be able to enroll in school or access medical or other services.⁶⁰

III. LGBTIQ+ Asylum Claims Based on Membership in a Particular Social Group

“Membership in a particular social group” is one of the five protected grounds articulated in the 1951 Convention, though it is not defined therein. It has been increasingly invoked in asylum applications in recent years, especially in LGBTIQ+ asylum cases. At the same time, in the United States, this ground has been subject to increased litigation and has seen attempts to narrow its scope. The Handbook provides generally that a particular social group (PSG) is normally comprised of persons of similar background, habits, or social status,⁶¹ and other UNHCR guidelines elaborate on the proper interpretation and substantive analysis of membership in a PSG.⁶²

While a PSG cannot be “exclusively defined by the fact that it is targeted for persecution,” there is no “closed list” of groups that constitute a PSG.⁶³ Social groups should also be viewed in an evolutionary manner, “open to the diverse and changing nature of groups in various societies and evolving international human rights norms.”⁶⁴ The following subsections offer an overview of relevant international legal standards on cognizable groups and nexus and articulate how they apply in the specific context of LGBTIQ+ asylum claims presented in the United States.

a. Legal Cognizability of Particular Social Groups

International law recognizes alternative approaches to defining a “particular social group,” and LGBTIQ+ asylum claims may be established under either. Under these alternative approaches, an asylum seeker may demonstrate that their PSG is comprised of a group of persons that *either* shares a common characteristic (**the protected characteristics approach**) *or* is perceived as a distinct group by society (**the social perception approach**).⁶⁵ Sexual orientation and / or gender identity are innate and immutable characteristics “so fundamental to human dignity that the person should not be compelled to forsake them.”⁶⁶ Even where an individual’s identity is still evolving and they consider their sexual orientation as “fluid,” it would nonetheless be considered fundamental to their identity and fall within the particular social group ground for asylum.⁶⁷ The “social perception” approach “requires neither that the common attribute be literally visible to the naked eye nor that the attribute be easily identifiable by the general

⁵⁸ Need to Know Guide, at 15-16.

⁵⁹ Need to Know Guide, at 15-16; LGBTIQ+ Discussion Paper, ¶ 19.

⁶⁰ Need to Know Guide, at 16.

⁶¹ Handbook, ¶ 77.

⁶² UNHCR, *Guidelines on International Protection No. 2: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/GIP/02/02, ¶ 11 (May 7, 2002) [hereinafter Social Group Guidelines].

⁶³ Social Group Guidelines, ¶ 2.

⁶⁴ Social Group Guidelines, ¶ 3.

⁶⁵ Social Group Guidelines, ¶ 11.

⁶⁶ Sexual Orientation and Gender Identity Guidelines, ¶ 47.

⁶⁷ Sexual Orientation and Gender Identity Guidelines, ¶ 47.

public,”⁶⁸ and members of a social group may therefore neither be recognizable to each other nor associate with one another.⁶⁹ In the context of LGBTIQ+ claims, the inquiry instead requires determining “whether the society distinguishes sexual minorities from other individuals in a meaningful way.”⁷⁰ Decision-makers therefore should avoid relying on stereotypes and assumptions, including visible markers or a lack thereof.⁷¹

Claims based on membership in a PSG have come under increased scrutiny in U.S. courts and administrative bodies in recent years. While U.S. law initially followed the protected characteristics approach,⁷² it has evolved to require essentially that *both* alternative approaches be satisfied, as a PSG must include members who share a common, immutable characteristic; be defined with particularity; and be socially distinct⁷³—thus establishing a threshold for cognizable PSGs that far exceeds international standards. Notably, in 2018, the decision in *Matter of A-B-* restated these heightened requirements⁷⁴ and significantly affected asylum seekers who fled domestic and gang violence, potentially including some who identify as LGBTIQ+.⁷⁵ UNHCR subsequently filed several amicus briefs addressing the U.S. interpretation of “particular social group,” underscoring how it is at variance with international legal standards and emphasizing that those with gender- or gang-based claims can qualify for protection.⁷⁶

Although *Matter of A-B-* was vacated in 2021,⁷⁷ establishing legally cognizable PSGs in U.S. asylum adjudication remains challenging and out of step with international law in a number of ways. The size of a PSG, for instance, sometimes becomes an issue. Under prevailing international standards, the size, cohesion, and diffusiveness of a proposed group are not at all relevant to determining whether a PSG exists within the meaning of Article 1A(2) of the 1951 Convention.⁷⁸ Nevertheless, while there are no explicit limitations on the size of a PSG under U.S. law and PSGs “may contain only a few individuals or a large number of people,”⁷⁹ the Board of Immigration Appeals (BIA) has cautioned that “major segments of the population will rarely constitute distinct social groups.”⁸⁰ The BIA’s warning, especially should it be used to deny recognition of an otherwise cognizable PSG, is contrary to international law.

