

TRANSCRIPT FROM THE MARGINS

Looking into the way circumstances and experiences of transgender persons coming from the Latin American Caribbean region are represented and considered in Dutch asylum procedures

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The content and implications of Transcript from the Margins, does not necessarily represent the knowledge, opinions or the approach of those experts or organisations advising this research. All content is the sole responsibility of the main researcher, Willemijn van Kempen and co-researcher, Alejandra Ortiz.

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Transcript from the margins

Looking into the way circumstances and experiences of transgender persons coming from the Latin America and the Caribbean region are represented and considered in Dutch asylum procedures.

“They can cut all the flowers, but they cannot stop spring”

– Pablo Neruda¹

¹ “Podrán cortar todas las flores, pero no podrán detener la primavera.”

Preface

“Transcript from the Margins” is a study into previously uncharted territory – the adjudication of the asylum claims of transgender persons in the Netherlands and its national and international asylum context. This report originated from a community support project for trans² asylum seekers with the aim of providing this group with information, buddy contacts and making gender-affirming medical assistance available to them. This community project developed into a collaboration between Alejandra Ortiz, a Latin American trans woman who has requested international protection, and me, Willemijn van Kempen, a Dutch trans woman. With shared knowledge of the many, interrelated negative experiences and circumstances that lead trans persons to seek refuge, we questioned the extent to which any or all of these factors are currently recognised and understood in their asylum procedures in the Netherlands. In fact, we learned that trans persons had been included only recently in the European Qualification for International Protection Directive (2011/95/EU). In Dutch asylum practice, this meant that the smaller group of trans persons was subsumed into the existing and larger LGBTI group³ with little regard for their specific needs and circumstances. Moreover, it soon became clear to us that there is almost no documentation or research on either the adjudication of trans persons’ asylum claims in the Netherlands, or their status within the national and international asylum context. All this motivated us to develop and conduct this research.

For me – the author and main researcher of this report – this study builds on more than a decade of engagement and expertise in pursuit of emancipation and equality for trans persons in the Netherlands. As a trans person born in a rural area of the Netherlands in 1961, living an authentic life has been a story of growth and survival against many odds. In fact, the resilience and independence gained from my own journey have proved crucial skills for conducting this research. At the same time, engaging with Alejandra and other trans asylum seekers from many parts of the world has been a humbling experience and it has taught me that I am one of the lucky ones. I could not have achieved this research without Alejandra’s cooperation as co-researcher, contributing her experiential expertise while also being a participant in the study. Her own story is one of growing up in poverty in the Latin America and the Caribbean, a person of colour in a rural, patriarchal, and Catholic setting. She was expelled from home, displaced, and lived abroad illegally. She spent time as a sex worker and faced imprisonment with men with no legal recourse to gender recognition or gender-affirming healthcare. The cultural and intersectional expertise that Alejandra invested in this research, informed by her life history and her observational nature have been important to this research. After a collaborative start and first phase, I (Willemijn) took on the role of main researcher, undertaking the background research, processing, coding, and analysing the research data, designing and writing the report. This also means that Alejandra did not process and interpret her own data in the research.

We proudly present this thorough analysis of trans persons’ claims to international protection within current Dutch asylum practice and the asylum context in general. We invite you to embrace it as a strong basis for the development and maturation of the way trans persons’ asylum procedures are conducted and informative for the tasks these procedures require of national and international stakeholders.

² “Trans” is synonymous with and used instead of “transgender” for brevity in this research.

³ Group of lesbian, gay, bisexual, trans- and intersex persons.

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In addition, we want to thank wholeheartedly the other three members of our advisory group for their close reading, feedback, and expert advice on parts of the research texts: **Mr. Dr. M. (Maarten) den Heijer**, assistant professor of international law at the Amsterdam Centre for International Law (UVA) provided crucial feedback with respect to the conclusions and recommendations, linking them to specific stakeholders in the asylum context. We thank **Mr. S. (Sabine) Jansen**, a renowned researcher in the area of LGBTI asylum policy and procedures, for insights that helped us to, among other things, position trans asylum procedures in the existing context of Dutch LGBTI asylum practise. We are grateful, too, for the contribution of **Dr. M. (Mijke) van der Drift**, who reflected with us on the best way to represent the experiences of the trans Latinas who feature in this research and, crucially, to secure the dignity of the trans Latinas we write about.

We also want to express our gratitude to the following contributors: our participants in the research; Nuno Ferreira, project leader at the Sexual Orientation and Gender Identity Claims of Asylum (SOGICA) project; Anna de Ruijter; Sabine Bastiaans; Caroline Pronk; from Bureau Clara Wichmann, Natasa Nedeski and Femke Zeven; from TNN: Sophie Schers; Samira Hakim; Nora Uitterlinden. Alistair Stewart and Callum Lynch from Human Dignity Trust; Jenni Millbank and Laurie Berg from the Faculty of Law at the University of Technology Sydney; and from Trans United Europe: Dinah de Riquet-Bons; Amy E. Ritterbusch; Lydia M. Romero-Moreno; Maria Ines Taracena; Victor. M. Duenas; Erika Castellanos; Fernanda Milan; Gabriel Bos; Denisse Valverde; Melisa Soto-Lafontaine; and all contributing photographers.

Willemijn van Kempen and Alejandra Ortiz

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Willemijn van Kempen



© Nick Jaussi, 2014. Image showing four trans women in bed in Bogota's Santa Fe District.

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Executive summary

Introduction

The research “Transcript from the Margins” focuses on the circumstances and experiences of transgender persons, which contribute to the danger and impossibility of living in countries of origin in the Latin America and the Caribbean (hereafter LAC) region that lead to an asylum application. The research question is whether and how these experiences and circumstances are seen, questioned and considered in Dutch asylum procedures? To answer it, an exploratory case study was designed and conducted. It analysed the Dutch asylum procedures of eight transgender (hereafter, trans) women from the LAC region whose countries of origin do not directly criminalise LGBTI identities. The material that was coded and analysed in this research included a semi-structured interview with each participant, asylum procedure documents from the immigration service, lawyers and courts, and background research information and Country of Origin Information (hereafter COI). The researchers, Willemijn van Kempen and Alejandra Ortiz, have a trans background in the Netherlands and the LAC region respectively and contributed fundamental knowledge and insight about trans persons’ lives and circumstances and lowered the threshold for participation. It should be noted that Alejandra, as the co-researcher, belongs to the research population, and is a participant in this research. After a collaborative start and first phase, Willemijn took on the role of main researcher, undertaking the background research, processing, coding, and analysing the research data, designing and writing the report. This also means that Alejandra did not process and interpret her own data in the research.

Eligible candidates for participation in the research were trans-identifying adults who had requested international protection in the Netherlands and who originated from countries in the LAC region that do not explicitly criminalise LGBTI persons. Recruitment of candidates from this small and hard-to-reach group was achieved through direct contact. Though not a selection criterion, all participants had a female gender identity and therefore the research group is not representative of all trans persons in the LAC region. Their experiences and circumstances, however, are very much in accordance with reports of the situation of trans persons in this region. The outcome of the participants’ asylum applications was neither the focus of this research, nor a criterion for participation. Instead, the research examines the process, content, and quality of the Dutch asylum procedures when dealing with trans persons.

The two main research chapters have a different focus. Chapter 2 provides “baseline observations and reflections” that deal with the conditions surrounding the trans asylum procedures and general elements in the execution of participants’ asylum procedures. Chapter 3 follows the central research question. It starts with participants’ experiences and circumstances, with a view to assessing the asylum procedure’s ability to represent and consider them. To this end, a number of relevant life events and their context in countries of origin were selected from semi-structured research interviews, asylum procedure documentation, and background research information.

The information gathered from these sources was organised into nine central themes that became an assessment framework for the research. The themes relate to the conditions in countries of origin and the exclusion and discrimination experienced by trans Latinas that make life dangerous and untenable in their countries of origin. They are: the circumstances and experiences in youth and early adulthood; gender-affirming healthcare, its absence, restrictions and/or related abusive preconditions; legal gender recognition, its absence, restrictions and/or related abusive preconditions; violence towards trans Latinas⁴ by state authorities; involvement in sex work; prison conditions; (self-) restriction; instability and/or repression in countries of origin; and individual disparities and/or circumstances intersecting with the trans identity and/or expression. As much as possible, these themes were supported and substantiated by relevant background research information, COI, and trans-specific knowledge. To assess the extent to which these nine themes were included and considered in the Dutch asylum process, they were tracked through participants’ asylum procedure documentation.

The large number of different observations and reflections that were generated from the research were distilled and reorganised into three major areas of concern and overarching observations, presented below, and framed as the findings of this research.

⁴ Trans Latina; a trans woman originating from the Latin American Caribbean region.

The research results

Absence of trans specificity

The first major area of concern is the profound lack of differentiation of the research group from the wider LGBTI group and the lack of specificity in Dutch asylum procedures for important themes relating to participants' trans identity and/or expression. Even without other observations yet to come, this lack of trans specificity⁵ in itself invalidated the adjudication of participants' asylum applications.

Background research information clearly supports the need for differentiation and specificity and reveals a number of reasons for such a trans-specific approach. It should be noted that several themes are highly relevant and specific to trans persons and the many human rights challenges they face. We have defined these "trans-related themes" as: legal gender recognition (hereafter LGR); imprisonment based on the sex assigned at birth; and gender-affirming healthcare. Moreover, the visibility of trans women as gender non-conforming is seen as a probable trigger for a higher burden of adverse experiences. Indeed, the burden of exclusion, discrimination, and violence towards LGBTI persons in general is reported to be even higher for trans persons in the LAC region in most circumstances. This reality will only be visible when trans persons are actively differentiated from the larger group. Finally, but no less importantly, trans persons in the LAC region are reportedly less protected by laws and regulations.

Ignoring trans-related themes

The research reveals a near absence of conscious and informed inclusion of trans-related themes in the participants' asylum process. Procedures ignore the fact that trans-related human rights are largely dependent on explicit legislation and provisions by governments in countries of origin. Equally, only a minority of LAC countries provided LGR and gender care along the lines of the Yogyakarta Principles⁶ and none of the countries followed human rights guidance concerning the imprisonment of trans persons. The Dutch asylum process also fails to take into account that an absence of such rights is known to be strongly connected to a well-founded fear of persecution; and that access to these rights and protection for participants was absent in most cases.

Those negative experiences connected to trans-related themes that did surface in asylum hearings were not linked to a structural absence of these rights. Assessments followed this trend by failing to consider the legal and actual situation and/or governments' responsibilities to implement trans-related rights in countries of origin. As a result, it produced a picture that portrayed the multitude of negative experiences of exclusion, discrimination, violence, as well as cruel, inhuman, and degrading treatment and/or torture, as rather separate or random occurrences. Given the prevalence of such experiences, they should have been assessed as structural and pervasive. Furthermore, the process did not acknowledge that when such rights are absent or restricted, participants were left unprotected and without the legal grounds to ask for protection from state authorities. Finally, the research reveals that there was no attention in participants' procedures for the fact that abusive preconditions to trans-related rights, e.g. mandatory sterilisation or sex reassignment surgery, are serious human rights violations in themselves.

Misgendering

The majority of trans women in our research were misgendered,⁷ with the wrong pronouns and first names being

⁵ Trans-specificity refers to an approach to trans asylum procedures that differentiates information and ideas from the larger LGBTI group and assesses their applicability for persons with a trans identity and/or expression. Moreover, it pays specific attention to important themes relating to participants' trans identity and/or expression and assesses them in the context of countries in the LAC region. A trans-specific approach is founded in relevant knowledge and insight.

⁶ Yogyakarta Principles, 2007. "Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity" (Geneva: ICJ, International Commission of Jurists) pp. 1-38. Available at: <https://www.refworld.org/docid/48244e602.html>; last accessed 15 December 2020. The Yogyakarta Principles are a set of principles on the application of international human rights law in relation to sexual orientation and gender identity. The Principles affirm binding international legal standards with which all States must comply. They are the outcome of an international meeting of human rights groups held in Yogyakarta, Indonesia, in November 2006.

⁷ Misgendering: The intentional or unintentional referral to, or interaction with, a trans person using language to describe that person which is not in accordance with the gender this person identifies with. For example, referring to a person identifying female as "he" or calling her a "guy" (Clements, KC. 2018).

used in their procedure, especially in written documents and by the immigration service. While lawyers also occasionally did this, it is notable that the courts consistently gendered trans persons correctly. Misgendering trans persons disrespects their gender identity and/or expression, which is the core reason for their asylum request. Instead, persistent use of the sex assigned at birth confirms a gender normative position towards trans identities that reinforces the notion that it is birth characteristics and not identity that define who they are. The current Dutch asylum praxis does not distance itself from misgendering. This may well indicate a gender normative bias among adjudicators and/or a lack of appreciation for its importance. Such lack is very unfortunate, since most of the violence against trans Latinas that needs to be brought up and assessed in asylum procedures is rooted in gender normative mechanisms and disrespect for their identity. Despite its importance, the link between trans Latinas' gender non-conformity and all the ways in which it triggers violence against them was not actively questioned in their asylum hearing or considered in assessments.

A lack of differentiation

The use of undifferentiated information and topics that are relevant to persons with an LGB identity but not to trans participants led to serious but also smaller mistakes and misinterpretations on numerous occasions. This is apparent in, for instance, the immigration service's working guidelines, the implementation thereof, and the misinterpretation of anti-discrimination provisions. The fact that the guidelines classify a trans identity and/or expression as a sexual identity, under LGBT, and only propose questions about sexual preference sets the wrong tone. Consequently, mistakes occurred in their execution, i.e. when questioning the credibility of the trans identity. In addition, the erroneous application of existing anti-discrimination provisions for LGB persons – in several countries these provisions do not include trans persons – resulted in serious mistakes in a majority of participants' cases.

The lack of differentiation also means that the immigration service's severity assessment frequently failed to include the greater severity and frequency of negative experiences and circumstances of trans persons in the LAC region. The background research reveals how they are less protected by law and in practice, compared to persons with an LGB identity. This is disregarded in the adjudication of their asylum claims. Moreover, the misgendering of trans women as men creates an impression that Dutch immigration service officers are incorrectly identifying trans women as gay men. All this undermined the assessments in the participants' cases.

Inadequate interpretation of circumstances

The second major area of concern is the highly inadequate interpretations of circumstances in countries of origin during the assessment of trans participants' asylum applications.

Findings show that where COI should enable a well-founded, informed, and balanced assessment of circumstances in asylum procedures, the reality is that it is riddled with problems. This research reveals that COI for the larger group of LGBTI persons is scarce and insufficient and mostly addresses the larger LGBTI group in general with little attention to specific subgroups. This situation is likely to be even more pronounced for trans persons, given the late inclusion of gender identity as an asylum motive in the asylum context. The near absence of trans-specificity is exacerbated by the lack of COI that could support such differentiation and specificity. Furthermore, it was not clear what COI was available to and considered by the immigration service prior to our participants' asylum applications, or how it was weighed in the general assessment of conditions in their countries of origin. An official information request was submitted to the Dutch government with respect to this and other topics but, to date, no response has been received. COI is mentioned sparsely in trans Latinas' procedures, often without correct references. Where it is mentioned, it is very general in nature and fails to address many relevant circumstances.

The following research results for this area of concern deal with important themes relating to the severity assessment, such as: the possibility of protection for participants in their countries of origin; how pervasive police violence is; and the degree to which circumstances in the home country are grounds for a well-founded fear of persecution upon return.

A failure to consider an absence of protection

The assessment of protection possibilities in countries of origin reveals serious errors and the level of protection has been overestimated in our participants' cases. As mentioned earlier, the failure to differentiate trans persons from

the wider LGB group led to the mistaken projection of anti-discrimination provisions regarding a person's sexual orientation onto trans persons in the majority of cases.

Moreover, the consequences of a lack of trans-specific rights in legislation and provisions in many countries were not taken into account. This refers first of all, to the absence of LGR or the human rights-violating requirements connected to obtaining LGR, such as mandatory sterilization or sex reassignment surgery. Without LGR, there is no protection against exclusion, discrimination and violence in many areas of life, such as work, housing, education, when travelling, opening a bank account, claiming heritage, or against gender-based violence. Second, the incarceration of transgender people based on the sex they were assigned at birth sentences trans women to prison terms in a male prison. This is a known risk of cruel, inhuman and degrading treatment and/or torture against which trans Latinas are not protected by the state in LAC countries. Thirdly, it is important whether and how access to gender care is facilitated by the government. In the majority of countries of origin in the LAC region access to such care is absent or restricted. If such care is available, it often means that trans persons have to submit to human rights-violating preconditions, such as pathologising diagnosis or mandatory medical treatment such as sterilisation and/or gender reassignment surgery. Most participants lived in circumstances where the rights mentioned here did not exist or were inaccessible without facing human rights violations. These facts and the consequences of being unprotected in absence of specific provisions for trans persons have not found their way into trans-asylum procedures.

In addition to these observations, the IND's assessment of the protection options for Cuban participants by the organisation CENESEX when submitting a complaint was unbalanced and debatable. This assessment ignored both the authoritarian and communist background of this state institution headed by a daughter of Raul Castro and the double role it has since transgender people also depend on CENESEX in its distribution of the very scarce gender care in Cuba. Many LGBT people do not trust the organisation and trans people already fear that they will not gain access through CENESEX to the very scarce gender care. If a complaint to be submitted, for example because of police violence, would be unwelcome to CENESEX, trans people feared that they would miss out on the desired gender care.

In sum, it was frequently assumed that participants had recourse to state protection, leading to an expectation that they should have filed complaints in their home country if they had experienced exclusion, discrimination, or violence. Frequently, participants who had not sought protection in their country were judged as having failed to fulfil an obligation and the asylum claim was assumed to lack reasonable grounds.

The combination of omissions, mistakes, and unbalanced representations, which contribute to a false idea about what state protection is available to trans participants, is detrimental to a fair assessment of a well-founded fear of persecution in participants' asylum procedures.

Assessing police violence

Violence by state authorities directed at trans Latinas was interpreted in immigration service assessments, specifically in "intention" documents⁸ as incidental and random, and was not underpinned by any reference to COI. Caution should be exercised when assessing the extent of police violence in situations where information is scarce, fragmentary, or unclear, or in cases where the absence of information about police violence is inversely proportional to the high likelihood of it occurring. This caution is missing in the immigration service's approach. Furthermore, analysis of both the background research information and trans Latinas' narratives pointed to recurring violence by state authorities against them in the LAC region, with this violence regularly meted out in many countries by, among others, police officers. The information and narratives also show how a prejudiced and violent attitude among police forces can be seen as a reaction to the perceived gender non-conformance of a trans person. But the connection between gender normative violence and trans identity and/or expression was not actively explored and included in hearings and assessments, despite it being widely acknowledged that violence towards trans Latinas is not random. The violence is connected to being part of a marginalised, gender non-conforming social group with an innate variance in gender identity.

In the case of Cuban participants, the Dutch state linked the violence by police forces in Cuba against persons with an LGBTI identity to "police attention at gay meeting spots", and "public order problems and crimes such as prostitution". Sex work was interpreted as a criminal offence in asylum assessments. Immigration officers incor-

⁸ The intention (to a decision) is the preliminary (negative) conclusion, in writing, of an individual asylum procedure case by the immigration service.

rectly applied these elements to the violence experienced by Cuban trans women, whose narratives simply did not match what the immigration service suggested as locations of or reasons for police violence. Moreover, sex work is not, in fact, a criminal offence in Cuba. Consequently, the attention devoted to these misinterpretations in the Cuban cases steered adjudicators away from participants' experiences of violence triggered by perceived gender non-conformance.

Neglecting the influence of instability and/or repression in countries of origin

Serious instability and/or repression are present in LAC countries of origin such as Guatemala, El Salvador, Honduras, the south of Mexico, Colombia, Venezuela, and Cuba. The impact of gangs or other violent non-state groups results in the improbability or total absence of protection and increases the risks of violence in general, but even more so for trans women in these countries. In Venezuela, the democratic system has collapsed, increasing repression, violence, and human rights violations by police forces and "Colectivos"⁹ who act with impunity.

Such circumstances were clearly recorded in the background research information and reflected the negative experiences articulated by most participants during hearings, but they remained underrepresented in asylum assessments. With respect to Cuba, there were also disputable interpretations of the existing repression. Little weight was given to several relevant and highly negative circumstances in the country. This gives the impression that the severity of problems is downplayed. For instance, there was no acknowledgement in immigration service assessments of the fundamental critique of the "Ley de Peligrosidad"¹⁰ by key information sources. These sources support and corroborate participants' reports of, among other things, the risk of imprisonment without having committed an offence. Punishment can be imposed on the basis of vague descriptions and suspicion of, for example, 'socially reprehensible behaviour'. After warnings and fines, often related to their gender non-conformity, trans Latinas have been oppressed for years by means of weekly police surveillance at their home address, under threat of jail time and the warning not to dress as women. The information also shows that protection against the government repression under this law is absent, while trans Latinas are at much greater risk because of their gender non-conformance. Trans women are imprisoned with men, exposing them to a known and predictable risk of cruel, inhuman and degrading treatment and/or torture, while the authorities fail to protect them from such risk. These risks, which are clearly present on return to Cuba, do not appear to have been considered in assessments.

We conclude that many claims made and positions taken by the Dutch immigration service in the assessment of situations in countries of origin were inadequate. They were either unsubstantiated, involved disputable interpretations or damaging errors, omitted highly relevant circumstances and information, represented participants' reasons for claiming asylum in unbalanced ways, or misdirected situations. This in no way provides solid ground for assessments in asylum procedures and cannot ensure any form of objectivity and transparency. It should be stated that the sparseness of COI does not sufficiently explain the problems described here. After all, it became clear in the course of this research that a better foundation for interpretations in assessments is possible, if prior knowledge and insight concerning trans issues is present, research strategies are adapted, a larger variety of sources is included and capacity investments are made.

A different approach to the interpretation of circumstances in the country of origin by the Dutch government¹¹ became apparent recently regarding Venezuela. It emerged at the end of the research cycle and after writing the above analysis. The Dutch government's country-specific asylum policy¹² with respect to Venezuela identifies trans persons in Venezuela as a risk group. It incorporates how instability and/or repression in a country of origin leads to an absence of state protection, acknowledges that a number of laws have no consequence in reality, and accepts that relocation is not an alternative. Crucially, it is more trans-specific; it takes into account that trans persons face higher risks of exclusion, discrimination, and violence – also by state authorities – compared to LGB persons. It acknowledges that the absence of legal gender recognition in Venezuela is a strong predictor of a trans person being outlawed in essential areas of life and it highlights how their marginalisation predisposes individuals to being trafficked and/or becoming involved in sex work.

⁹ Armed paramilitary organisations/groups in support of Venezuela's president, Maduro, and the party he belongs to.

¹⁰ Ley de Peligrosidad is shorthand for "Ley de Peligrosidad y rehabilitación social"; translated here as the "law of dangerousness and social rehabilitation," which is a Cuban public order and vagrancy law. It is included in Cuba's penal code, Código Penal, as "Estado peligroso y las medidas de seguridad" described in articles 72 to 84.

¹¹ Dutch Government, Ministry of Foreign Affairs, 2020 A. "Algemeen Ambtsbericht Venezuela 2020", pp. 1-121. Available at: <https://www.rijksoverheid.nl/documenten/ambtsberichten/2020/06/11/algemeen-ambtsbericht-venezuela-juni-2020>; last accessed 28 December 2020.

¹² Dutch Government, Ministry of Justice and Security, 2020 B. "Landenbeleid Venezuela", pp. 1-5. Available at: <https://www.rijksoverheid.nl/documenten/kamerstukken/2020/08/25/tk-landenbeleid-venezuela>; last accessed 28 December 2020.

In our opinion, this approach to the situation of trans persons in Venezuela is an example of a better praxis, one that accords with the analysis and recommendations of this research and a starting point for a differentiated and specific approach to trans persons' experiences and circumstances.

A failure to include relevant, interrelated elements and the whole picture

A third area of major concern coming forward from the research results is the substantial number of relevant experiences, circumstances and interactions thereof which were not represented or considered in their asylum procedures. This concerns elements that are directly related to their trans identity and/or expression that are not observed or taken into consideration in their asylum procedures. There is also no acknowledgement of the presence and aggravating effects of individual disparities and circumstances that interact with the hardships of a trans identity and/or expression. Each research participant faced at least three, and often more, intersecting disparities, e.g. being poor, coming from a rural background, a mixed racial background, or having contracted the human immunodeficiency virus (hereafter, HIV). Furthermore, the whole picture, i.e. how all these elements in the lives of trans Latinas interact, accumulate, and result in additional hardships was not established or considered in the asylum procedures.

The observations and analysis in this research were gathered based on the themes of marginalisation and intersecting disparities in childhood and into adulthood, sex work, and limitations on participants communicating their lived experiences and circumstances in hearings.

Marginalisation at a young age and intersecting disparities

The narratives told by participants during the research interviews, about coming out in their early teens combined with other disparities, were infrequently represented in their asylum hearings and rarely taken into account in the immigration services assessments. Indeed, in only one case were such early problems defined and assessed as material fact¹³. Generally, the discrimination, exclusion and violence that trans persons experienced from their family, in education, and neighbourhoods after coming out, which resulted in social marginalisation, were not assessed. Moreover, the presence of individual intersecting disparities such as being poor, from a rural background, or a mixed racial background, in addition to a trans identity and/or expression almost certainly contribute to participants being expelled from home and school, leading to the termination of education, homelessness, and an inability to find employment. Furthermore, assessments failed to consider that the interplay of several disparities accumulates and results in greater hardships, i.e. becoming involved in sex work, being displaced from their birth region/country, and/or acquired HIV. The hearings and assessments also did not appear to be informed about key background research information, confirming that an unprecedented 75 per cent or more of trans Latinas are involved in sex work in the LAC region.

The Dutch immigration service's approach showed no signs of including trans Latinas' "intersectional reality"¹⁴ in their asylum procedures. The inclusion of such intersectional reality would have demonstrated an awareness and acknowledgement of the importance of the interaction between individual disparities and the negative circumstances and effects that they have on a person, i.e. they exacerbate the negative experiences that participants had as a result of their trans identity. It would thus be logical to respect and take into account the intertwined character of e.g. trans identity and sex work; as we will see, however, the immigration service took another path.

¹³ Material fact: "A circumstance or fact in the asylum procedure concerning at least one topic or narrative related to being a refugee or article 3 ECHR". ACVZ, Advisory Committee on Immigration Affairs, 2016. "De Geloofwaardigheid Gewogen". (Den Haag: ACVZ), pp. 1-83, esp. p. 33. Available at: https://www.eerstekamer.nl/bijlage/20160630/acvz_advies_de_geloofwaardigheid/document3/f=/vk5dhol7brer.pdf; accessed 11 December 2020.

Separate material facts are a starting point for assessments in asylum procedures.

¹⁴ According to Manuel (2006), explaining intersectionality basically "contends that the [negative reactions to] distinguishing categories within a society, such as race/ethnicity, gender, religion, sexual orientation, class, and other markers of identity and difference, do not function independently but, rather, act in tandem as interlocking or intersectional phenomena."

Assessment of sex work

The intersectional reality of participants who had been involved in sex work in their countries of origins was ignored in their assessments. Instead, the elements of trans identity and sex work were considered to be separate; moreover, sex work was presented as the trigger for violence by state authorities. Consequently, the fact that trans identity and/or expression is an equally important trigger for violence was neglected. This separation of trans identity and sex work is artificial and, as argued frequently in this research, misrepresents the real situation.

The described separation of elements was exacerbated by the immigration service's mistaken claim that sex work in two LAC countries (one of which is Cuba) is a criminal offence, the implication being that the consequences of such offences were an individual responsibility. It should be stated here that sex work is not a criminal offence in these countries. Moreover, individual responsibility is a problematic concept when 75 per cent or more of trans Latinas are reported to be involved in sex work. The immigration service thus mirrored the stigma and incrimination by society and state authorities in the countries of origin. Participants' lived realities and background research information were not included in assessments. The result is that the police violence they experienced was not considered or given the necessary weight. This approach is in direct opposition to the perspective taken by human rights organisations on the matter. Such organisations do not view violence by state authorities as "law enforcement", but rather as unlawful violence and repression and, in this case, a breach of (trans) sex workers' basic human rights. Moreover, when such violence is sanctioned by the state it removes a person's access to redress or protection from state authorities.

The analysis in this research has inevitably led to the importance of an intersectional approach to trans Latinas sex work. An approach that includes the individual disparities and negative conditions in countries of origin in their interaction with and accumulation of the problems because of a trans-identity and how this poses a high risk of involvement in sex work. The hardships of trans sex work are aggravated further by the major, intersecting problems of repression and criminalisation of sex work.

Psychological impact and cognitive limitations affecting the representation of lived experiences

The psychological impact of what participants had experienced in their country of origin was observed in medical examinations prior to their hearings and recalled at the start of the second hearing. This included impairments in memory, the diminished accuracy of data and details, and heightened emotional responses. In addition, there were observations in the research that indicated some cognitive impairment and/or lack of education in a minority of participants, which hindered their ability to communicate their own experiences and circumstances in their asylum procedure. There was not much evidence that the immigration service takes such psychological impact or cognitive limitations into account as to their effect on the ability of trans asylum seekers to communicate their hardships.

The psychological impact likely shaped participants' behaviour. It was certainly observed in the research interviews, for example in the way that participants downplayed problems, demonstrated a tendency to avoid situations, did not trust authorities, and expressed a lack of hope that anything good would come their way. All of this may have hindered the transmission of their experiences and circumstances, in turn influencing the way they were perceived in hearings and judged in assessments. For instance, hardships were frequently omitted or downplayed in a hearing, or participants appeared to be detached from such experiences. In some assessments, adjudicators perceived trans Latinas attitudes to seeking protection in their countries of origin as lacking effort. Other possible interpretations however were that trauma caused fear and avoidance of authorities or how experiencing the uselessness or dangerousness of filing complaints turned into hopelessness.

These issues may have led to four participants not talking about their involvement in sex work in hearings, also because they know how the stigma imposed on them for being trans and a sex worker could endanger their credibility. As a result, this diminished the presence and effects of sex work in hearings in terms of aggravating the risk of a well-founded fear of persecution. Insight into the individual, intersectional dynamics in trans persons' lives and in trans asylum procedures is highly relevant. Unfortunately, the research evidences a lack of such insight in asylum procedures, not only with respect to sex work. Given the immigration service's approach in cases when participants did talk about sex work in hearings, participants' fears about such admissions having a negative influence on their asylum outcome are apparently well-founded.

The scope of an asylum procedure

Fact finding and assessments in trans asylum procedures clearly need to have a broad scope in order to cover the entirety of experiences, circumstances, intersecting disparities, and the way they interact and accumulate. But the research reveals how procedures tended to “narrow down” the focus and divided the total lived experience into a few separate material facts. A limited number of separate and “physical” material facts were taken into account, with little consideration for context; the whole picture and the various correlations were not represented.

When the reasons why things happen and the dynamics of situations are not considered, the elements of a narrative can appear more incidental and random while, in fact, they are structural and pervasive. Moreover, a wide range of “smaller and larger” lived experiences were not considered in the course of asylum procedures and this was exacerbated by an overall lack of attention to and consideration for participants’ individual and intersectional reality in Dutch asylum procedures.

Overarching observations

The three main areas of concern described above, and the role of the immigration service in this regard, are focused on the primary process in Dutch asylum procedures. But Dutch asylum practise functions in and is influenced by a wider field of national, European and international circumstances and stakeholders that will be discussed in this section. The recent inclusion in an asylum context of gender identity and/or expression in the recast of the European Qualification Directive¹⁵ may explain why the theme of gender identity and/or expression is not yet sufficiently integrated in the work of many national and international stakeholders. It is important to indicate some circumstances here and highlight the state of development in the work of various international, European and national stakeholders regarding this inclusion.

It is a fundamental but also highly relevant point that trans persons have only recently begun to emerge from marginalisation and pathologisation. The Yogyakarta Principles of 2007 are a landmark for the specification and affirmation of human rights for trans persons. But moving from a situation of awareness to one of unambiguous legislation, rights, and equality for trans persons is a gradual process and remains a long way off in many parts of the world. Even if European countries such as the Netherlands do receive trans asylum seekers, the development is incomplete and varies greatly within Europe, with some countries even rolling back or obstructing rights. This situation may influence stakeholders’ sensitivity to and perception of trans-related themes and the weight they have in asylum procedures. When trans persons were formally included in the asylum context in 2011, they were simply subsumed within the larger LGB group in the Netherlands. The position adopted by the European Asylum Support Office (hereafter, EASO), as detailed in their 2015 practical guide to COI research, was not to focus fully on trans persons “because their asylum procedures are not so common.” Such a position is not helpful and regrettable. It illustrates how the smaller, disadvantaged trans group is less regarded while a differential approach is urgently needed. It should be noted that, even for the LGB group, there is insufficient COI and a lack of differentiation of information and topics within this group. Where COI exists, it currently shows a bias towards gay men. The unfortunate failure to consider trans persons as distinct from the larger LGB group in the asylum context has contributed to the lack of a specific and differentiated approach to trans persons’ experiences and circumstances. Our research shows, for instance, that migration lawyers generally did not consider the significance of trans-specific themes when defending their trans clients and sometimes misgendered them. The UNHCR’s current 2012 guideline no. 9¹⁶ regarding claims to refugee status based on sexual orientation and/or gender identity, while attempting to be trans-specific in its approach, is incomplete and does not reflect the significance in trans asylum procedures of the representation of LGR, gender care, and imprisonment.

The shortcomings observed in the availability and application of COI in trans asylum procedures are detrimental to the quality of trans asylum procedures. One observation in this research is that trans-specific knowledge and insight is generated by human rights organisations and NGOs but is not represented in the asylum context. Even in a human rights context, however, most organisations or agencies fail to consider the full range of issues relevant to trans persons. Consequently, to date, there is no evidence of analysis of the whole picture and all relevant

¹⁵ European Council, 2011, Art. 10,1, d.

¹⁶ UNHCR: The United Nations High Commissioner for Refugees: the UN refugee agency. UNHCR, 2012.

themes. The cumulative effects, structural nature, and intersectionality of hardships that lead to or compound a well-founded fear of persecution among trans persons in the LAC region (and elsewhere) remain largely undocumented. Hence we call on the UN Independent Expert on Violence and Discrimination Based on Sexual Orientation and Gender Identity to conduct an inquiry and report on the position of trans persons in the LAC region.