Even though U.S. law remains at variance with international standards, U.S. federal courts and administrative adjudicators have found individuals with diverse sexual orientations and gender identities

⁶⁸ Sexual Orientation and Gender Identity Guidelines, ¶ 49.

⁶⁹ Sexual Orientation and Gender Identity Guidelines, ¶ 47.

⁷⁰ U.S. Citizenship & Immigration Services, RAI0 Directorate, Officer Training Program, *Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims*, at 16 (Dec. 28, 2011), <https://www.uscis.gov/sites/default/files/document/guides/RAIO-Training-March-2012.pdf>.

⁷¹ Sexual Orientation and Gender Identity Guidelines, ¶ 49.

⁷² *Matter of Acosta*, 19 I&N Dec. 211, 233 (BIA 1985) (interpreting “particular social group” to mean a group of persons who share a common, immutable characteristic).

⁷³ *Matter of S-E-G-*, 24 I&N Dec. 579, 582, 589 (BIA 2008).

⁷⁴ *Matter of A-B- I*, 27 I&N Dec. 316, 317 (A.G. 2018) (“The applicant must demonstrate membership in a group, which is composed of members who share a common immutable characteristic, is defined with particularity, and is socially distinct within the society in question.”).

⁷⁵ *Matter of A-B- I*, 27 I&N Dec. 316, 320 (A.G. 2018) (suggesting, in dicta, that “claims by [noncitizens] pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum”).

⁷⁶ See, e.g., UNHCR Amicus Brief, *Grace v. Barr*, No. 19-5013 (D.C. Cir. July 31, 2019), <https://www.refworld.org/docid/5d7a0e544.html>; UNHCR Amicus Brief, *Matter of O.L.B.D.*, No. 18-1816 (A206-252-605) (1st. Cir. Mar. 11, 2019), <https://www.refworld.org/docid/5c8924454.html>; UNHCR Amicus Brief, *Marroquin-Perez v. Barr*, No. 18-73146 (BIA Feb. 28, 2020), <https://www.refworld.org/docid/5f647e574.html>.

⁷⁷ *Matter of A-B- III*, 28 I&N Dec. 307 (A.G. 2021).

⁷⁸ This means that an asylum seeker does not have to establish that all members of the group are at risk of being persecuted or that all members of the proposed group know or associate with each other for the PSG to be considered legally cognizable. Social Group Guidelines, at 15, 17-18; UNHCR Amicus Brief, *Matter of O.L.B.D.* (citing Social Group Guidelines, ¶¶ 15, 18).

⁷⁹ *Perdomo v. Holder*, 611 F.3d 662, 669 (9th Cir. 2010).

⁸⁰ *Matter of M-E-V-G-*, 26 I&N Dec. 227, 239 (BIA 2014), citing *Ochoa v. Gonzales*, 406 F.3d 1166, 1170-71 (9th Cir. 2005).

to be members of various social groups.⁸¹ The below list (and corresponding footnotes) includes examples of LGBTIQ+-specific PSGs that have been recognized under U.S. law:

- Social groups based on actual or imputed sexual orientation⁸²
- Social groups based on actual or imputed gender identity⁸³
- Social groups based on HIV/AIDS status⁸⁴

UNHCR notes that individuals may be eligible for asylum based upon multiple PSGs, as well as various protected grounds since the Convention grounds are not mutually exclusive (see Section IV, below).⁸⁵

b. Nexus

Under the 1951 Convention, nexus is established when the persecutor harms an individual for reasons of a Convention ground.⁸⁶ The protected ground only has to be a “relevant contributing factor, [and] it need not be . . . the sole, or dominant, cause” of the persecution.⁸⁷ The intent or motive of the persecutor, while not a prerequisite, may be relevant to establishing nexus, as perpetrators may “rationalize the violence they inflict on LGBTIQ+ individuals by reference of ‘correcting,’ ‘curing,’ or ‘treating’ the person.”⁸⁸ Even if an asylum seeker is unable to show that the persecutor acted based on a protected ground, nexus may nonetheless be established if the State is unable or unwilling to protect the asylum seeker *based on* a Convention ground—perhaps in this case, for example, because of the individual’s sexual orientation or gender identity.⁸⁹

U.S. law governing nexus exceeds international standards. Under U.S. law, an asylum seeker must demonstrate that a protected ground “was or will be at least one central reason” for the applicant’s persecution.⁹⁰ However, U.S. courts have acknowledged that applicants rarely know the “exact

⁸¹ *Matter of Toboso-Alfonso*, 20 I&N Dec. 819, 822 (BIA 1994).