The information presented in an asylum context is observed to be incomplete, undifferentiated, and excludes trans-relevant themes and/or is collected with trans persons' concerns at the periphery of the investigation. In particular, general country reports, for instance those from the United States, contain minimal trans-specific information that is generally limited to a few remarks in a section about LGBTI persons. A few COI productions by ACCORD¹⁷ and a UNHCR report stood out as containing valuable information on aspects of trans-relevant issues, but certainly did not consider the full set of themes.

Any way forward should include the approach to COI research for the LGB population proposed by EASO. We subscribe to EASO's arguments about why a specific investment in COI is needed and we value the proposed approach. Any information gathering must be executed by researchers with prior knowledge of trans issues and who have an understanding of the relevant research questions and local contexts, are able to use specific search terminology and sources, and can obtain alternative sources of information. Our research demonstrates that such a strategy results in a wider coverage of trans-specific themes and a better representation of trans persons' circumstances and experiences. We conclude that a concerted effort is needed by both national and international stakeholders to improve research and the gathering and interpreting of COI used to substantiate trans persons' circumstances and experiences.

Conclusion

The sobering conclusion is that current Dutch asylum procedures reveal a severe lack of attention and consideration for trans-specific themes such as LGR, gender-affirming healthcare, and imprisonment. The higher severity and occurrence of hardships, while receiving less legal protection, compared to the LGB group in the LAC region are not differentiated. A trans person's identity is often not respected in language and writing while it is at the core of their asylum request. It harbours the risk of underlying gender normative judgments by immigration service officers. It leads to the question and doubt whether such officers will have the insight and critical distance to their own gender normative judgments to be able to question and consider the gender normative mechanisms behind the exclusion, discrimination and violence that trans persons so frequently face. In addition, interpretations of trans persons' circumstances in LAC countries are often incomplete, mistaken, unbalanced, or unsubstantiated. The observed sparseness of trans-specific COI information, combined with poor insight into trans lives in the LAC region and a lack of strategy and/or effort in COI research, can easily lead to uninformed and unsubstantiated assessments of circumstances in trans asylum procedures. The sparseness of COI does not sufficiently explain the problems described here since this research shows how insight and knowledge in trans persons concerns, better search strategies and investment in COI research enables much more differentiation and specificity than is currently present in Dutch asylum procedures.

A failure to include the many negative experiences and the individual disparities that interact with the trans identity, and to recognise the consequences of intersectional issues in their lives, does not do justice to their lived experiences as a whole. What is left is a partial picture with the focus of asylum claims narrowed down to larger, more general elements that are divorced from the context. Our observations reveal how incomplete the development of a trans-specific approach in asylum practice is in the work of many national and international stakeholders. The relatively recent inclusion of trans persons as a relatively small and severely marginalised group in the asylum context may contribute to such hampered development.

¹⁷ Austrian Centre for Country of Origin and Asylum Research and Documentation.

Recommendations

Based on our research findings and conclusions, we make the following recommendations to both national and international stakeholders in order to improve and promote the quality of trans asylum procedures nationally and internationally.

1. National and international stakeholders must develop a trans-specific approach when looking into experiences and circumstances of trans persons and adopt the **terms of reference** outlined in Chapter 8, Appendix 5 when conducting their work.

2. The Dutch immigration service must urgently consider a trans-specific approach in trans asylum procedures. This necessitates attention to important and specific themes relating to trans persons' identity and/or expression in their countries of origin. It also requires a differentiation of information and ideas from the larger LGBTI group and consideration of their applicability for trans persons.

This **trans-specific approach** includes:

Specific consideration of themes such as legal gender recognition, imprisonment of trans persons based on sex assigned at birth, and gender-affirming healthcare.

Consistent use of the preferred name, gender marker, and pronouns that respect a trans person's gender identity and/or expression in all communications, regardless of what may be recorded in their ID.

Differentiating information and concepts relating to trans persons from the LGB or larger LGBTI group and also giving due attention to the fact that trans persons in the LAC region experience a higher severity and occurrence of hardships while being less protected by law.

Consistently considering and recording in asylum procedures how negative experiences are related to and provoked by gender non-conformity and visibility as a trans person.

Asylum procedures must include **more adequate and substantiated interpretations of the circumstances of trans persons in their countries of origin**. This includes:

Maximising the specific knowledge, insights, and country of origin information regarding trans persons' experiences and situations in their countries in asylum procedures.

Improving the quality, balance, and accuracy of interpretations in assessments of trans persons' experiences and circumstances, based on the improved information gathered as per the previous recommendation.

The immigration service must consider the whole picture and intersectional issues:

Consider the broad array of trans persons' lived experiences and circumstances in fact-finding and assessments, instead of narrowing down to a few isolated material facts.

This includes issues such as circumstances in childhood, instability and repression in countries of origin, displacement, or sex work.

Be attentive to and include the many **individual disparities** like poverty, a mixed racial background, or being HIV positive, and circumstances in their country of origin which intersect with the trans identity and that accumulate and aggravate a well-founded fear of persecution.

Take a more nuanced approach to the involvement of trans persons in sex work, which is often the consequence of several circumstances and individual disparities that intersect with a trans identity.

Follow a human rights approach that recognises how criminalisation of sex work and its enforcement of-

ten exacerbates stigmatisation and unjustified violence against (trans) sex workers by police forces.

More and detailed recommendations with respect to the immigration service are available in Appendix 4.

3.

Migration lawyers must improve the legal support and representation of trans persons in asylum procedures. This includes:

Consistent inclusion of important trans-specific themes and ensuring that trans persons and their experiences and circumstances are differentiated from the wider LGB group. Ensure that the immigration service has also adopted this approach when assessing asylum clients' claims.

Investing in obtaining and using COI that corroborates trans persons' hardships.

Highlighting and promoting the inclusion and consideration of trans persons' negative experiences, aggravating circumstances, individual disparities and the way they interact and accumulate to produce a well-founded fear of persecution.

4.

We call on the **asylum and refugee support organisation (VWN)** to:

Assist trans asylum seekers in the preparation of their asylum procedures while keeping in mind all the relevant experiences and circumstances highlighted in this research.

Conduct trans-specific COI research and produce compilations that include all topics presented in this research that can inform VWN's work and asylum lawyers' COI documentation.

5.

We call on **courts and judges** to take notice of and follow up on current inadequacies in trans persons' asylum procedures; in particular, to be aware of whether the relevant themes addressed in this research are included and considered.

6.

The **State Secretary of the department of Justice and Security**, the **Directorate-General for Migration**,¹⁸ the **Managing Board Migration Policy**,¹⁹ and the **immigration service's managing board** must command and enable fundamental improvements to the preparation and execution of trans asylum procedures. This includes:

Facilitating the roll-out of the aforementioned recommendations to the immigration service and ensuring that all staff understand and incorporate these recommendations into daily practice.

The education and training of all relevant immigration service personnel that includes teaching about a trans person's identity, experiences, and circumstances and also how they are shaped by regional and country conditions.

Enable training to heighten insight and reflection on gender normativity and to ensure trans asylum seekers are consistently and accurately interacted with in accordance with their identification. Recognising that a separate assessment of the situation of trans persons as a social group in a country of origin, based on the terms of reference (see Appendix 5), is necessary when determining country-specific asylum policy or when requesting the production of a general country report by the Foreign Ministry. Such policy cannot be inferred from a "safe country" status based on the general population.

Coordinating and enabling a substantial improvement in COI research and collection both in the Dutch

¹⁸ The Directorate-General for Migration: Directoraat-Generaal Migratie (DGM).

¹⁹ The Managing Board Migration Policy: Directie Migratiebeleid (DMB).

context and in cooperation with EASO and the UNHCR.

Producing a document that defines the immigration service's approach to the preparation and execution of trans asylum procedures. This document must be publicly available and shared with lawyers, courts, VWN, and asylum seekers.

Including the expertise and input of trans identifying experts in these improvements, including trans refugees, -migrants, -persons and trans organisations, like Transgender Network Netherlands and others.

7.

The UNHCR must contribute to improvements to trans asylum procedures. This includes:

Improvements to the Guidelines on International Protection no. 9 to better and specifically include topics pertaining trans persons.

Promoting the proposed **terms of reference** as a starting point for the questions that must be answered in an asylum context, for instance, when gathering COI documentation for trans persons in a country of origin or region, or composing country reports and guidance.

Promoting trans-specific COI research and collection by "Refworld" and other producers of COI in order to improve the scope, quality, and trans-specificity of such research.

Countering the current dynamics of asylum procedures. The use of only a few material facts and narrowing down attention to only a part of the total of the lived experiences and circumstances of trans persons does not give the full picture. Countering this dynamic will improve the analysis of the total of experiences and circumstances, their interaction and the accumulation of hardships.

8.

We call on the **United Nations Independent Expert on Violence and Discrimination based on SOGI**²⁰ to invest in a comprehensive thematic inquiry, fact-finding mission, and report that investigates the experiences, circumstances, and individual disparities in the lives of trans persons in many countries in the LAC region. This inquiry must include the way that multiple problems intersect and accumulate, resulting in a well-founded fear of persecution or life becoming unsustainable. These findings must be translated and promoted in an asylum context and used to inform and guide the preparation and execution of trans persons' asylum procedures.

9.

We call on the **IACHR and the OAS**²¹ to adopt the approach described in recommendation no. 8 above. We also call on them to support and protect local and regional trans persons and organisations.

10.

We call on the **European Asylum Support Office** to contribute to the improvement of the quality and trans-specificity of trans asylum procedures. This includes:

Facilitating better use of COI by European national asylum authorities. This process should be guided by our **terms of reference**.

Revise the 2015 EASO practical guide and actions related to it in order to fully include trans persons as a group that requires specific COI research.

To develop practical guidance that assists national asylum authorities to conduct trans persons asylum procedures in a trans-specific way.

²⁰ SOGI: Sexual Orientation and Gender Identity.

²¹ Inter-American Commission on Human Rights and the Organisation of American States.

11.

We call on **ACCORD**²² to use their expertise to provide for good quality COI that includes the **terms of reference** proposed in this research.

12.

We ask **ILGA**²³ and **Transgender Europe** to develop a plan – together with all relevant stakeholders and in co-operation with **Transgender Network Netherland (TNN)** – guided by this research, that advocates for improvements in trans asylum procedures within the EU. We specifically call on **Trans United Europe and the Global Network of Sex Work Projects** to contribute to this advocacy with regard to the way sex work, HIV, racial or ethnical disparities, displacement, migration, and being undocumented intersect with a trans identity and lead to the accumulation and exacerbation of hardships for trans persons.

²² The Austrian Centre for Country of Origin and Asylum Research and Documentation.

²³ ILGA: The International lesbian, gay, bisexual, trans and intersex association.



© Kike Arnal, 2018. Image shows trans women eating at a table.

1. About the research

1.1 Introduction

This research analyses the Dutch asylum procedures for trans women²⁴ from the LAC region (hereafter, trans Latinas). It is an explorative case study using semi-structured interviews, documents related to individual asylum procedures, and background research information. The starting point for this research is the circumstances and experiences of eight trans Latinas engaged in the Dutch asylum process between October 2015 and May 2019. The participants originate from countries that do not directly criminalise²⁵ trans identities. It analyses whether and how these circumstances and experiences are represented and considered in the asylum procedure. The phenomenon of trans persons requesting international protection because of the threat to and impossibility of life in their home country is relatively small-scale²⁶ and recent. We observed a lack of attention to and information about specific themes concerning persons with a trans identity in the Dutch asylum context. The EU²⁷ has explicitly included trans persons as a group eligible for international protection only since 2011. At first sight, the current approach of adding “the smaller group” of trans persons to the existing lesbian, gay, and bisexual group in the asylum procedure might seem logical, but despite being part of the LGBTI²⁸ group, there are several important topics relevant only to trans persons; moreover, the severity of experiences and circumstances of trans persons can differ from those of LGB and I persons.²⁹ This must be taken into account both in the asylum procedure and when collecting and using COI. This research provides insight into, knowledge about, and an outline of central themes that can be of benefit to all stakeholders in the Dutch and international asylum context. Its findings can be used to improve future asylum procedures and COI research regarding trans persons.³⁰

This research, which focuses on trans persons from countries in the LAC region, finds its roots in supporting trans asylum seekers by informing them, advocating for their gender-affirming healthcare, and by providing buddy contacts. From this support, a collaboration developed between a Latin American trans woman seeking asylum in the Netherlands and a Dutch trans woman, leading to this research. Limited observations indicated that trans

²⁴ “Trans” is used instead of “transgender” for brevity. According to the Transgender Europe network (TGEU), the terms are interchangeable. See TGEU, 2016 A, “Glossary”. Available at: <https://tgeu.org/glossary/>; last accessed 27 December 2020.

Trans is an umbrella term for people whose gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth. It includes many different identities each holding equal value. Unintentionally, this research only represents trans female experiences. At the moment of the research, predominantly trans female persons were applying for asylum in the Netherlands.

We do not use an asterisk since we consider “trans” or “transgender” to be inherently inclusive terms.

Trans woman: Someone who identifies as female or whose identity is feminine-directed while the assigned sex at birth is different.

²⁵ Direct criminalisation is seen here as the explicit mention and inclusion in laws of LGBTI persons’ behaviour and/or identity as unlawful and punishable.

²⁶ If we extrapolate figures from Jansen, S., “Pride or Shame”, 2018, the influx might be roughly 50 to 75 trans asylum seekers applying for asylum in the Netherlands annually, arriving from countries criminalising or not directly criminalising them for their identity. It should be noted that it is a rough estimate and we use it, with reservations and lacking an alternative, in order to give some idea. Jansen received access to 20,220 case files in the Dutch immigration service’s database over a six-month period. From these, she selected 1467 files (1/14th sample) guided by two criteria: including countries from where LGBTI persons flee and excluding countries where the largest number of refugees come from, i.e. Syria or Afghanistan. With five trans persons featured in the 1/14th sample of the total influx of asylum seekers to the Netherlands in a six-month period, this would amount to $5 \times 14 \times 2 = 140$ trans asylum seekers annually. But since the files in her research are not selected randomly our extrapolation has a high risk of error. Hence we can talk, albeit with a caveat, of 50 to 75 trans asylum seekers a year.

Jansen, S., 2018, English edition, 2019. “Pride or Shame? Assessing LGBTI Asylum Applications in the Netherlands Following the XYZ and ABC Judgments”. (“Trots of Schaamte? De Beroordeling van LHBTI Asielaanvragen in Nederland na de Arresten XYZ en ABC”). Available at: <https://www.coc.nl/wp-content/uploads/2019/01/Pride-or-Shame-LGBTI-asylum-in-the-Netherlands.pdf>; last accessed 10 December 2020.

²⁷ European Council, 2011. Directive 2011/95/EU, “On Standards for the Qualification of Third-country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted”, *Official Journal of the European Union*, pp. L 337/9-26, art. 10,1,d. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32011L0095&from=NL>; last accessed 23 December 2020.; Jansen, S. 2018. English edition, 2019. “Pride or Shame? Assessing LGBTI Asylum Applications in the Netherlands Following the XYZ and ABC Judgments”. (Dutch title; “Trots of Schaamte? De Beroordeling van LHBTI Asielaanvragen in Nederland na de Arresten XYZ en ABC”), pp. 1-181, esp. p. 15. Available at: <https://www.coc.nl/wp-content/uploads/2019/01/Pride-or-Shame-LGBTI-asylum-in-the-Netherlands.pdf>; last accessed 10 December 2020.

²⁸ We follow the LGBTI acronym, including the “I” of intersex persons since they are included in Dutch LGBTI policy. We are reluctant to do so in the context of our research. This research is a conscious effort to differentiate (not separate) the trans identity from the LGBTI group for the purpose of specific representation in an asylum context. It feels somewhat ironic to add intersex persons who may be in need of a similar approach of specific consideration rather than simple addition. That being said, we are also aware that bisexual, lesbian persons, or even gay men, might also warrant specific consideration in an asylum context.

²⁹ Bach, J. 2013. “Assessing ‘Transgender’ Asylum Claims”, *Forced Migration Review*, 42, pp. 34-36, esp. p 34. Available at: <https://www.fmreview.org/sogi/bach>; last accessed 07 December 2020.

³⁰ Firstly, regarding trans Latinas from countries of origin not criminalising the trans identity directly.

persons from countries where an LGBTI identity³¹ is directly criminalised³² had a greater chance of being granted asylum than trans Latinas from countries that did not directly criminalise them. This is logical within the asylum procedure since direct criminalisation³³ of an identity clearly produces risks of persecution. Whether criminalised or not, the narratives of trans persons' adverse experiences have many similarities; and being violated by government actors is also experienced by those trans persons from countries that do not directly criminalise their identity. Both groups are violated by "a broad societal front" that often begins within the family and continues to marginalise them throughout life. Moreover, the reduced chances of trans Latinas who arrive from countries that do not criminalise them being recognised as a refugee are at odds with accepted knowledge about this specific trans community.

The majority of trans Latinas face harsh and often life-threatening realities in their home countries. An indication of the life expectancy of a trans Latina is 30 to 35 years,³⁴ i.e. less than half of the life expectancy of 78 years for women and 72 years for men in general in the LAC region.³⁵ The "transgender murder monitor"³⁶ reveals that 79 per cent of the total 2982 murders of trans people registered worldwide since 2008 occurred in the LAC region and most victims are trans women. This is a much higher percentage compared to the 33 percent of murders committed against the general population in the LAC region.³⁷ The murders of trans persons are often committed with an excess of violence and mutilation of the victim, pointing to both transphobia and misogyny.³⁸ In addition to the risk of violence and health disparities in general, one specific health disparity, the prevalence of HIV,³⁹ is 49 times higher for trans women than for the average woman,⁴⁰ and may contribute to their shorter life expectancy.

The observations above made us wonder how the Dutch asylum procedure looks at and considers the lived realities of trans persons from the LAC region coming from countries not directly criminalising them. What is known about the experiences of trans Latinas and the circumstances that contribute to an environment that makes life in their countries of origin dangerous and untenable? Are these circumstances and experiences narrated, asked about, and discussed in the asylum procedure and, if so, how are they processed? What is the consequence of considering trans identity within the wider LGBTI group for a specific analysis of topics relevant to trans persons? Is the asylum procedure, and all its stakeholders, equipped to consider trans persons requests adequately? What are the chances of improvement? The central research question developed is: **How, and to what degree, are the circumstances and experiences of trans persons in the Latin America and the Caribbean region, which contribute to the danger and impossibility of living in countries of origin, represented and considered in the current Dutch asylum procedure?**

³¹ In most countries that criminalise LGBTI persons, it is (consensual adult) same-sex relations or sexual activities that are criminalised. According to the Human Dignity Trust (2019), trans women and men (and bisexual persons) can also be targeted under these laws when perceived as gay, in absence of differentiation of sexual orientation and gender identity, and/or when being in a relationship (that is perceived as gay). Moreover, the general climate impacts all LGBTI persons.

Human Dignity Trust, 2019. "Injustice Exposed: The Criminalisation of Transgender People and its Impacts", pp. 1-136, esp. pp. 46-47. Available at: <https://baringfoundation.org.uk/resource/injustice-exposed-the-criminalisation-of-transgender-people-and-its-impacts/>; last accessed 18 December 2020.

³² A year after these initial observations, confirmation was found in Jansen, S., 2018, English edition, 2019, pp. 10-12, that a higher percentage of LGBTI persons were being granted asylum in the Netherlands from countries criminalising LGBTI identities.

³³ It has to be said though, that besides direct criminalisation, more general laws that do not explicitly mention sexual orientation or activities and/or trans identity can be used to target trans persons (Human Dignity Trust, 2019, pp. 15-45). Background research revealed eight countries in the LAC region with "public order and vagrancy laws" that do not name LGBTI persons explicitly but which can be used to target them.

³⁴ "30 to 35 years" is a rough estimate used by REDlactrans and IACHR. No further substantiation of this figure has been found in background research information. REDlactrans, 2014. "Report on the Economic, Social and Cultural Rights of the Transgender Population of Latin America and the Caribbean" (Buenos Aires: REDlactrans), pp. 1-55, esp. pp. 42. Available at: <http://www.redlactrans.org.ar/site/wp-content/uploads/2015/03/Report%20on%20DESC%20trans.pdf>; last accessed 7 December 2020.; IACHR, Inter-American Commission on Human Rights, 2015 C. "Violence Against Lesbian, Gay, Bisexual, Trans and Intersex Persons in the Americas", (Washington D.C.: IACHR) pp. 1-284, esp. p 16. Available at: <http://www.oas.org/en/iachr/reports/pdfs/ViolenceLGBTIPersons.pdf>; last accessed 24 December 2020.

³⁵ Pasquali, M. 2019. "Life Expectancy in Latin America and the Caribbean in 2019". Available at: <https://www.statista.com/statistics/274512/life-expectancy-in-latin-america-and-the-caribbean/>; last accessed 7 December 2020.

³⁶ TvT, Trans respect versus Transphobia, 2018 B. "TMM Update Trans Day of Remembrance 2018", press release, Transgender Europe. Available at: <https://transrespect.org/en/tmm-update-tdor-2018/>; last accessed 7 December 2020. Currently, there are limitations on collecting data on trans murders. The figures on murders of trans persons worldwide may be far higher.

³⁷ Muggah, R. and Aguirre Tobón, K. 2018. "Citizen Security in Latin America: Facts and Figures", *Igarapé Institute*, Strategic Paper 33, pp. 1-67, esp. p. 2. Available at: <https://igarape.org.br/wp-content/uploads/2018/04/Citizen-Security-in-Latin-America-Facts-and-Figures.pdf>, last accessed 13 December 2020.

³⁸ OTRANS, Organización Trans Reinas de la Noche et al. 2018. "Human Right Violations Against Transgender Women in Guatemala", pp. 1-12, esp. p. 10. Available at: https://www.ecoi.net/en/file/local/1427863/1930_1522220808_int-ccpr-css-gtm-30350-e.pdf; last accessed 7 December 2020.

³⁹ HIV: Human Immunodeficiency Virus.

⁴⁰ Poteat, T. et al. 2014. "HIV Risk and Preventive Interventions in Trans Woman Sex Workers", *The Lancet*, vol. 385, issue 9964, pp 274-286, esp. p. 274. Available at: https://www.researchgate.net/publication/264124016_HIV_Risk_and_Preventive_Interventions_in_Transgender_Women_Sex_Workers; last accessed 7 December 2020.

Trans persons with all possible identifications qualified for participation in this research if they were: adult; originated from a LAC country that does not directly criminalise LGBTI identities; and if they had applied for international protection in the Netherlands.⁴¹ We did not select based on the (possible) outcome of the asylum procedure. At the time of participation, only one participant was aware that a decision had been made to grant her international protection under Dutch law (Vreemdelingenwet 2000).⁴² A second participant was later granted international protection on the same grounds. Two participants received a “residence permit for medical treatment” after a “postponement of departure” decision, which is only valid for one year. Four of the asylum applications from trans Latinas ended in a rejection of a first instance or higher appeal. All asylum applications had come to a conclusion before the end of 2019. Most of the people among the small group from the LAC region seeking asylum in the Netherlands are trans female. This reflects the available background information, which is also concerned, primarily, with trans female circumstances and experiences. Eight (heterosexual) trans women, aged 25 to 40, participated in this research. This means, however, that sections of the trans population are not represented in the scope of this study, i.e. trans male persons, non-binary trans persons, and trans persons with a non-heterosexual sexual orientation. Currently, there is very limited information on these groups available with respect to the LAC region. Their lives and experiences are likely to differ from those of the trans women in the study.

The functional goals of this research are:

- to document the current state of the Dutch asylum procedure from the perspective of the circumstances and experiences of trans Latinas⁴³ and to identify shortcomings in the Dutch asylum procedure with respect to trans Latinas;
- to advocate for improvements in the preparation and execution of trans asylum procedures in the Netherlands. We therefore hope that this research reaches a broad array of stakeholders related to the asylum procedure, including: the Dutch Immigration and Naturalisation Service; COI researchers; asylum lawyers; Vluchtelingenwerk;⁴⁴ judges; the Dutch government; and Dutch LGBTI and trans organisations;
- to extend the lessons learned, where possible, to the asylum procedures of trans people in other European countries and to trans persons from other regions of the world. Specifically, we seek to inform stakeholders in other European countries, at a European Union, and at an international level of the research results and advocate for the improved quality of trans asylum procedures. This includes: the European Asylum Support Office; the United Nations High Commissioner for Refugees; the UN Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity; the Inter-American Commission on Human Rights; the Austrian Red Cross’s ECOI.net department; non-governmental organisations; Trans- and LGBTI-specific organisations; politicians and policymakers.
- Finally, we are working towards a report that identifies and outlines relevant themes that should be considered in COI research specific to trans Latinas and for the implementation of this body of knowledge in asylum procedures.

⁴¹ Inclusion of countries of origin in the research will be discussed under “The region” in subchapter 1.3.

⁴² Dutch Government, 2000. “Aliens Circular”, Vw 29.1.a. (Vw: Vreemdelingenwet (Aliens Circular)). Available at: https://wetten.overheid.nl/BW-BR0011823/2020-05-14#Hoofdstuk3_Afdeling4, last accessed 7 December 2020.

⁴³ From countries that do not directly criminalise trans identity.

⁴⁴ An independent Dutch organisation advocating for and supporting asylum seekers and refugees.

Reading guide

Chapter 2 provides a baseline for this research. It takes stock of the conditions surrounding the trans asylum procedures and general elements in the execution of participants' asylum procedures.

It looks at the level of knowledge presently available in asylum procedures for the assessment of trans persons' situations in the LAC region. An indication is sought for the level of risk for and the actual burden of negative experiences in trans Latinas' lives. It observes what influence the use of information about the total group of LGBTI persons (or another identity within this acronym) can have on the assessment of the situation of trans persons from the LAC region. The chapter reports on the way trans Latinas are referred to in writing with respect to pronouns and first names in asylum procedures. It also examines the approach to trans identity and/or expression in the immigration service's working guidelines and their implementation within the procedure to assess credibility of identity, which takes place in the second asylum hearing.

Note: Themes relating to trans persons in an asylum context have only recently surfaced and, in general, they are simply categorised under the LGB group. Specific remarks in COI and background research information on the higher degree of discrimination and abuse suffered by trans persons are often made in comparison to the wider LGBTI group. When comparative information is included in this research, as part of the sparse information available, it is done to specify the severity of trans Latinas' situations and to correct misinterpretations. This differentiation is not intended to downplay or diminish the severity of the circumstances and experiences of persons with an LGBTI identity in any way.

Chapter 3 is central to our research question. Nine **central themes**⁴⁵ are identified using semi-structured interviews, refugee status determination hearings, and background research information to pinpoint important circumstances and experiences of trans persons from the LAC region. These central themes relate to the circumstances, exclusion, discrimination, and violence experienced by trans Latinas that make life dangerous and untenable in their countries of origin. These nine central themes thus become the assessment framework for this research looking at the asylum procedure. They are: the circumstances and experiences in youth and early adulthood; gender-affirming healthcare and related abusive preconditions; legal gender recognition and related abusive preconditions; violence by state authorities; involvement in sex work; prison conditions; (self-) restriction;⁴⁶ conflict, instability, and repression in country of origin; and themes that intersect with a trans identity in the asylum procedure. Chapter 3 deals with these nine central themes in nine subchapters. Three of these nine themes are specifically **trans-related themes**: legal gender recognition; gender-affirming healthcare; and prison conditions.

The beginning of each subchapter contains background research information relating to the particular central theme. This background research includes: theses; research papers; media articles; reports from local, LAC regional, or general trans and or LGBTI organisations; non-governmental organisation reports; country of origin information (COI) resources; country reports as well as information from the UN, its programmes, agencies, and bodies; and Inter-American Commission on Human Rights (hereafter, IACHR) information. These sources provide more detailed information and are not synonymous with the current COI used in participants' asylum procedures by the Immigration and Naturalisation Service⁴⁷ (hereafter, immigration service) to determine intentions⁴⁸ and decisions. The background research provides a cross section of relevant information about the LAC region and is not extensive for every country of origin. When discussing specific elements connected to a particular participant, in five cases we do not reveal the country of origin where the information came from, for reasons of anonymity. Anonymity is less critical in the case of the narratives of three participants whose country of origin is Cuba, since

⁴⁵ These themes concern the circumstances and experiences of the trans female participants in this research. They do not encompass all possible themes for a wider group of trans persons. For instance, issues that might hold greater relevance to trans male persons include forced marriage and/or corrective rape. For non-binary persons, the provision of legal gender recognition in a binary fashion may not be suitable or align with their identity and living without proper identification may leave them unprotected.

⁴⁶ (Self-) restriction is defined here as being forced by outside (fear of) (further) repression to hide their preferred gender expression to various degrees during periods in life, in general, or in specific situations. Since the causes of restriction are located mostly in the outside world, it can be argued that adding the "self" to the restriction is not correct. On the other hand, it is the self that submits/adapts to repression.

⁴⁷ Throughout this research, the term "immigration service" is used to indicate the Dutch "Immigration and Naturalisation Service". In Dutch: "Immigratie- en Naturalisatiedienst", IND.

⁴⁸ The intention (to a decision) is the preliminary conclusion, in writing, of an individual asylum procedure case by the immigration service. The migration lawyer can give an opinion on the "intention". This is followed by a decision, in writing, by the immigration service.

dozens of trans Latinas from Cuba entered the Netherlands at the end of 2017.

The background information used to reconstruct trans Latinas' situations in the LAC region and countries of origin is frequently incomplete or preliminary. Within the limits of sometimes crude pieces of information, the combination of many sources from background research reconstructs trans Latinas' realities, albeit in a patchwork of information.

Most of Chapter 3's subchapters feature summaries of participants' experiences and circumstances relating to the particular central theme of each subchapter. These summaries have been collated from research interviews and hearings. Observations and analysis are presented regarding whether, and how, these experiences and circumstances are addressed in asylum procedure documentation, hearings, intentions, and decisions. The research observes whether, and how, these circumstances and experiences are narrated, questioned, or discussed (represented) in hearings. The research follows how and to what degree the circumstances and experiences are assessed (considered) when determining intentions and decisions in the asylum procedure and what COI is used to inform these assessments. The "intention" documentation is the primary source in terms of understanding the position adopted by the immigration service during assessments. The decisions examined in this research reveal that the arguments and COI presented by lawyers with respect to intentions – these submissions are called "opinions" – were not accepted in seven cases and thus had no influence on the assessment by the immigration service. In only one case, the lawyer's "opinion" may have influenced the asylum procedure from a negative to a positive decision. The immigration service does not explain the motivations behind their decisions; therefore, it could not be established what arguments influenced the decision. The role of migration lawyers in trans asylum procedures is not analysed explicitly in Chapter 3 in this research. However, the arguments and COI presented by lawyers did play a role when assessing the immigration service's response to this input. The outcome of the observations will be analysed, discussed, and alternative interpretations given when there is reason to doubt interpretations by the immigration service on the grounds of background information, knowledge concerning a trans identity and/or expression, or participants' narratives.

This approach is in direct contrast to the usual field of force that distributes the power of judgement in the asylum procedure to the immigration service. The research is process oriented and does not argue with or contest the final outcome of individual participants' asylum procedures. The inclusion of case law is not within the scope of this research.

Chapter 4 uses the large number and broad range of observations accumulated in Chapters 2 and 3 as a solid basis for answering the research question. This is done by organising these observations into three major themes, followed by overarching observations and concluding with a discussion. The first theme is trans-specificity⁴⁹. This section details problems concerning the need to differentiate trans persons from the larger LGBTI group and the issue of specificity when assessing a person's trans identity and/or expression in the context of the LAC region. The second theme is the interpretation of trans persons' experiences and circumstances. This section groups and examines interpretations by the immigration service in assessments regarding the level of protection to be expected for trans persons in countries of origin, assessments of police violence, and the influence of instability and/or repression. The third theme relates to observations and experiences of asylum procedures that were decided based on a partial representation of disconnected, separated elements of the claimant's total lived experience. It examines what relevant experiences, individual disparities, and circumstances are not represented in asylum assessments and how the whole picture is being ignored, including the way different problems interact and accumulate resulting in a well-founded fear of persecution. The fourth theme, overarching observations, looks at the implications of the recent, immature inclusion of gender identity in the wider national and international context of trans asylum procedures, and reveals recommendations for improvements. Chapter 4 concludes with a discussion of circumstances and choices that have defined the direction and reach of the study.

⁴⁹ Trans-specificity is seen here as an approach to trans asylum procedures that differentiates information and ideas from the larger LGBTI group with respect to its applicability for persons with a trans identity and/or expression. In addition, it is specific in attending to important themes relating to participants' trans identity and/or expression and its context in countries in the LAC region in Dutch asylum procedures, founded in relevant knowledge and insight.

1.2 Context and positioning of the research

The development of the gender identity and/or expression theme within an asylum context will be described here. This also provides the necessary background to indicate the position of this research.

Context

The attention to and collecting of knowledge about persons with an LGB identity internationally in a human rights context is a relatively new phenomenon and has developed mainly in the last two decades.⁵⁰ Subsequently, gender identity has been thematised in and added to this context and developed in connection to LGB asylum law and practice.⁵¹

As early as 1981, a lesbian, gay, or bisexual orientation was recognised as an accepted source of persecution for the purposes of granting asylum in the Netherlands by the Council of State.⁵² In 2004, this was followed by their inclusion in the European Qualification Directive.⁵³ Articles that focused on sexual orientation in the asylum context in the first decade of the 21st century mostly did not mention or consider gender identity.⁵⁴ The Yogyakarta Principles (2007) are an important international landmark that provide more explicit detail on trans persons' human rights. They elaborate on the application of existing international human rights standards concerning sexual orientation and gender identity. The principles include themes such as: legal gender recognition without abusive, human-rights-violating preconditions; gender-affirming healthcare without a mandatory and violating protocol; and specific requirements for trans persons when imprisoned.