⁸² *Reyes-Reyes v. Ashcroft*, 384 F.3d 782, n.1 (9th Cir. 2004) (recognizing that sexual identity is inherent to one’s identity). For cases where courts recognized social groups based on homosexuality, see *Karouni v. Gonzales*, 399 F.3d 1163, 1172 (9th Cir. 2005) (holding that “all [noncitizen] homosexuals” constitutes a PSG); *Doe v. Attorney General*, 956 F.3d 135, 142 (3rd Cir. 2020) (recognizing the lesbian, gay, bisexual, transgender and intersex (LGBTI) community in Ghana as a PSG); *Tairou v. Whitaker*, 909 F.3d 702, 706 (4th Cir. 2018) (recognizing “homosexuals in Benin” as a PSG); *Amanfi v. Ashcroft*, 328 F.3d 719, 721-22 (3d Cir. 2003) (finding that membership in a PSG of homosexuals can be imputed); *Matter of Toboso-Alfonso*, 20 I&N Dec. at 822-23 (finding that homosexuality is an “immutable” characteristic and recognizing “homosexuals” as a PSG).

⁸³ *Gonzalez Aguilar v. Garland*, 29 F.4th 1208, 1213 (10th Cir. 2022) (recognizing transgender women in Honduras as a PSG); *Ibarra-Aviles v. Garland*, No. 19-60273, *2 (5th Cir. Jan. 19, 2022) (recognizing “male to female transgender persons” as a PSG); *Hernandez-Montiel v. INS*, 225 F.3d 1088, 1094-95 (9th Cir. 2000) (finding that a gay man with a female sexual identity who suffered persecution in Mexico, largely because he was effeminate, qualified for asylum).

⁸⁴ UNHCR has identified “children affected by HIV/AIDS,” which includes those who are HIV-positive and those with an HIV-positive parent or other relative, as a viable PSG. See Child Guidelines, ¶¶ 50, 52. In addition, U.S. courts have recognized HIV-related PSGs. See, e.g., *Velasquez-Banegas v. Lynch*, 846 F.3d 258, 261-64 (7th Cir. 2017) (recognizing the validity of asylum and withholding of removal claims based on the imputation of gay identity to unmarried, straight, HIV-positive men).

⁸⁵ LGBTIQ+ activists and human rights defenders, for example, may be seen as articulating a political opinion, or their activism may be viewed as going against prevailing religious views. Sexual Orientation and Gender Identity Guidelines, ¶ 40. Thus, persecution in such settings might effectively be linked to religion or political opinion, actual or imputed. *Id.*

⁸⁶ Social Group Guidelines, ¶ 21.

⁸⁷ Gender Guidelines, ¶ 20; Social Group Guidelines, ¶¶ 15, 18.

⁸⁸ Sexual Orientation and Gender Identity Guidelines, ¶ 39.

⁸⁹ Social Group Guidelines, ¶ 22.

⁹⁰ INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i). As with the definition of PSG, federal courts have interpreted the “one central reason” requirement in various ways, and some administrations have attempted to heighten the requirement for proving nexus. For example, while the Third Circuit held that “one central reason” must be “an essential or principal reason for the persecution,” *Gonzalez-Posadas v. U.S. Att’y Gen.*, 781 F.3d 677, 685 (3d Cir. 2015), the Ninth Circuit has held that the persecutor may be motivated by more than one central reason, and an applicant need not prove which reason was dominant. *Singh v. Holder*, 764 F.3d 1153 (9th Cir. 2014). In addition, in *Matter of A-B- II*, the then-

motivation” of their persecutors.⁹¹ UNHCR notes that, as a Convention ground need not be the sole or dominant cause for the persecution (rather, it only needs to be a relevant contributing factor), the existence of personal or interpersonal animus does not necessarily lead to a claim failing for lack of nexus, an issue that has come up in U.S. asylum adjudication.⁹² Persecution could, for instance, be perpetrated due to personal or interpersonal animus in combination with one or more Convention grounds, and this would satisfy the causal link under international standards so long as the Convention ground(s) were a relevant, contributing factor. Accordingly, personal or interpersonal animus should not automatically preclude a grant of refugee status.