The European Union is working towards a common policy on asylum, including a Common European Asylum System. Nevertheless, according to the European Union Agency for Fundamental Rights (FRA),⁵⁵ established in 2007, many problems and inconsistencies exist between European countries with respect to their LGBTI asylum procedures. The agency⁵⁶ also highlighted that European countries did not uniformly recognise that the protection offered in the context of sexual orientation should also be extended to "transsexuals." As of 2011, gender identity was explicitly included in the recast of the Qualification Directive as a possible reason for a well-founded fear of persecution and potential grounds for qualification for asylum.⁵⁷

The FRA's observations regarding differences between European countries revealed the need for further examination and improvement. The study "Fleeing Homophobia" (2011)⁵⁸ provided the first comprehensive analysis of LGBTI asylum claims on a European level. It concluded that asylum practice, as observed in Europe's member

⁵⁰ Myrtilinen, H. and Daigle, M. 2017. "When Merely Existing is a Risk: Sexual and Gender Minorities in Conflict, Displacement and Peacebuilding", pp. 1-35, esp. p. 13. (London: International Alert). Available at: <https://www.international-alert.org/publications/when-merely-existing-is-a-risk>, last accessed 7 December 2020.; Jansen, S., and Spijkerboer, T. 2011. "Fleeing homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in Europe", COC Netherlands / VU University (Amsterdam: Vrije Universiteit Amsterdam), pp. 1-86, esp. pp. 13-14. Available at: <https://www.refworld.org/docid/4ebba7852.html>; last accessed 7 December 2020.; LaViolette, N. 2010. "The UNHCR'S Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: A Critical Commentary", *International Journal of Refugee Law*, 22 (2), pp. 173-208 esp. p. 175. Available at: https://www.researchgate.net/publication/228195075_UNHCR_Guidance_Note_on_Refugee_Claims_Relating_to_Sexual_Orientation_and_Gender_Identity_A_Critical_Commentary/link/5526b7460cf2520617a6a316/download; last accessed 7 December 2020.

⁵¹ Berg, L. and Millbank, J. 2013. "Developing a Jurisprudence of Transgender Particular Social Group", in Spijkerboer, T. 2013, "Fleeing Homophobia" (Abingdon: Routledge), pp. 121-153, esp. p. 3. Available at SSRN, and used in this research, is the pre-publication: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2312887; last accessed 12 September 2019.

⁵² Jansen, S. 2018, English edition, 2019, p. 15.

⁵³ European Council, 2004. "DIRECTIVE 2004/83/EC, On Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted", pp. (L 304)12-23, art. 10,1,d. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32004L0083&from=EN>; last accessed: 23 December 2020.

⁵⁴ For instance: LaViolette, N. 2004, "Sexual Orientation and the Refugee Determination Process: Questioning a Claimant About Their Membership in the Particular Social Group", pp. 12-22. Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2294763; last accessed 7 December 2020.; Berg, L. and Millbank, J. 2009. "Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants", *Journal of Refugee Studies*, 22 (1), pp. 195-223, Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1339581; last accessed 7 December 2020.

⁵⁵ FRA, the Fundamental Rights Agency (European Union Agency for Fundamental Rights), 2009. "Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States Part II: The Social Situation", pp. 1-157, esp. pp. 96-99. Available at: https://fra.europa.eu/sites/default/files/fra_uploads/397-FRA_hdgso_report_part2_en.pdf; accessed last 7 December 2020.

⁵⁶ FRA, the Fundamental Rights Agency (European Union Agency for Fundamental Rights), 2011. "Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States. Summary of Findings, Trends, Challenges and Promising Practices", pp. 1-44, esp. pp. 33-34. Available at: <https://fra.europa.eu/en/publication/2011/homophobia-transphobia-and-discrimination-grounds-sexual-orientation-and-gender>; last accessed 7 December 2020.

⁵⁷ European Council, 2011, Art. 10,1, d.

⁵⁸ Jansen, S., and Spijkerboer, T. 2011.

states, did not meet the standards prescribed by international and European human rights and refugee law in several respects. The study also confirmed and elaborated on the considerable differences between countries in examining asylum applications. Eight central themes⁵⁹ were analysed with respect to LGBTI asylum procedures, their problems, and the considerable differences between European countries. One of the outcomes was that decisions on the credibility of a LGBTI identity were often based on stereotypes concerning LGBTI asylum seekers.

The growing awareness and attention for LGBTI persons' issues in the 21st century does not mean that everything is in order, as the UNHCR⁶⁰ observed in 2015. For instance, a lack of LGBTI-specific COI is observed and an inadequate comprehension of LGBTI experiences in different cultural contexts may seriously affect the assessment and understanding of protection needs and the assessment of credibility of LGBTI persons within the asylum procedure. Divan et al. (2016) and Bach (2013)⁶¹ indicate that focusing on the "aggregate category LGBTI" risks homogenising a heterogeneous group that faces different challenges.

Another issue to be resolved is the lack of official statistics⁶² on the number of persons with an LGBTI identity requesting international protection in Europe. This omission is said to be due to data protection issues and confidentiality; moreover, data provided by civil society are often incomplete.⁶³ Only rough estimates are available and date from around 2010. They report that several hundred LGBTI persons request international protection in the Netherlands, Sweden, and Belgium annually, with a few dozen claims every year in Italy and Norway.⁶⁴ More recent Dutch data suggest a clear rise in LGBTI asylum seekers from "several hundred" in 2011 to more than thousand in 2015/2016.⁶⁵ If we extrapolate these figures for trans persons,⁶⁶ then between 50 and 75 trans persons might be applying for asylum in the Netherlands per year.⁶⁷ 65 per cent of asylum seekers identifying as LGBTI and coming from countries that criminalise LGBTI identity receive a positive decision in the Netherlands. This is compared to only 40 per cent of those seeking asylum from countries that do not criminalise LGBTI identity.⁶⁸

Since there is scant information regarding gender identity in asylum procedures, the early efforts by Berg and Millbank (2013),⁶⁹ published as a chapter in the book *Fleeing Homophobia* (Spijkerboer, 2013),⁷⁰ are presented here, albeit they consider asylum procedures within an Anglo-Saxon case law system.⁷¹ The study examines 42 asylum cases to observe how trans identity and experience can be framed within a "particular social group" – one of five categories established in the UN's 1951 Refugee Convention. The authors argue that the assessment of trans asylum claims must include a full account of how the claimant's gender identity evolved over time and how the expression of this identity interacts with the external perceptions of gender non-conformity and imputations by others. Looking at gender non-conformity allows for the inclusion of the intersections between sexuality, gender identity, and gender. Keeping these related but distinct aspects in mind simultaneously is seen as the key challenge in trans

⁵⁹ These themes were: the criminalisation of an LGBTI identity; the demand to invoke state protection against non-state actors; the 'discretion' requirement; whether or not an internal protection alternative in the country of origin is present; credibility assessment of the identity; late disclosure; country of origin information; and reception. Most of these themes recur in Jansen, S., 2018, English edition, 2019.

⁶⁰ UNHCR, 2015 A. "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", pp. 1-35, esp. p. 7. Available at: [https://www.refworld.org/pdf-id/566140454.pdf](https://www.refworld.org/pdf/id/566140454.pdf); last accessed 21 Dec. 2020.

⁶¹ Divan, V. et al. 2016. "Transgender Social Inclusion and Equality: A Pivotal Path to Development", *Journal of the International AIDS Society* 19 (3, Suppl. 2), pp. 1-6, esp. p.2, Available at: https://www.researchgate.net/publication/305413394_Transgender_social_inclusion_and_equality_A_pivotal_path_to_development; last accessed 7 December 2020.; Bach, J. 2013, p. 34.

⁶² Jansen, S. and Spijkerboer, T. 2011, p. 15.

⁶³ FRA, the Fundamental Rights Agency (European Union Agency for Fundamental Rights) 2017. "Current Migration Situation in the EU: Lesbian, Gay, Bisexual, Transgender and Intersex Asylum Seekers", pp. 1-20, esp. pp. 2-4. Available at: <https://fra.europa.eu/en/publication/2017/current-migration-situation-eu-lesbian-gay-bisexual-transgender-and-intersex-asylum>; last accessed 7 December 2020.

⁶⁴ Jansen, S. and Spijkerboer, T. 2011, p.15.

⁶⁵ Jansen, S., 2018, English edition, 2019, pp. 7-11. Jansen reportedly found 267 LGBTI asylum cases in a 1/14th sample of asylum cases in the Netherlands covering a six-month period (at the end of 2015 and beginning of 2016). From this, we extrapolate a rough indication that the total number of LGBTI asylum seekers arriving in the Netherlands annually must be over a thousand.

⁶⁶ The influx is estimated to be roughly 50 to 75 trans asylum seekers applying for asylum in the Netherlands annually, arriving from countries that criminalise and also those that do not directly criminalise trans persons for their identity. It is a rough extrapolation from other data, explained earlier.

⁶⁷ Experience in the Netherlands shows that some Dutch residents that identify as LGB in the first instance may come out as a trans person later. Consequently, it is not unlikely that among those persons presenting as LGB, some might later identify as trans; see Jansen, S., 2018, English edition, 2019, p. 49.

⁶⁸ Jansen, S., 2018, English edition, 2019, pp. 10-12. Six out of 15 asylum seekers were granted asylum.

⁶⁹ Berg, L. and Millbank, J. 2013.

⁷⁰ Spijkerboer, T. 2013, *Fleeing Homophobia* (Abingdon: Routledge), pp. 1-264, esp. pp. 121-153.

⁷¹ The study includes asylum cases in Australia, New Zealand, Canada, the United Kingdom, and the US. Contrary to the Anglo-Saxon case law system, the Netherlands has a Civil Law system. University of South Carolina, 2018. "A Quick Primer on the World's Legal Systems", *School of Law Library*. Available at: <https://guides.law.sc.edu/c.php?g=315476&p=2108388>; last accessed 11 May 2020.

asylum procedures.⁷² According to Berg and Millbank, a range of difficulties emerge when defining and understanding trans identities. During procedures, many applicants express their identities in “fractured terms and oscillating between sexuality and gender.” In numerous cases, the terms applicants used to describe themselves were not clear. At the same time, it was not certain what adjudicators meant when they used terms such as “transvestite”. Misgendering in legal decisions often reveals the view that trans persons are, or remain, their birth sex. Another problem is that the majority of descriptions of particular social groups used in the research case studies are inter-related with sexual orientation or, indeed, only refer to sexual orientation.⁷³ All too commonly, trans persons in the research cases were interpreted as a subset of sexual orientation. This risks misconceptions that, in turn, can influence asylum assessments. In terms of an applicant’s claim, such misinterpretation can misdirect the analysis of issues such as risk of persecution and failure of state protection. Furthermore, the research reveals how the wrong COI is used during assessment⁷⁴ thus rendering the applicant’s experience of gender non-conformity invisible. This is unfortunate given the knowledge that those stigmatised as gender non-conforming are disproportionately likely to suffer sexualised forms of persecution.⁷⁵ Finally, this “rendering invisible” of the trans identity contributes to its erasure in legal texts and law-making.⁷⁶

Berg and Millbank’s insights, as described above, contain valuable starting points for further reconnaissance. Despite this, we cannot leave unchallenged the inadequate depictions of trans identities in terms of terminology and statements⁷⁷ used and note the risk of these being reproduced elsewhere. The authors use inappropriate depictions of trans identities in terminology and statements, for instance when discussing what the basis is for trans persons belonging to a “particular social group” as can be seen below:

Yet the very fluidity of shifting gender and sexuality identification involved in gender transitions poses numerous challenges to norms and requirements of innateness and unchangability enmeshed in the RSD [Refugee Status Determination] elements of ‘well-founded fear’ and PSG [Particular Social Group]: a heterosexual born man, once MTF [Male to Female], may ‘become’ a lesbian’. And, as sexual orientation claims may often involve applicants with heterosexual histories or mixed identifications over time, so too may transgender applicants move back and forth between different gender identifications and expressions rather than a binary sex ‘change’.⁷⁸

As it is currently written, it can damage the way trans persons in asylum procedures are perceived. The phrases, “[y]et the very fluidity of shifting gender” and “[t]o move back and forth between different gender identifications and expressions rather than a binary sex ‘change’” are a damaging misrepresentation of a group. They give the impression that trans persons in general can have multiple, shifting, or changing gender identities. This is incorrect. Trans persons, like non-trans persons, have stable gender identities,⁷⁹ as observed with respect to trans youth according to Gülgöza.⁸⁰ The phrase, “rather than a binary sex ‘change’” suggests something that is to be expected; it suggests that a “sex change” is something more likely, stable, better, or preferable. Given our understanding of how different trans persons can be, expecting them all to be “binary” is insensitive. Furthermore, the term “sex change” is itself a crude depiction of a gender-affirming process and/or surgery.⁸¹ Finally, if the authors intended to depict gender fluid persons, this should have been stated explicitly. Even then, gender

⁷² A trans person identifying as a woman loving men might face imputations of being homosexual, may be designated as male in punitive environments, face gender-based violence from her partner as a woman, and might be mutilated and killed for what others perceive as a severe transgression of gender normativity. A trans man loving women might be seen as a lesbian, facing gender-based violence, including “corrective rape” or “forced marriage”, be obstructed from travelling when imputations of being a female are placed upon him, or be attacked or killed because of gender non-conformity.

⁷³ Berg, L. and Millbank, J. 2013, pp. 18-19.

⁷⁴ *Ibid.*, p. 3.

⁷⁵ *Ibid.*, p. 2.

⁷⁶ *Ibid.*, p. 15.

⁷⁷ *Ibid.*, pp. 2,5, 12 and 30.

⁷⁸ *Ibid.*, p. 12.

⁷⁹ A smaller part of all trans persons may identify as gender fluid but this still does not mean that fluidity cannot be a stable, innate way of identifying, as is the case with bisexual persons. The authors did not include a gender fluid identity in their definition of “transgender” on page 1. If the authors intended to consider this section of the trans population it should have been consciously earmarked as a discussion on gender fluidity. Even then, the text would be seen as inadequate here.

⁸⁰ Gülgöza, S. et al. 2019. “Similarity in Transgender and Cisgender Children’s Gender Development”, *Proceedings of the National Academy of Sciences of the United States of America*, 116 (49), pp. 24480-24485, esp. p. 24480 and 24483, Available at: <http://idl.cs.washington.edu/files/2019-TransgenderSimilarity-PNAS.pdf>; last accessed 7 December 2020.

⁸¹ Instead of “sex change”, the terms “transition”, “sex reassignment surgery”, or “gender-affirming surgery” should be used.

fluid persons have an identity that is fluid in a stable way.⁸² Analogous to bisexual persons, they can count on the presence of such an identity through life.

The phrase “a heterosexual born man, once MTF, may ‘become’ a lesbian” is written from a “body-first mindset” that fits with a gender normative⁸³ approach. It depicts a trans person from an outsider perspective and puts a trans person’s assigned sex at birth first (as does MTF (Male to Female)). “Once MTF” suggests that a person becomes MTF, whereas trans persons identify as such early on in life. Such a depiction neglects the core, innate, stable gender identity, which is the fundamental consideration for a trans person. Moreover, sexual orientation should not be the primary subject matter; given that it is mentioned, however, when seen from the viewpoint of her gender identity, the trans women always identified as a woman loving women and did not, therefore, “become” a lesbian. A rephrasing, respectful to the trans identity, would be: “A trans woman lived closeted for a while.⁸⁴ Once transitioning, she could express her female identity while still loving women.”

The researchers also observe that insights, concepts, and language to describe trans identity and/or expression can differ greatly. We think there is a clear need for “a common base of terms, concepts and language” for stakeholders in asylum procedures to communicate about trans identity and/or expression in the future.

We conclude that, within asylum procedures, trans persons must be represented unambiguously, using terms and concepts that respect the equality and dignity of the gender identity and/or expression that guides their life. Any gender normative terms and concepts used by society, government, outsiders, and perpetrators that impact the life of trans persons negatively, should be clearly tagged as such. There can be many reasons for differences in the use of terms and concepts pertaining to trans persons. We believe, however, that any cases where this is attributed to unreliability or instability of identities should be questioned.

The **UK gender identity guidance** (2011),⁸⁵ is a guidance aimed at a more specific approach to the particular social group of trans persons. Whereas the Dutch working guidelines WI 2015/9, 2018/9, and WI 2019/17⁸⁶ address trans persons within the group of LGBTI persons (dealing mainly with the credibility of the identity), the UK has produced a specific national guidance for the purpose of asylum procedures where gender identity and/or expression are the primary motive. The UK guidance deals with a number of themes concerning trans persons that are not part of the Dutch working guidelines concerning LGBTI asylum claims, such as: the instruction to refer to trans persons by their chosen name both in contact and in correspondence; the negative effect that an absence of legal recognition of the gender identity has on trans persons’ lives; restrictions to gender-affirming treatments and discriminatory medical processes; forced sterilisation; the cumulative effect of discriminatory elements in trans persons’ lives; the requirement to search for and use trans-specific COI during assessment; and that decisions about whether a transgender claimant should receive protection and is able to relocate must be a matter of specific attention and COI research. On the other hand, some descriptions in the UK guidance might need correcting and its emphasis on transition-related aspects may turn into stereotyping and result in more weight being given to those transitioning. Bach (2013)⁸⁷ argues that the guidance results in the conflicting notion that being a trans person is something that can be tested and proven, a notion that causes many hardships. Though the English guidance is not ideal, it is an example of a specificity in thinking about gender identity and/or expression in the asylum context that is lacking in the Dutch guidelines.

A key study on the way the Dutch immigration service deals with LGBTI applications in the asylum procedure and the way this has evolved in recent times is the qualitative research by Jansen, “Pride or Shame” (2018). According to Jansen, the asylum procedure has become more lenient, producing more positive decisions com-

⁸² TGEU, 2016 B. “Legal Gender Recognition in Europe Toolkit”, 2nd revised version (Berlin: TGEU) pp. 1-57, esp. p. 30. Available at: <https://tgeu.org/wp-content/uploads/2017/02/Toolkit16LR.pdf>; last accessed 7 December 2020.

⁸³ Gender normativity is seen here as enforcing social standards in terms of how those assigned a physical sex at birth should behave, express, and develop. Gender normativity will be positioned further in Chapter 2.4.

⁸⁴ While not expressing her identity giving way to gender norms.

⁸⁵ UK Government, asylum policy guidance, 2011. “Gender Identity Issues in the Asylum Claim”, pp. 1-18. Available at: <https://www.gov.uk/government/publications/dealing-with-gender-identity-issues-in-the-asylum-claim-process>; last accessed 8 December 2020.

⁸⁶ Dutch Government, asylum policy guidance, 2015. “WI 2015/9, Working Guidelines, Hearing and Deciding in Cases Where an LGBT Orientation is Presented as Motive for Asylum”, pp. 1-4. Available at: <http://cmr.jur.ru.nl/cmr/tbv/tbv13/15/wi.2015.09.pdf>; last accessed 8 December 2020; Dutch Government, asylum policy guidance, 2018. “WI 2018/9, Renewed working Guidelines, Hearing and Deciding in Cases Where an LGBT Orientation is Presented as Motive for Asylum”, pp. 1-4. Available at: <https://cmr.jur.ru.nl/cmr/tbv/tbv13/18/wi.2018.09.pdf>; last accessed 8 December 2020; Dutch Government, asylum policy guidance, 2019 A. “WI 2019-17, Hearing and Deciding in Cases where an LGBT Orientation is Presented as Motive for Asylum”, pp. 1-7. Available at: https://ind.nl/Documents/WI_2019-17.pdf; last accessed 22 December 2020.

⁸⁷ Bach, J. 2013, pp. 34-36.

pared to 2010,⁸⁸ and a higher influx of LGBTI asylum seekers. Moreover, there is now greater attention from and a clear obligation for the State Secretary to look into the circumstances and danger of criminalisation of the LGBTI identity in a country of origin. “Discretion” can no longer be required of an LGBTI asylum seeker when arguing about return to a country of origin, though the issue of “discretion” is not completely resolved. Since 2016, late disclosure has been accepted for full consideration in Dutch asylum law.⁸⁹ The incorporation of the 2014 ABC judgement⁹⁰ in the working guidelines for the assessment of an LGBTI identity in Dutch asylum procedures⁹¹ set some clear boundaries regarding what can be included in fact-finding in LGBTI asylum procedures. On the other hand, Jansen’s study finds a clear rise in negative decisions made on the grounds that claimants are deemed “not credible in their identity” in LGB(TI)⁹² asylum applications.⁹³ It is striking that practically all such negative decisions occur in the cases of LGB(TI) asylum seekers who originate from countries where such identities are criminalised. The 2015 working guidelines⁹⁴ for the assessment of persons with an LGBTI identity deal predominantly with the credibility assessment. They describe the “expectation that in a country with an LGBTI-hostile climate, LGBTI persons always go through a process of awareness and a process leading towards self-acceptance.”⁹⁵ This expectation is certainly present and Jansen criticises it as a stereotypical idea at the core of Dutch LGBTI asylum policy.⁹⁶ Furthermore, other stereotyping notions about sexual orientation remain present in the credibility assessment. It should be noted here that the important discourse in Jansen’s research, which examines negative credibility assessments of the sexual orientation of asylum claimants originating from countries that criminalise their identity, is different from the current dilemmas experienced by our research population, as we will see in the positioning and content of this research.

Positioning of the research

The developments described above with respect to gender identity and/or expression in the asylum context form the background to positioning a number of characteristics of this research.

Focus on trans persons

This research analyses asylum procedures where a trans identity and/or expression is the primary reason for seeking protection. It seeks specificity for trans persons and their differentiation from the larger “LGBTI umbrella”. Berg and Millbank’s paper points to the need for differentiated research with respect to the specific group of persons with a trans identity and/or expression. The aforementioned UK guidance (2011) demonstrates that it is possible to include more specific instructions, covering a broader array of themes relating to trans asylum cases, than is currently the case in the Netherlands. The analysis in Jansen (2018) and the recent emphasis in advocacy on the credibility assessment of an identity is highly relevant for persons with an LGB identity but is currently⁹⁷ less relevant for participants with a trans identity and/or expression in this research. Note: The intended trans-specificity is not meant as a call to divorce the group of trans persons from the LGBTI group in asylum procedures.

⁸⁸ Jansen, S., 2018, English edition, 2019, p. 167. 63 per cent of 231 LGBTI asylum seekers from both criminalising and non-criminalising countries received a positive decision.

⁸⁹ But there is a catch here, since submitting information on the LGBTI identity later might play a role in the credibility assessment, although it is not allowed to be the singular reason for rejection.

⁹⁰ European Court of Justice, 2014. “ECLI:EU:C:2014:2406, ABC judgement”. Available at: <http://curia.europa.eu/juris/document/document.jsf?docid=160244&doclang=EN>; last accessed 8 December 2020. As a consequence of this judgement: Medical tests and psychological examination must not to be used; documentary photo and video evidence will not be asked for, and, when given it must not be included. Sexual acts and activities will not be questioned and, if mentioned, the asylum seeker must be made aware that it is not necessary. But stereotypical questions on LGBTI identity are permitted and “positive recognition of such stereotypical signs” can be taken into account positively. An absence of such signs should not mean, however, that a person is less credible.

⁹¹ Jansen, S., 2018, English edition, 2019, pp. 25–26.

⁹² Practically all of these negative assessments of credibility of their identity concerned a gay or bisexual (LGB) orientation.

⁹³ *Ibid.*, p. 41.

⁹⁴ Dutch Government, asylum policy guidance, 2015.

⁹⁵ *Ibid.*, p. 3.

⁹⁶ Jansen, S., 2018, English edition, 2019, p. 167.

⁹⁷ This does not mean that it is unthinkable that the issue of credibility, which has become more poignant for persons with an LGB orientation in the last decade, might become more relevant for persons with a trans identity and/or expression in the future.

Credibility

All trans persons in Jansen's 2018 study⁹⁸ were deemed "credible in their identity" in their asylum procedures. With the exception of one person, the same is true for participants featured in the aforementioned "Fleeing Homophobia" study. Likewise, Berg and Millbank⁹⁹ also reported that 41 of 42 trans persons in their study were deemed credible in their identity. This trend is mirrored among our eight research participants. In the case of our participants, final decisions about asylum applications did not depend on the credibility of their identity; rather, they were based on weighing up the severity and credibility of the claimants' experiences and circumstances. It is worth noting here that, despite the number of trans persons deemed credible in their identity in the above studies, problems remain concerning the way the assessment of the credibility of trans identity is dealt with in the Dutch guidelines and how it is implemented in hearings. This issue will be addressed in this research.

Severity

Given the absence of negative credibility assessments and taking into account that our participants come from countries that do not directly¹⁰⁰ criminalise the trans identity, the current assessment process mainly centres on the severity and credibility of claimants' experiences and circumstances, which contribute to a well-founded fear of persecution.¹⁰¹ The paper by LaViolette (2011)¹⁰² and the Wijker (2018)¹⁰³ article are informative in terms of the position of our research participants in the asylum process. In cases that "come close to a threshold of persecution," the availability and use of specific COI is essential when assessing whether claimants fear persecution rather than discrimination; whether they can access state protection; if internal protection is possible if the claimant is relocated within the country of origin; and what the risk (well-founded fear) of persecution is upon return.

The evidentiary burden for trans Latinas to present anything that contributes to (a well-founded fear of) persecution has to be fulfilled mostly without much corroborating evidence. As such, a lot depends on a person's capacity to convey their lived experience and circumstances. It also depends on whether the hearing and assessment of their cases is executed in a trans-specific way by the immigration service. This trans-specificity depends on differentiation from the larger LGBTI group, the adjudicator's knowledge about and insight into circumstances in countries of origin, and the experiences and consequences of a trans person's identity guiding the asylum procedure. Moreover, it relies on the availability, collection, use, and assessment of trans-specific COI. When the severity assessment in a trans participant's asylum procedure is close to "the threshold of persecution," the outcome is especially critical on whether this is done in a trans-specific way.

How and to what degree the hearing and assessment in participants' asylum cases is executed with knowledge and insight of the trans identity is central to the aforementioned nine main research themes concerning trans Latinas. Several authors mentioned above observed a sparsity of available COI for consideration, the use of LGB information that might not be adequate in trans asylum cases, and a need for trans-specific COI. Where possible, this research presents trans-specific background research information. Such knowledge, insights, and COI are important for estimating the severity and for supporting the veracity of participants' experiences and circumstances. It is also important to estimate whether "invoking state protection against non-state actors" and "an internal protection alternative" is possible and what the risk of persecution is if a person is returned to their country of origin.

⁹⁸ *Ibid.*, p. 46.

⁹⁹ Berg, L. and Millbank, J. 2013, p. 9.

¹⁰⁰ "Not directly"; it is phrased this way because even though there is no direct mention in law of the identity and no explicit law targeting trans Latinas, eight of 21 LAC region countries in our research do have public order and vagrancy laws that might target trans and/or LGBTI persons.

¹⁰¹ Of course, the determination of credibility is also important in the context of everything that an asylum seeker might present as evidence of (the risk of) persecution.

¹⁰² LaViolette, N. 2011. "Independent Human Rights Documentation and Sexual Minorities: An Ongoing Challenge for the Canadian Refugee Determination Process", *The International Journal of Human Rights*, Vol. 13, No. 2/3, pp. 437-476. Available at: https://www.researchgate.net/publication/228195492_Independent_Human_Rights_Documentation_and_Sexual_Minorities_An_Ongoing_Challenge_for_the_Canadian_Refugee_Determination_Process; last accessed 8 December 2020.

¹⁰³ Wijker, A. 2018, "Kunnen Cubaanse LHBTI-zaken als Onvoldoende Zwaarwegend Worden Afgedaan?" *Asiel & Migrantenrecht* 2018, No. 2, pp. 82-85. Available with subscription only: <https://www.stichtingmigratierecht.nl/asiel-migrantenrecht>; last accessed 17 May 2019.

Evolving terms and concepts

Appropriate terms and concepts that respect the human rights, dignity, and equality of persons with a trans identity and/or expression are essential. Not as a theoretical consideration, but as a practical concern for the use of language in asylum procedures. Words and meanings concerning trans persons have changed and continue to change in the recent momentum for progress while still depending strongly on local and regional circumstances and resistance to them. Such terms and concepts are not always used, acknowledged, or respectful of a trans identity in mainstream society. How should this key issue be addressed? We will highlight central ideas and suggest criteria that define a respectful approach rather than aiming at an extensive guidance.

In the past, words and meanings regarding trans persons were laden with gender normativity that devalued, humiliated, pathologised, sexualised, ridiculed, and incriminated this group. Think, for instance, of the term “public indecency” used by the police,¹⁰⁴ the words “perversion”, “psychopathology”, and “mono symptomatic psychosis” in psychiatry,¹⁰⁵ depictions of “disorder”, “transsexualism”, and “transsexism”¹⁰⁶ by medical professionals, or sensational headlines in the media referencing “sex swap” or “GI becomes blond bombshell”. Such outdated terminology in relation to trans persons must be identified as inappropriate, lacking respect, and harmful to the integrity and equality of trans persons.

On the other hand, differentiated and respectful terms and concepts are being developed within/by groups of trans persons in the context of growing but still limited agency and space in many societies. Different identities, including non-binary persons¹⁰⁷ with a genderqueer, gender fluid, or a-gender identity, are encompassed by language representing this diversity.¹⁰⁸ The term trans (gender) persons has become an umbrella term for a wide range of trans identities and/or expressions. These terms and concepts are proposed to society while simultaneously negotiating their place in it. But significant variance remains in the degree to which this terminology has been integrated into the language of society and/or governance. It remains a dynamic process, adding to the complexity for trans individuals seeking to position and describe themselves, and for stakeholders wanting to incorporate these terms and concepts.

We propose the use of terms and concepts in asylum procedures that have been defined primarily by trans advocacy organisations,¹⁰⁹ and that respect the human rights, dignity, and equality of persons with a trans identity and/or expression. A list of these terms can be found in the glossary.

Between past negative depictions and the proposed differentiated and respectful representation there are still terms and concepts in use that are condoned or open to whitewashing by society. A number of expressions, currently in use in Dutch society, come to mind; for instance, using terms such as “a re-built man” or “he had a sex change” when talking of a trans woman are sometimes defended as harmless. But such expressions position the birth sex as central, ignoring gender identity and/or expression, and they reduce gender affirmation to something surgical or mechanical, the renovation of a structure. Contrary to such representation, an innate gender identity is the reason to seek a transition that comprises a wide variety of possible steps that may, but not necessarily, include affirmation of the body to that identity.

A particular and problematic concept often posited concerning trans persons, and countered by Bettcher (2007

¹⁰⁴ Andere tijden, 2013. “Transgender Pioniers”, Available at: <https://anderetijden.nl/aflevering/90/Transgender-Pioniers>; last accessed 22 December 2020.

¹⁰⁵ von Krafft-Ebing R. 1840-1902. Selections from “Psychopathia Sexualis with Special Reference to Contrary Sexual Instinct”; Cauldwell, D. 1897-1959. “Psychopathia Transexualis”, in Stryker, S. and Whittle, S. 2006. *The Transgender Studies Reader*, (Abingdon: Routledge) pp. 1-752, esp. pp. 21-27 and pp. 40-44.

¹⁰⁶ In the Dutch context, this was called “transsexisme” in the 1960s.

¹⁰⁷ Tsjeng, Z. 2016. “Teens These Days Are Queer AF, New Study Says”, *Vice*. Available at: <https://www.vice.com/en/article/kb4dvz/teens-these-days-are-queer-af-new-study-says>; last accessed 27 December 2020.

¹⁰⁸ We refer to the glossary for definitions.

¹⁰⁹ Definitions used for Gender, Gender Expression, Gender Identity, Gender-queer, Sexual orientation, Transgender or Trans, Transgender man, Transgender woman, Transphobia and Transsexual are drawn from the following sources: TGEU, 2016 A.; TNN, Transgender Network Netherlands, 2020. “Woordenlijst”. Available at: <https://www.transgenderinfo.nl/2-2/transgender/#informatie-algemeen|2>; last accessed 27 December 2020.; GLAAD, no date. “GLAAD Media Reference Guide – Transgender”. Available at: <https://www.glaad.org/reference/transgender>; last accessed 8 October 2020.

and Laidlaw (2016),¹¹⁰ is the idea that trans persons are deceptive or pretending to be something they are not. When a trans person is perceived as being “dressed up”, for instance, this might be condoned as a harmless depiction in society. But it harbours the gender normative perception of an observer seeing “a body deemed to represent reality” that is “disguised in the act of dressing up.” The gender normative judgement that the body is primary, defining, and immutable denies the reality of a stable immutable gender identity that guides a person’s life. It is important to be aware how this leads to seeing a trans women as “really a man disguised as a woman.” This is possibly followed by the idea that “a trans person can deceive someone,” which can become life threatening for trans persons when perpetrators claim the right to be angry following the “discovery of the truth behind a deception.” Achieving a respectful and alert adjudication of trans persons’ asylum procedures requires insight into and the dismantling of gender normative terms and concepts relating to trans persons that are still present in society, in particular terms that might not immediately be identified as such.

Action points regarding terms and concepts:

- In order to communicate about trans persons’ circumstances and experiences in the asylum process while respecting their human rights, dignity, and equality, it is important for stakeholders in European asylum procedures to have a common understanding of terms and concepts;
- Reject and do not use outdated words or phrases originating from criminalising, psychiatric, stigmatising, or pathologising terms and concepts.
- When discussing trans persons, we advise using recent terms, concepts, and information, preferably obtained from trans organisations, which support their human rights, dignity, and equality. In a European asylum context, these will most probably voice a “Western perspective”.
- Be aware that the LAC region’s culture, circumstances, and experiences can result in different meanings being attached to terms and concepts than those in a Western context. It is important that stakeholders also incorporate these differences when dealing with trans Latinas.
- Respectful terms and consideration for trans persons should start from and acknowledge gender identity and/or expression as an innate characteristic that drives their actions, and is deserving of equality.
- Persons that start their reasoning from the perspective of the sex assigned at birth, and who attribute meaning and judgement of a trans person from the outside are at risk of reproducing gender norms.
- We invite the development of insight into and sensitivity for the more hidden transphobic connotations that certain terms and concepts condoned in society can have.

1.3 Method and Data

Research

This qualitative research is an explorative case study based on semi-structured interviews with eight selected participants, asylum procedure documents covering the many steps in the Dutch asylum process provided by participants, and background research information. The information was encoded in Atlas.ti and analysed and supported by triangulation of any overlap in the information to check and balance the analysis.