IV. LGBTIQ+ Asylum Claims Based on Other Convention Grounds

Any of the Convention grounds may be applicable to LGBTIQ+ asylum claims, and while a large number of these claims fall under the “particular social group” ground, they “may frequently overlap with a claim on other grounds,” such as political opinion, race, or religion.⁹³ LGBTIQ+ activists and human rights defenders may have claims based on their political opinion or religion, if, for example, “their advocacy is seen as going against prevailing political or religious views and / or practices.”⁹⁴ The religion and political opinion grounds may also overlap where religious and State institutions are not clearly separated.⁹⁵ Thus, persecution in such settings might effectively be linked to political opinion or religion, actual or imputed.

UNHCR’s *LGBT Guidelines* elaborate on how these Convention grounds may apply in LGBTIQ+ asylum claims.⁹⁶ Religious beliefs, or a refusal to hold such beliefs, may form the basis of an asylum claim, for example where an individual is viewed as not conforming to the teachings of a religion based on his or her actual or perceived sexual orientation or gender identity and is punished or subjected to serious harm as a consequence.⁹⁷ Religious groups and communities may express negative attitudes towards LGBTIQ+ individuals in various ways, from discouraging same-sex activity or expression of diverse gender identity to active opposition, “including protests, beatings, naming/shaming and ‘excommunication,’ or even execution.”⁹⁸ However, LGBTIQ+ applicants still may “continue to profess adherence to a faith in which they have been subject to or threatened with harm,”⁹⁹ which does not necessarily undermine their need for international protection. U.S. administrative bodies have recognized that LGBTIQ+ asylum claims may have a religious component.¹⁰⁰

Acting Attorney General attempted to heighten the nexus requirement by requiring that asylum seekers show that the protected status was the “but-for” cause and “neither incidental nor tangential to another reason for the harm.” *Matter of A-B- II*, 28 I&N Dec. 199, 210-11 (A.G. 2021), vacated by *Matter of A-B- III*, 28 I&N Dec. 307 (A.G. 2021).

⁹¹ *Ordonez-Quino v. Holder*, 760 F.3d 80, 90 (1st Cir. 2014).

⁹² See, e.g., *Matter of Pierre*, 15 I&N Dec. 461, 462-63 (BIA 1975) (finding no nexus because “[t]he motivation behind [the persecutor’s] alleged actions appears to be strictly personal”); *Marquez v. INS*, 105 F.3d 374, 380 (7th Cir. 1997) (“A personal dispute, no matter how nasty, cannot support [a noncitizen’s] claim of asylum.”); Final Rule, *Procedures for Asylum and Withholding of Removal; Credible and Reasonable Fear Review*, 85 Fed. Reg. 80,274, 80,281 (Dec. 11, 2020) (providing that “[i]nterpersonal animus or retribution” is a circumstance that “would not generally support a favorable adjudication of an application for asylum or statutory withholding of removal due to the applicant’s inability to demonstrate persecution on account of a protected ground”) (currently enjoined by *Pangea Legal Services v. DHS* (3:20-cv-09253) and *Immigration Equality v. DHS* (3:20-cv-09258), Order Re Preliminary Injunction (N.D. Cal. Jan. 8, 2021)).

⁹³ Handbook, ¶ 77.

⁹⁴ Sexual Orientation and Gender Identity Guidelines, ¶ 40.

⁹⁵ Sexual Orientation and Gender Identity Guidelines, ¶ 43.

⁹⁶ Sexual Orientation and Gender Identity Guidelines, ¶¶ 40-50.

⁹⁷ Sexual Orientation and Gender Identity Guidelines, ¶ 38.

⁹⁸ Sexual Orientation and Gender Identity Guidelines, ¶ 43.

⁹⁹ Sexual Orientation and Gender Identity Guidelines, ¶ 43.

¹⁰⁰ U.S. Citizenship & Immigration Services, RAO Directorate, Officer Training Program, *Guidance for Adjudicating Lesbian, Gay, Bisexual, Transgender, and Intersex (LGBTI) Refugee and Asylum Claims*, at 14 (Dec. 28, 2011), <https://www.uscis.gov/sites/default/files/document/guides/RAIO-Training-March-2012.pdf> (citing *In re S-A-*, 22 I&N Dec. 1328, 1336 (BIA 2000) (granting asylum to young Moroccan woman whose father persecuted her on account of her liberal Muslim views of which he disapproved)).

Claims by individuals who have diverse sexual orientations or gender identities may also be based on political opinion. The term “political opinion” “should be understood in the broad sense, to incorporate any opinion on any matter in which the machinery of State, government, society, or policy may be engaged,” which may include fundamental beliefs concerning gender roles and sexual orientation.¹⁰¹ The expression of a diverse sexual orientation or gender identity may be viewed as political, “particularly in countries where such non-conformity is viewed as challenging government policy or where it is perceived as threatening prevailing social norms and values.”¹⁰² As with religious beliefs, State authorities and non-State actors may impute political opinions to an individual. Even if an applicant is not LGBTIQ+, a non-conformity in how they express themselves—for instance by failing to appear in a stereotypical way—may be perceived by the State as a political opinion.¹⁰³ U.S. courts and administrative bodies have recognized LGBTIQ+ asylum claims based on political opinion.¹⁰⁴

V. Agents of Persecution and a State’s Ability and Willingness to Protect

International legal standards do not require the persecutor to be a State actor. In UNHCR’s view, “the source of feared harm is of little, if any, relevance to the finding of whether persecution has occurred, or is likely to occur.”¹⁰⁵ The Handbook, while acknowledging that persecution is “normally related to action by the authorities of a country,” explicitly states that it “may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned.”¹⁰⁶ Such claims may warrant a more nuanced analysis, but that does not render these claims “less relevant or less deserving of international protection.”¹⁰⁷

Persecution by non-State actors may give rise to an asylum claim if such persecution is “knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.”¹⁰⁸ *Effective protection* is not “merely enacting a law prohibiting persecutory practices,”¹⁰⁹ as the State “may nevertheless continue to condone or tolerate the practice, or may not be able to stop the practice effectively.”¹¹⁰ For example, State protection is *ineffective* 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[Q+] individuals with due diligence.”¹¹¹ Instead, effective protection depends on the *de jure* as well as *de facto* capabilities of the authorities and requires an in-depth analysis of each individual’s unique circumstances.¹¹²

¹⁰¹ Sexual Orientation and Gender Identity Guidelines, ¶ 50.

¹⁰² Sexual Orientation and Gender Identity Guidelines, ¶ 50. “Anti-LGBTI statements could be part of a State’s official rhetoric, for example, denying the existence of homosexuality in the country or claiming that gay men and lesbians are not considered part of the national identity.” *Id.*

¹⁰³ Sexual Orientation and Gender Identity Guidelines, ¶ 43.

¹⁰⁴ See, e.g., *Pitcherskaia v. INS*, 118 F.3d 641, 644, 648 (9th Cir. 1997) (remanding based on BIA’s flawed analysis of “persecution” where applicant faced harm based on her political opinion in support of lesbian and gay civil rights in Russia and her membership in the PSG consisting of “Russian Lesbians”).

¹⁰⁵ UNHCR, *Interpreting Article 1 of the 1951 Convention*, ¶ 19 (Apr. 2001), <https://www.refworld.org/docid/3b20a3914.html>.

¹⁰⁶ Handbook, ¶ 65.

¹⁰⁷ UNHCR, *Comments of the United Nations High Commissioner for Refugees on the Proposed Rules from the U.S. Department of Justice (Executive Office for Immigration Review) and U.S. Department of Homeland Security (U.S. Citizenship and Immigration Services) “Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review”*, at 44 (July 15, 2020), <https://www.refworld.org/docid/60f846504.html>.

¹⁰⁸ Handbook, ¶ 65.

¹⁰⁹ UNHCR Amicus Brief, *Mijangos v. Barr*, 27, No. 19-70489, (9th Cir. Feb. 28, 2020), <https://www.refworld.org/docid/5f60a2bd4.html>.

¹¹⁰ Gender Guidelines, ¶ 11 (emphasis omitted).

¹¹¹ Sexual Orientation Guidelines, ¶¶ 34-37.

¹¹² Sexual Orientation and Gender Identity Guidelines, ¶ 37; UNHCR Amicus Brief, *Mijangos v. Barr*, at 27.

While in some LGBTIQ+ asylum claims the State may perpetrate the harm, in others, the agent of persecution is a non-State actor, such as “family members, neighbours, or the broader community,” who may be directly or indirectly involved in persecutory acts, including “intimidation, harassment, domestic violence, or other forms of physical, psychological or sexual violence.”¹¹³ In some countries, armed groups, criminal gangs, and vigilantes may specifically target LGBTIQ+ individuals.¹¹⁴ Even where laws criminalizing same-sex conduct have been repealed, “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.”¹¹⁵ Similarly, the existence of anti-discrimination laws and LGBTIQ+ organizations does not necessarily rebut an individual’s well-founded fear, as societal attitudes and prejudices may not align with such laws in a way that creates continued risks when authorities fail to enforce protective laws.¹¹⁶ All of these factors must be taken into account when assessing the ability and willingness of a State to protect an individual.