Given the limited number of case files reviewed, this research does not purport to provide a quantitative analysis of state practice. The findings solely intend to be illustrative of the themes discussed in the research. To that end,

110 Bettcher, T. 2007. “Evil Deceivers and Make-Believers: On Transphobic Violence and the Politics of Illusion, *Hypatia: A Journal of Feminist Philosophy*, 22 (3), pp. 43-65, esp. p. 47. Available at: <https://kingsphilosophydotcom.files.wordpress.com/2019/11/talia-mae-bettcher-evil-deceivers-and-make-believers.pdf>; last accessed 8 December 2020.; Idem, 2014. “Transphobia”, *TSQ: Transgender Studies Quarterly*, 1: 1-2, pp. 250-251. Available at: <https://read.dukeupress.edu/tsq/issue/1/1-2>; last accessed 8 December 2020.; Laidlaw, L. 2016. “Trans Representation and the Criminological Implications”, *Robson Crim Legal Blog*. Available at: https://www.academia.edu/34765322/trans_representation_and_the_criminological_implications; last accessed 12 May 2020.

the total individual outcome of the asylum procedure will not be analysed and commented. Instead, the research looks at the process, content, and quality of the Dutch asylum procedures when dealing with trans persons, examining how and to what degree the procedure represents and considers trans Latinas' circumstances and experiences.

Selection of participants

For inclusion as research participants, our candidates had to be transgender asylum seekers from the LAC region who had started the process of applying for asylum in the Netherlands and who originate from countries that do not directly criminalise trans identities. Eligible participants were required to be at least 21 years old.¹¹¹ We did not select participants based on the (possible) outcome of the asylum procedure. At the moment of participation only one person knew the final outcome of her procedure.

The initial goal was to include 15 participants. Recruitment was done by direct contact with trans Latinas at key moments, i.e. in housing facilities (AZC),¹¹² at social events for LGBTI asylum seekers organised by the Dutch LGBTI organisation (COC Netherlands), and at events organised by the Dutch Union for Sex Workers in Amsterdam (Proud). We also made efforts to reach out to other trans Latinas through social media. Possible candidates lived spread throughout the Netherlands. Direct contact proved to be a prerequisite for building a level of trust in interactions and for introducing the research. A call for participation through Dutch trans organisations proved ineffective. Participants needed reaffirmation of anonymity and that we were in no way connected to authorities like the immigration service. They feared that participation would be harmful to the asylum procedure or their stay in the AZC. Most were at least hesitant that this research would help in any way. For others, the long-term effect of such research seemed abstract or beyond their perspective. A motivating factor was the opportunity for their lived experiences and experiences of the asylum procedure to be heard. The incentive of a gift voucher of 25 euros was helpful.

The region

We adopted the International Lesbian, Gay, Bisexual, Trans and Intersex Association (hereafter, ILGA) definition of the LAC region as stated in their 2017 Trans Legal Mapping Report.¹¹³ The criterion for including a country of origin from the LAC region in the research was that persons with an LGBTI identity were not directly criminalised as of 1 January 2018. For this reason, Jamaica and Trinidad Tobago were excluded. Territories still associated with or under the control of the Netherlands, UK, France, and the USA were also excluded. This was done to avoid further widening of the heterogeneity of countries included. Thus, when we refer to the LAC region in this research, it is a restricted version of it and includes only 21 countries: Argentina; Bolivia; Brazil; Chile; Colombia; Costa Rica; Cuba; Dominican Republic; Ecuador; El Salvador; Guatemala; Haiti; Honduras; Mexico; Nicaragua; Panama; Paraguay; Peru; Saint Lucia; Uruguay; and Venezuela.

Research sample

The sample of eight persons turned out to be smaller than anticipated and consisted solely of trans feminine persons. The hope of finding 15 participants originated from positive results in one housing facility that we visited to select candidates. Unfortunately, these positive results were not replicated in other locations where we were not physically present. The chance of successfully recruiting participants was not high given their small number, their vulnerability, the need for face-to-face communication, and the time needed to achieve informed consent.

The group of participants is not representative for all trans people in the LAC region. The selection is determined by the following elements: escaping the persecution experienced in the country of origin; applying for international protection; willing participation in the research. The research group consists solely of trans feminine persons aged between 25 and 40. Trans masculine,¹¹⁴ non-binary trans,¹¹⁵ and non-heterosexual trans persons could not be recruited for the research. The majority of trans persons coming to the Netherlands seeking asylum from the LAC

¹¹¹ Not all countries have the same age of maturity, we chose the highest age, 21.

¹¹² In the Netherlands, housing facilities for asylum seekers are called AZC: Asielzoekers Centrum (Centre for Asylum Seekers).

¹¹³ ILGA, 2017. "Trans Legal Mapping Report: Recognition Before the Law", second edition, pp. 1-242. Available at: https://ilga.org/downloads/ILGA_World_Trans_Legal_Mapping_Report_2019_EN.pdf; last accessed 13 December 2020.

¹¹⁴ Trans masculine persons: persons identifying in the masculine direction while being assigned female at birth.

¹¹⁵ We did not encounter information in the background research on non-binary trans persons.

region are trans female.¹¹⁶ This reflects the background information, which focuses almost entirely on trans female circumstances and experience.¹¹⁷ Only a few short quotes in the literature are dedicated to trans masculine experiences.¹¹⁸ The only trans masculine person from the LAC region seeking asylum in the Netherlands known to us chose not to participate in the research. One of the participants actively identifies as mestiza, whereas six others are also of mestiza or Afro-mestiza descent but do not actively identify as such.

Anonymity

Participants must remain anonymous due to the vulnerable position of trans persons in their country of origin. We do not want to risk any harm to them in either their country of origin or in the asylum procedure. Since trans Latinas are a small group, there is a greater probability of tracing specific persons. Consequently, we anonymise any names, locations, or COI references that can connect a specific participant to a country of origin, with the exception of Cuba. Because a larger group of asylum seekers arrived from Cuba at the end of 2017 and early 2018, including an estimated 30 to 40 trans refugees, it is easier for participants to remain anonymous.

Semi-structured interviews

One semi-structured interview of between 1.5 and 2.5 hours was held with each of the eight participants between April 2018 and May 2019 in accordance with research standards.¹¹⁹ Ethical approval was obtained.¹²⁰ Participants who indicated an interest in participating received a research information sheet and a consent form in Spanish. Before the interview, the information was gone through in detail and explained together with the candidate participant. Participants signed the consent form. Data collection was done according to the EU Directive 95/46 on Data Protection. Interviews were recorded. Participants were free to stop the interview at any moment and a decision to not answer questions was respected at all times.

A line of questioning with two major parts was devised. The first part was concerned with all the ways and situations in which participants experienced exclusion, discrimination, and violence in their country of origin as a trans person and followed the participant's life history. The second part of the interview was concerned with the experience of participants during the hearings with the Dutch immigration service in the asylum procedure with a view to understanding what was discussed in these hearings and how these hearings were perceived by trans Latinas. After the interview, participants received a 25-euro gift voucher. Interviews were transcribed and translated into English. The transcriptions were then encoded and subsequently analysed for critical themes.

Documents related to the asylum procedure

Participants provided the documents in their possession that related to their asylum procedure. In this way, we could see what the line of questioning was by the immigration service in the hearings, in particular regarding the credibility of the trans identity and any questioning related to assessing the severity and veracity of adverse ex-

¹¹⁶ Feminine identification and/or expression in those assigned the male gender at birth is known worldwide to be a very strong trigger to hostility and violence. Combined with gender normativity and misogyny being very common in the LAC region this may contribute to a much higher number of trans women seeking refuge.

¹¹⁷ At the moment, some sources on Mexico, Venezuela, and Colombia indicate a ratio of one trans masculine person in six trans feminine persons (respectively 16, 20 and 4 per cent of the total population and 84, 80 and 96 per cent).

Sources: HVI, 2019. "En México Hay Entre 360 Mil y 600 Mil Personas Trans, Según Estudio", *Televisa.com*. Available at: <https://noticieros.televisa.com/ultimas-noticias/mexico-personas-transgenero-sexualidad-poblacion/>; last accessed 2 August 2019; Balzer, C., LaGata, C. and Hutta, J. 2015. "The Social Experiences of Trans and Gender-Diverse People in Colombia, India, the Philippines, Serbia, Thailand, Tonga, Turkey and Venezuela", *Transrespect versus Transphobia worldwide publication Series Vol. 9, Transgender Europe (TGEU)*, pp. 1-84, esp. p. 13. Available at: <https://transrespect.org/wp-content/uploads/2015/08/TvT-PS-Vol9-2015.pdf>; last accessed 9 December 2020.

¹¹⁸ Three sources point to trans masculine persons being "less visible", while they may encounter severe violence when, for instance, experiencing sexual assault in so-called corrective rape and forced into marriages. Their HIV infection rate is lower than for trans women but higher than for the general population.

Madrigal-Borloz, V. 2018. "A/HRC/38/43, Report of the Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity", pp. 1-20, esp. par. 42 and 56. Available at: <https://www.pgaction.org/inclusion/pdf/resources/2018-05-Report-Independent-Expert-protection-against-violence-discrimination-SOGI.pdf>; last accessed 9 December 2020; Balzer, C., LaGata, C. and Hutta, J. 2015. p. 14; Berredo, L. et al. 2018. "Global Trans Perspectives on Health and Wellbeing: TvT Community Report", *Transrespect versus Transphobia Worldwide Publication Series vol.20, Transgender Europe*, p. 17. Available at: <https://transrespect.org/wp-content/uploads/2018/12/TvT-PS-Vol20-2018-EN.pdf>; last accessed 9 December 2020.

¹¹⁹ Longhurst, R. 2010. "Semi-Structured Interviews and Focus Groups" in: Clifford, N. et al. (ed.), "Key Methods in Geography", 2nd edition (London: Sage), pp. 103-115. Chapter Available at: http://dsc.du.ac.in/wp-content/uploads/2020/04/3.4-Semi_structured-Interviews-Focus-Groups.pdf; last accessed 9 December 2020.

¹²⁰ Ethical approval for the study was granted by the Ethics Review Committee Psychology and Neuroscience at Maastricht University. The research is registered as: DISELAT (Dutch Immigration Service's Evaluation of Latin American Transgender refugees) under supervision of Dr. S. Stutterheim with reference number 188_11_02_2018_S5.

periences and circumstances in their country of origin. The hearings in the asylum procedure also provided insight into the basis for the “intention to decide on the asylum procedure” (hereafter, intention) and the “decision”. All participants were missing at least one or more documents from the set that covers all the steps in the asylum procedure.¹²¹ A specification of the documents that were available to us is given in Chapter 8, Appendix 1. We assisted some participants in contacting lawyers in order to obtain some of the asylum procedure information. Two court verdicts were found on the internet. For reasons of anonymity and autonomy, it was out of the question to try and acquire documents from the immigration service. In two participants’ cases, the lack of some of the documentation hindered the research somewhat. Specifically, the absence of the “intention” document for participant E was inconvenient because this is the document that details the complete assessment by the immigration service. The “decision” document, which follows the “intention” document, refers to the “intention” without repeating all details of the total assessment, as documented in the “intention”. The absence of documentation relating to the second hearing of participant B was partly compensated for by documentation relating to a third hearing. The asylum-procedure-related documents were also encoded in Atlas.ti and analysed for critical themes.

Background research information

Besides the asylum procedure documents and the semi-structured interviews, we collected “background research information”, including: a) Information concerning countries of origin and the region; b) information on what is known about the experiences of and conditions for trans and LGBTI people in the LAC region and/or their country of origin; and c) information on the laws, rules, and logistics of the Dutch asylum procedure. An overview of this information can be found under “Sources” below. Our own information will be called “background research information”, in order to distinguish it from COI sources used by the immigration service to inform intentions and decisions. There is, however, an overlap between the two categories: part of our background research information originates from COI databases like ACCORD¹²² and Refworld.¹²³ Background sources are highly heterogeneous, ranging from: personal narratives or small-scale reports to systematic reviews and large populations. They are mainly qualitative and a few are quantitative, ranging from global to city-level information, from the total LGBTI group to trans sex workers; from HIV research to urban planning; from legal to social circumstances. All background research, semi-structured interviews, and the documents covering the individual asylum procedures were coded, analysed, and, where possible, supported by triangulation to check and balance the analysis.

It is important to be informed about the way immigration service officials are prepared/educated to handle asylum cases where a trans identity and/or expression is the primary motive, including the use of COI, and some quantitative data. Therefore, a formal information request was made to the immigration service in February 2019 in the context of public access to governance.¹²⁴ The questions asked within the request can be found in Appendix 5. It is unfortunate that we did not receive any information in response to this request¹²⁵ as it could have served as a standard which to compare practice in the research cases.

Researchers own position

Being trans women from the LAC region and Europe ourselves is an important aspect of the research. In our own experience, coming from a small, marginalised group increases the risk of misconceptions, a lack of information, and neglect. Our trans expertise facilitated our entrance to and research into content; our personal histories also lowered the threshold for trans Latinas to engage with us. We encountered vulnerabilities in the housing facilities of trans people, many of whom are undereducated, traumatised, and often involved in sex work due to the lack of other options in their country of origin. Given this information, we were not always convinced they were in a position to represent themselves in their best interests. But who else was willing to engage with

¹²¹ There are many steps that could be documented with respect to the asylum procedure. Documentation might include: first hearing by the immigration service; corrections & additions by the lawyer; second hearing (and sometimes an additional hearing), again with the possibility of corrections & additions by the lawyer. This is followed by an “intention” (to reject) from the immigration service. The lawyer can respond by issuing an “opinion” [zienswijze in Dutch] on the “intention”. The immigration service then issues the “decision” [Beslissing in Dutch]. The lawyer can appeal on behalf of the client followed by a court hearing. If the judge grants the appeal, this might start a second cycle by the immigration service of an intention and a revised “decision”. If the appeal is rejected by the lower court, the lawyer can appeal to the highest and final instance, the Council of State. We did not consider any documents from the military police.

¹²² Austrian Centre for Country of Origin and Asylum Research and Documentation, Austrian Red Cross.

¹²³ UNHCR Database containing COI.

¹²⁴ This information request is called a “WOB request” and was submitted by the representative of Transgender Netwerk Nederland, Mr. J.C.H. Pronk, Apeldoorn, 28 February 2019, reference number D100010/JCHP.

¹²⁵ The deadline passed in June 2019.

this relatively small group? We have risen to the challenge in this research, growing from a position of experience to one of insight, relevant knowledge, and critical distinction. Our experiences with and as trans women motivate us to provide solid research that can be used to inform tangible improvements to asylum procedures where a trans identity and/or expression is the primary motive.

The research contains a participatory element since the co-researcher, Alejandra Ortiz, belongs to the research population and is a participant in this research. Her contribution has had many positive effects on the research, from being a trigger and a motivation to start the study, to co-developing it, recruiting and interviewing participants, and transcribing and translating the interview results. The research has profited from her knowledge of, insight into, and reflection on the region and the way the development of a trans identity is shaped by various conditions. After a collaborative start and first phase, Willemijn van Kempen took on the role of main researcher, undertaking the background research, processing, coding, and analysing the research data, and designing and writing the report. This also means that Alejandra did not process and interpret her own data in the research..

Insight into legal aspects and the structure of asylum procedures developed in the course of a year. Preparations included visiting congress events,¹²⁶ a network meeting with the immigration service and the Central Organ for the Reception of Asylum Seekers (COA), seeking advice from Dr. Sarah. E. Stutterheim at Maastricht University and Dr. Elise van Alphen at TNN¹²⁷ when developing a research proposal.

Translation from Spanish to English was done by Alejandra Ortiz; Dutch to English by Willemijn van Kempen.

¹²⁶ University of Utrecht, "The (In)visibility of Transgender Refugees and Migrants", 6 February 2017; COC Netherlands, Out & Proud? Conference on LGBTI Asylum in Europe, 5–6 October 2017, Amsterdam; Stake-holder meeting immigration service, with COA, DT&V, about LHBTI asylum applicants, 29 November 2018, The Hague.

¹²⁷ Transgender Network Netherlands (Transgender Netwerk Nederland).



© Mariana Leder, 2019. Image showing protesters, holding the sign "basta de genocidio trans/travesi"; stop the genocide of trans/travesti persons.

2. Trans-specificity in the asylum procedure

The following chapter provides a baseline for this research by looking at the conditions surrounding the trans asylum procedures and general elements in the execution of participants' asylum procedures. It takes stock of the current state of differentiation from the larger LGBTI group and whether there is a specific approach to trans identity and/or expression as the primary motive in asylum procedures. A trans-specific approach is seen here as composed of two aspects: 1) differentiation of the information and concepts about trans persons from those for the larger group of LGBTI persons, and: 2) specificity, i.e. a conscious approach guided by knowledge and insights about what is important for trans persons in an asylum context.

2.1 Knowledge of the research group

What is the current state of affairs regarding knowledge of the experiences and circumstances of trans persons from the LAC region?