Under U.S. law, persecution by non-State actors may give rise to asylum eligibility when the government is either unwilling or unable to either control the ‘private’ actor or to protect the asylum seeker.¹¹⁷ Most courts, administrative bodies, and training materials apply the framing focused on the ‘private’ actor,¹¹⁸ which diverges slightly from the international standard because it focuses on a State’s ability to *control the persecutor*, rather than on its ability to *protect an individual* effectively from persecution. In one decision, the U.S. government attempted to heighten the standard by requiring asylum seekers to show that the State “condoned the private actions or at least demonstrated a complete helplessness to protect the victims.”¹¹⁹ This development was heavily litigated in federal courts¹²⁰ until the decision was vacated and adjudicators received instructions to revert to the “unwilling or unable to control” standard.¹²¹

VI. Sur Place Claims

¹¹³ Sexual Orientation and Gender Identity Guidelines, ¶ 35.

¹¹⁴ Sexual Orientation and Gender Identity Guidelines, ¶ 35.

¹¹⁵ Sexual Orientation and Gender Identity Guidelines, ¶ 37.

¹¹⁶ Sexual Orientation and Gender Identity Guidelines, ¶ 37; *see also*, *Avendano-Hernandez v. Lynch*, 800 F.3d 1072, 1080 (9th Cir. 2015) (finding that the BIA erred in relying on the passage of laws purporting to protect the gay and lesbian community when holding that applicant, who is transgender, would be protected from future harm and underscoring that “laws recognizing same-sex marriage may do little to protect a transgender woman . . . from discrimination, police harassment, and violent attacks in daily life”).

¹¹⁷ *Matter of A-R-C-G-*, 26 I&N Dec. 388, 395 (BIA 2014); *see also* *Rosales Justo v. Sessions*, 895 F.3d 154, 159, 163 (1st Cir. 2018) (holding that the asylum seeker had met the “unable or unwilling” standard where the government had displayed a “willingness to investigate” the murder of the applicant’s family member by non-State actors but could nonetheless not protect the applicant).

¹¹⁸ *See* *Rizal v. Gonzales*, 442 F.3d 84, 92 (2d Cir. 2015) (holding that a non-State actor’s conduct may constitute persecution where the government is “unable or unwilling to control it”); *Matter of A-R-C-G-*, 26 I&N Dec. 388, 395 (BIA 2014) (“[I]n order for the respondent to prevail on an asylum claim based on past persecution, she must demonstrate that the Guatemalan Government was unwilling or unable to control the ‘private’ actor.”); U.S. Citizenship & Immigration Services, RAO Directorate, Officer Training, *Definition of Persecution and Eligibility Based on Past Persecution*, at ch. 4.2 (Dec. 20, 2019), https://www.uscis.gov/sites/default/files/document/foia/Persecution_LP_RAO.pdf (“An applicant may establish that he or she has suffered or will suffer persecution by a non-government actor if the applicant demonstrates that the government of the country from which the applicant fled is unable or unwilling to control the entity doing the harm.”); Charles Shane Ellison & Anjum Gupta, *Unwilling or Unable? The Failure to Conform the Nonstate Actor Standard in Asylum Claims to the Refugee Act*, 52 COLUM. HUMN. RTS. L. REV. 441, 455-91 (Winter 2021) (analyzing the standard applied as applied by the BIA, each federal Circuit Court, and the Supreme Court.).

¹¹⁹ *See* *Matter of A-B- I*, I&N Dec. 316, 337 (A.G. 2018); *Matter of A-B- II*, 28 I&N Dec. 199 (A.G. 2021), *vacated by* *Matter of A-B- III*, 28 I&N Dec. 307 (A.G. 2021).

¹²⁰ *See* *Grace v. Barr*, 965 F.3d 883, 903 (D.C. Cir. 2020) (finding that implementation of the heightened standard was arbitrary and capricious as the U.S. government failed to acknowledge or explain the change); *Jimenez Galloso v. Barr*, 954 F.3d 1189, 1192 (8th Cir. 2020) (holding that the unwilling-or-unable test, rather than the completely helpless test, controls since the two tests conflict and the unwilling-or-unable standard came first). For a detailed discussion on the “unwilling or unable” standard and interpretations in the different federal circuit courts before the vacatur of *Matter of A-B-*, *see* generally Ellison & Gupta, *Unwilling or Unable? The Failure to Conform the Nonstate Actor Standard in Asylum Claims to the Refugee Act*.

¹²¹ *Matter of A-B- III*, 28 I&N Dec. 307, 309 (A.G. 2021) (vacating *Matter of A-B- I* and *II*, pointing out confusion over the applicable “unable or unwilling standard,” and instructing courts to follow pre-*A-B- I* precedent until further rulemaking clarifies the standard).

Sur place claims are asylum claims that arise after an individual has left their country of origin, even though they were not a refugee at the time of departure.¹²² This could be due to changes in circumstances in the individual’s country of origin or in the individual’s personal identity or gender expression after their arrival in the country of asylum.¹²³ In the context of LGBTIQ+ asylum claims, some applicants “may not have identified themselves as LGBT[IQ+] before the arrival to the country of asylum or may have consciously decided not to act on their sexual orientation or gender identity in their country of origin.”¹²⁴ Applicants’ fear of persecution “may thus arise or find expression whilst they are in the country of asylum, giving rise to a refugee claim *sur place*,” such as when individuals identifying as LGBTIQ+ engage in political activism or media work or where their sexual orientation or gender identity is exposed by someone else.¹²⁵

VII. Procedural Considerations

UNHCR has recognized that LGBTIQ+ individuals require a supportive and safe environment throughout the asylum adjudication process so that they can present their claim without fear and has proposed substantive and procedural measures to address the unique needs of LGBTIQ+ applicants, including providing decision-makers, interviewers, interpreters, advocates, and legal representatives specialized training on the claims of LGBTIQ+ asylum seekers and granting requests from applicants regarding the preferred gender of interviewers or interpreters.¹²⁶

Several measures may help LGBTIQ+ individuals convey sensitive information critical to adjudicating their asylum claims while minimizing re-traumatization. These include:

- Establishing trust between the interviewer and applicant to create an open and reassuring environment that will assist the disclosure of personal and sensitive information.¹²⁷
- Asking self-identified LGBTIQ+ asylum seekers their preferred name, gender, pronoun and title during registration and protection interviews.¹²⁸
- Avoiding expressing, verbally or physically, “any judgment about the applicant’s sexual orientation, gender identity, sexual behaviour or relationship pattern”¹²⁹ and using non-offensive vocabulary that shows a positive disposition towards diversity of sexual orientation and gender identity.¹³⁰ Use of inappropriate terminology, as well as even seemingly neutral or scientific terms, may prevent the applicant from conveying the actual nature of their fear.¹³¹
- Allowing asylum seekers to express a preference for the sex of their interpreter and interviewer.¹³² If the interpreter is from the same “country, religion or cultural background, this may heighten the

¹²² Handbook, ¶ 94.

¹²³ Sexual Orientation and Gender Identity Guidelines, ¶ 57.

¹²⁴ Sexual Orientation and Gender Identity Guidelines, ¶ 57.

¹²⁵ Sexual Orientation and Gender Identity Guidelines, ¶ 57.

¹²⁶ Sexual Orientation and Gender Identity Guidelines, ¶¶ 58-61.

¹²⁷ Sexual Orientation and Gender Identity Guidelines, ¶ 60.

¹²⁸ Need to Know Guidance, at 24.

¹²⁹ Sexual Orientation and Gender Identity Guidelines, ¶ 60.

¹³⁰ Sexual Orientation and Gender Identity Guidelines, ¶ 60.

¹³¹ Sexual Orientation and Gender Identity Guidelines, ¶ 60.

¹³² Sexual Orientation and Gender Identity Guidelines, ¶ 60.

applicant’s sense of shame and hinder him or her from fully presenting all the relevant aspects of the claim.”¹³³

- Respecting the confidentiality of the information disclosed by the asylum seeker.¹³⁴
- Ensuring additional safeguards in claims based on sexual orientation and / or gender identity by women, including interviewing women separately from their families.¹³⁵
- Implementing additional safeguards in cases of child applicants, such as processing such claims on a priority basis and appointing a guardian and legal representative.¹³⁶

In addition, UNHCR recommends that asylum adjudicators, prior to deciding an LGBTIQ+ claim, become familiar with various ways in which LGBTIQ+ identity may be established, as ascertaining an applicant’s LGBTIQ+ background is essentially an issue of credibility.¹³⁷ Not all LGBTIQ+ individuals will self-identify with LGBTIQ+ terminology, and some may only be able to draw upon (derogatory) terms used by their persecutor.¹³⁸ Decision makers must therefore be flexible in applying labels and careful not to fail to recognize a valid claim.¹³⁹ Useful areas of questioning may include self-identification, childhood, self-realization, gender identity, non-conformity, family relationships, romantic and sexual relationships, community relationships, and religion.¹⁴⁰ Finally, adjudicators should be attentive to the differences in applicants’ experiences based on their sex and / or gender and recognize that sexual orientations and gender identities are diverse and evolving identities, whose expression may vary depending on the individual and the cultural, legal, political, and social context.¹⁴¹

VIII. Overview of UNHCR Resources to Support LGBTIQ+ Asylum Claims

For a discussion of substantive and procedural considerations relevant to LGBTIQ+ asylum claims, see:

- UNHCR, [Need to Know Guidance: Working with Lesbian, Gay, Bisexual, Transgender, Intersex and Queer Persons in Forced Displacement](#) (2021)
- UNHCR, [LGBTIQ+ Persons in Forced Displacement and Statelessness: Protection and Solutions – Discussion Paper](#) (June 2021)
- [Guidelines on International Protection: 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](#) (Oct. 2012)
- [UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity](#) (2008)

¹³³ Sexual Orientation and Gender Identity Guidelines, ¶ 60.

¹³⁴ Sexual Orientation and Gender Identity Guidelines, ¶ 60.

¹³⁵ Sexual Orientation and Gender Identity Guidelines, ¶ 60; *see also* Gender Guidelines.

¹³⁶ Sexual Orientation and Gender Identity Guidelines, ¶ 60.

¹³⁷ Sexual Orientation and Gender Identity Guidelines, ¶ 62.

¹³⁸ Sexual Orientation and Gender Identity Guidelines, ¶ 11.

¹³⁹ Sexual Orientation and Gender Identity Guidelines, ¶ 11. Individuals with an intersex condition, for example, may not identify as LGBTIQ+ because they do not view the condition as part of their identity, and men who have sex with men may not always identify as gay. *Id.*

¹⁴⁰ Sexual Orientation and Gender Identity Guidelines, ¶ 63.

¹⁴¹ Sexual Orientation and Gender Identity Guidelines, ¶ 14. Certain heterosexual or male gay norms or country information may not, for example, apply to the experiences of lesbians in the country. *Id.*; *see also Razkane v. Holder*, 562 F.3d 1283, 1288 (10th Cir. 2009) (holding that the immigration judge’s homosexual stereotyping—including his own views of the appearance, dress, and affect of gay men, which led to his conclusion that the applicant would not be identified as gay—precluded meaningful review of the case); *Shahinaj v. Gonzales*, 481 F.3d 1027, 1029 (8th Cir. 2007) (reversing adverse credibility finding where immigration judge found applicant not credible based upon a conclusion that his mannerisms and speech did not indicate he was homosexual).

For a discussion of UNHCR’s views on the legal analysis of LGBTIQ+ asylum claims in the U.S. context, see:

- [Comments on the Proposed Rules from the U.S. Dept. of Justice and Dept. of Homeland Sec., “Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review” \(July 2020\)](#)
- [Amicus Brief, *Marroquin-Perez v. Barr* \(Feb. 2020\)](#)
- [Amicus Brief, *Grace v. Barr* \(July 2019\)](#)
- [Amicus Brief in Support of Petitioner’s Petition for Panel Rehearing or Rehearing En Banc, *Bringas-Rodriguez v. Lynch* \(Feb. 2016\)](#)

For a discussion of the specific protection issues, problems, and risks facing refugee and asylum-seeking LGBTIQ+ individuals, see:

- [UNHCR, *Need to Know Guidance: Working with Lesbian, Gay, Bisexual, Transgender, Intersex and Queer Persons in Forced Displacement* \(2021\)](#)
- [UNHCR, *LGBTIQ+ Persons in Forced Displacement and Statelessness: Protection and Solutions – Discussion Paper* \(June 2021\)](#)
- [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* \(Dec. 2015\)](#)
- [Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico \(Oct. 2015\)](#)

For country-specific guidelines that discuss the situation and common protection needs of LGBTIQ+ individuals, see:

- [International Protection Considerations with Regard to People Fleeing the Republic of Iraq \(May 2019\)](#)
- [Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan \(Aug. 2018\)](#)
- [Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Guatemala \(Jan. 2018\)](#)
- [UNHCR, “We Keep it in Our Heart” – Sexual Violence Against Men and Boys in the Syria Crisis \(Oct. 2017\)](#)
- [Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Honduras \(July 2016\)](#)
- [Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador \(Mar. 2016\)](#)
- [Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Colombia \(Sept. 2015\)](#)
- [Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka \(Dec. 2012\)](#)
- [Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Eritrea \(Apr. 2011\)](#)