Since 2011, trans persons are explicitly eligible for international protection. They surface late in the asylum context, as a smaller group, and with trans-specific circumstances to consider. The need for knowledge and insight into the experiences of trans people is a logical consequence of this inclusion in the asylum context to inform the assessment process in asylum procedures where a gender identity and/or expression is central. But even for the assessment of the total group of LGBTI asylum seekers, several stakeholders have signalled the inadequacy of current COI.¹²⁸

Statements often point to a lack of specific information and data in different knowledge areas on the lived experience and circumstances of trans people in the LAC region. Violence against the total group of LGBTI persons is seriously underreported and states do not have data collection systems that properly record victims' gender identities.¹²⁹ Lanham (2019) reports a gap in evidence regarding the types of abuse trans women experience in the LAC region.¹³⁰ According to Berredo, access to data is often limited due to political contexts and legal and social persecution. The marginalisation of gender diverse people persists in the absence of research and critical analysis.¹³¹ Similarly, REDlactrans (2012, 2014) observes how the absence of official statistics on the situation of trans persons hinders progress. A lack of forensic and legal data, caused by the omission of trans persons in official records, restricts advocacy for trans persons.¹³² Until a few years ago, HIV-related research did not differentiate trans people from "men who have sex with men" and sex workers¹³³ and left their situation unspecified. Differentiated HIV research now includes some useful broader information on the circumstances and experiences that trans Latinas face and reveals a much higher prevalence of HIV compared to males having sex with men and other groups. Together with international experts, Ritterbusch, Correa Salazar, and Correa (2018)¹³⁴ ask why the average physician, population researcher, and policymaker is so uninformed about the needs of trans individuals. She sees the answer in insufficient awareness about themes important to trans persons and a lack of acceptance of trans people. According to Watson, Wright, and Groenewald (2016) and Hagen (2016), the integration of LGBTI themes into the

¹²⁸ Jansen, S. and Spijkerboer, T. 2011, pp. 71-76; FRA 2017, p. 6; other sources can be found in the section "Current limitations to COI".

¹²⁹ IACHR, The Inter-American Commission on Human Rights, 2018 B. "On Transgender Day of Remembrance, the IACHR Calls on States to Provide Comprehensive Protection for the Lives of Trans and Gender-Diverse People", OAS.org. Available at: https://www.oas.org/en/iachr/media_center/PReleases/2019/085.asp; last accessed 9 December 2020.

¹³⁰ Lanham, M. et al. 2019, "We're Going to Leave You for Last, Because of How You Are: Transgender Women's Experiences of Gender-Based Violence in Healthcare, Education, and Police Encounters in Latin America and the Caribbean", *Violence and Gender*, 6 (1), pp. 37-46, esp. p 38. Available at: https://www.ohchr.org/Documents/Issues/SexualOrientation/Data/UNDP_AdditionalReference_2.pdf; last accessed 10 December 2020.

¹³¹ Berredo, L. et al. 2018, p.4.

¹³² REDlactrans, 2014, p 12; REDlactrans, 2012. "The Night is Another Country: Impunity and Violence Against Transgender Women Human Rights Defenders in Latin America", (Buenos Aires: REDlactrans), pp. 1-23, esp. p 8. Available at: <http://redlactrans.org.ar/site/wp-content/uploads/2013/05/Violencia-e-impunidad-English1.pdf>; last accessed 10 December 2020; OTRANS et al. 2018, p 8.

¹³³ UNAIDS, 2016. "Global AIDS Response Progress Reporting: Construction of Core Indicators for Monitoring the 2011 United Nations Political Declaration on HIV and AIDS", pp. 1-202, esp. p. 80, 81. Available at: https://eody.gov.gr/wp-content/uploads/2018/12/GARPR_Guidelines_2016_EN.pdf; last accessed 10 December 2020.

¹³⁴ Ritterbusch, A., Correa Salazar, C. and Correa, A. 2018. "Stigma-Related Access Barriers and Violence Against Trans Women in the Colombian Healthcare System", *Global Public Health*, 13 (12), pp. 1831-1845, esp. p. 1842. Available at: <https://www.tandfonline.com/doi/abs/10.1080/17441692.2018.1455887>; last accessed 8 March 2019.

traditional “gender equality” agenda involves a rethinking and broadening of the former focus on “equal rights for women and violence against women and children.”¹³⁵ Integrating LGBTI themes challenges the “gender equality” domain above and beyond hetero- and cis-normativity.¹³⁶ REDlactrans (2012) calls on women’s organisations to include trans women’s organisations as strategic partners to combat discrimination and violence.¹³⁷

Little is known about LGBTI and transphobic violence by armed state and non-state actors, groups, and individuals.¹³⁸ According to Myrntinen and Daigle (2017), information concerning LGBTI persons will likely remain invisible in the absence of attention and research. This can lead to intersectionalities in trans persons’ lives being neglected in a conflict situation and when LGBTI persons’ concerns have not yet been integrated in an international human rights context of conflict and peacebuilding.¹³⁹

Areas with a greater research focus include the Colombian (past) conflict and the peace process, HIV, and intersectionality. Attention to the Colombian conflict and peace process generated some information on the way non-state armed groups persecute LGBTI/trans persons. Examples of social cleansing by armed groups in Colombia¹⁴⁰ and Peru¹⁴¹ illustrate the heightened risk for LGBTI/trans persons in conflict situations. Specified data for trans persons only recently became practice in HIV research and in response to advice by the United Nations AIDS organisation in 2014 to collect information separately about trans people and trans sex workers given that these groups experience some of the highest recorded HIV prevalence rates.¹⁴² The theme of intersectionality regularly emerges when trans Latinas are discussed. For instance, the combination of a trans identity and/or expression with poverty, being forced out of home and the family circle, interrupted education due to gender-based violence, and lack of job opportunities. This combination of discrimination and violence quickly leads to many trans Latinas engaging in sex work and its inherent risks.¹⁴³

There can be an overrepresentation of topics pertaining to gay persons. Katyal (2002) points to the “gay identity model” as it developed in the US advocacy for gay rights, which also found application outside the US.¹⁴⁴ Jansen and Spijkerboer¹⁴⁵ (2011) suggest that, traditionally, attention has leaned towards gay men more than any other group within the LGBTI group. ILGA (2019)¹⁴⁶ observes how media representation, and to some extent scholarship, focuses on the idea of gay marriage, revealing a neglect of topics important to trans persons. Divan *et al.* (2016) emphasise that attention for the “aggregate category LGBTI” risks homogenising a heterogeneous group that faces different challenges:

¹³⁵ Watson, C., Wright, H. and Groenewald, H. 2016. “Gender Analysis of Conflict Toolkit” (London: Saferworld), pp. 1-73, esp. pp. 3 and 4. Available at: <https://www.saferworld.org.uk/resources/publications/1076-gender-analysis-of-conflict>; last accessed 27 December 2020.; Hagen, J. 2016. “Queering Women, Peace and Security”, *International Affairs*, 92 (2), pp. 313-332 esp. 314-325. Available at: https://library.pcw.gov.ph/sites/default/files/HAGEN-2016-International_Affairs.pdf; last accessed 10 December 2020.

¹³⁶ Cis gender: A person whose gender identity and expression corresponds with their sex assigned at birth. A cis-gender identity is relative to a trans-gender identity in the same way that a heterosexual orientation is related to a homosexual orientation. Cis normativity: To judge based upon and enforce the idea that gender identity and expression should fit and be expressed in accordance with physical sex assigned at birth.

¹³⁷ REDlactrans, 2012, p. 37.

¹³⁸ Watson, C., Wright, H. and Groenewald, H. 2016, p. 3. “SGMs [Sexual and Gender Minorities] are often absent from discussions of gender in the peacebuilding and development world, which can mean that their specific vulnerabilities are ignored, their needs unmet and their contributions overlooked.”

¹³⁹ Myrntinen, H. and Daigle, M. 2017, pp. 6, 7, and 8.; Hagen, J. 2016, pp. 313-332.

¹⁴⁰ Myrntinen, H. and Daigle, M. 2017, p. 19. Regarding **social cleansing**: armed groups have drawn on homophobic sentiment to consolidate their power and reinforce a particular understanding of the nation and normative gender roles, often using the language of “social cleansing”, exacerbating and policing heteronormative gender ideals both within their own ranks and among the civilian population.

¹⁴¹ Campuzano, G. 2006. “Reclaiming Travesti Histories, IDS Bulletin, Institute of Development Studies”, 37(5), pp. 34-39, esp. p. 36. Available at: https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/8375/IDSB_37_5_10.1111-j.1759-5436.2006.tb00299.x.pdf; last accessed 22 December 2020.

¹⁴² UNAIDS, 2014 A. “Global AIDS Response Progress Reporting”, (Geneva, UNAIDS) pp. 1-264, esp. p 19 and 32. Available at: https://files.unaids.org/en/media/unaids/contentassets/documents/document/2014/GARPR_2014_guidelines_en.pdf; last accessed 16 December 2020.

¹⁴³ IACHR, 2018 B.; IACHR, 2015 C, para. 17, p 17 and para. 366, p 197.

¹⁴⁴ Katyal, S. 2002. “Exporting Identity”, *Yale Journal of Law & Feminism*, 14 (1), pp. 97-176, esp. p 141. Available at: <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1181&context=yjlf>; last accessed 10 December 2020. It elaborates on the fact that the human rights approach based on gay identity (the substitutive model), which has developed over decades in the United States, has become a dominant model. Under this “substitutive model typical of antidiscrimination norms, transgendered individuals are excluded from protection [and] of discrimination on the basis of both sex and sexual orientation.” Thus, the provisions for the protection of gay identity can even exclude trans people from anti-discrimination provisions and she argues that this effect is “exported” outside the US to other countries.

¹⁴⁵ Jansen, S. and Spijkerboer, T. 2011, p. 10.

¹⁴⁶ ILGA, International Lesbian, Gay, Bisexual, Trans and Intersex Association, 2019. “State Sponsored Homophobia”, pp. 1-536, esp. p.63. Available at: https://ilga.org/downloads/ILGA_State_Sponsored_Homophobia_2019_light.pdf; last accessed 10 December 2020.

Understanding of trans people's concerns around stigma, discrimination, and violence, related as they are to gender identity, is often limited due to their being combined with lesbian, gay, and bisexual sexual orientation issues. However, trans people's human rights concerns, grounded in their gender identity, are inherently different and necessitate their own set of approaches.¹⁴⁷

Strickler (2017) points to the later development of the trans movement, which has been ostracised from the gay rights movements in the past. Despite the present space inside the LGBTI rights movement that the trans movement has now acquired, the focus in the literature still leans towards legislation for gay rights.¹⁴⁸

Current limitations to COI

Information that is used in procedures that assess claims to refugee status or other forms of international protection is called Country of Origin Information or COI.¹⁴⁹ This information must be relevant, up to date, complete, reliable, and impartial.¹⁵⁰ In order to understand how COI is used in Dutch asylum procedures with respect to trans persons, an official information request was made to the Dutch government. This request contained several questions on the way COI is researched, selected, and used¹⁵¹ but, to date, no response has been received. Nevertheless, it is possible to observe directly from participants' documents relating to intentions and decisions how the immigration service positions a country of origin's situation and what COI is used with respect to the topics analysed in Chapter 3.

The United Nations High Commissioner for Refugees¹⁵² (hereafter, UNHCR), views specific LGBTI-related COI and the understanding of LGBTI experiences in different cultural contexts as insufficient in asylum procedures. This may seriously affect the assessment and understanding of protection needs and the assessment of credibility of LGBTI persons during asylum procedures. It is also clear that a poor human rights situation can contribute to less information¹⁵³ and that the absence of information should not be seen as an absence of problems.¹⁵⁴ LaViolette (2010, 2011)¹⁵⁵ also sees the lack of COI as a general problem in cases of LGBTI claimants. Existing country documentation continues to fail to provide the kind of information refugees need to support their claims. Especially when the claim is on "the threshold of persecution," the focused and detailed specific information from international human rights organisations that is needed is often insufficient, for instance with respect to whether protection is available for LGBTI persons specifically.

In 2014, the EU issued a resolution calling on asylum authorities to improve the systematic documentation of the legal and social situation of LGBTI persons in order to provide asylum procedure decision makers with better COI documentation. It also recommended giving them adequate training to handle specific themes relating to LGBTI persons.¹⁵⁶ As a result, the European Asylum Support Office (hereafter, EASO) produced a practical guide in 2015.¹⁵⁷ This guide aims to facilitate and equip country of origin researchers confronted with the difficulties of looking into the circumstances of LGB persons in their countries of origin. Researching COI for LGB asylum cases demands an understanding of relevant research questions, search terminology, local contexts, types of sources, and obtaining alternative sources of information. EASO recognises that COI remains scarce, incomplete, and generic, despite an increase in its availability since the 1990s. There are various reasons for poor documentation, including the

¹⁴⁷ Divan, V. et al. 2016, p 2.

¹⁴⁸ Fernandez, 2004, cited in Strickler, J. 2017. "Variation in Latin American LGBT Rights", PhD, University of Miami, pp. 1-95, esp. p. 7. Available at: https://scholarship.miami.edu/discovery/fulldisplay/alma991031447666002976/01UOML_INST:ResearchRepository; last accessed 4 April 2019.

¹⁴⁹ EASO, 2018. "Judicial Practical Guide on Country of Origin Information", EASO Professional Development Series, pp. 1-54, esp. p.8. Available at: https://www.easo.europa.eu/sites/default/files/judicial-practical-guide-coi_en.pdf; last accessed 10 December 2020.

¹⁵⁰ International Association of Refugee and Migration Judges, 2006. "Judicial Criteria for Assessing Country of Origin Information (COI): A Checklist", pp. 1-21, esp. p. 3. Available at: <https://www.refworld.org/docid/55702eac4.html>; last accessed 10 December 2020.

¹⁵¹ See Appendix Three for the list of questions submitted.

¹⁵² UNHCR, 2015 A, p 7.

¹⁵³ UNHCR, 2011, p 113, para. 37.

¹⁵⁴ UNHCR, 2012, para. 66.; Jansen, S. and Spijkerboer, T. 2011, pp. 10, 19, 20.; Jansen, S. 2014. "Good Practices Related to LGBTI Asylum Applicants in Europe", (Brussels: ILGA-Europe), pp. 1-57, esp. chapter 7.1. Available at: <https://www.ilga-europe.org/resources/ilga-europe-reports-and-other-materials/good-practices-related-lgbti-asylum-applicants>; last accessed 10 December 2020.; UK Government, asylum policy guidance, 2011, p. 11.

¹⁵⁵ LaViolette, N. 2010, pp. 203-207; *Idem*, 2011, pp. 437 and 441-449.

¹⁵⁶ European Parliament, 2014. "Roadmap Against Homophobia and Discrimination on Grounds of Sexual Orientation and gender identity", *Official Journal of the European Union*, C93, vol. 60, pp. 21-26, esp. notes 4 K, II and III. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2017:093:FULL>; last accessed 23 December 2020.

¹⁵⁷ EASO, European Asylum Support Office, 2015. "Researching the Situation of Lesbian, Gay, and Bisexual Persons (LGB) in Countries of Origin", EASO Practical Guide Series, pp. 1-60. Available at: <https://www.easo.europa.eu/sites/default/files/public/Researching-the-situation-of-LGB-in-countries-of-origin-FINAL-080515.pdf>; last accessed 10 December 2020.

stigmatisation of this population, which contributes to problems remaining unreported. Other reasons are the limited capacity of local or international groups to monitor abuse, attacks on human rights defenders, and the difficulties of documenting state persecution. There is also an emphasis on information relating to gay men with less attention for other identities. Additionally, COI tends to focus on minority situations in general, whereas individual situations are influenced by factors such as gender, socioeconomic status, (non-) conformity to norms, and geography.¹⁵⁸

Unfortunately, the EASO guide is limited to LGB asylum seekers, stating that “trans and intersex asylum seekers are not so common.” This is all the more regrettable since the observed shortcomings in COI strongly reflect the issues confronting trans asylum seekers. Though it might be true that gay men are the largest group requesting protection in the Netherlands,¹⁵⁹ and probably in Europe, numbers alone cannot be a proper reason for leaving out a vulnerable group of trans people (or, indeed, any other group within the LGBTI acronym) in need of international protection. It is also unfortunate given the need for COI in the assessment of trans persons’ asylum procedures. According to EASO (2018),¹⁶⁰ COI should enable the evaluation of a country of origin’s: human rights and security situation; the political situation and legal framework; cultural aspects and societal attitudes; the humanitarian and economic situation; events and incidents; and geographical issues. To enable an evaluation of all these topics in relation to trans persons requires trans-specific information.

According to the European Union Agency for Fundamental Rights (FRA) (2017),¹⁶¹ LGBTI organisations questioned how up to date and LGBTI-specific the COI gathered by national asylum authorities is. These LGBTI organisations see non-governmental organisations (NGOs) as a key resource for COI, but EU member states seem unaware or unwilling to rely on such COI resources. It must be noted here that we observed an underrepresentation of regional and national NGOs in our participants’ asylum cases, with a focus on large organisations such as Outright, Human Rights Watch, or Amnesty International.

This reluctance to rely on smaller NGOs’ information is compounded by the following: In a 2019 letter, the State Secretary¹⁶² asked for advice on COI issues, revealing some dilemmas in the execution of asylum policy relating to the use of country related information. The letter states that: “There are many country related information sources available, but it is not clear to the State Secretary when a source can or cannot be used and if a hierarchy of reliability can be applied.” The idea of a “hierarchy of reliability” is a possible risk to the desired trans-specificity. It may be logical in general to give credit to the larger quantity of data when available, bigger producers of COI such as the US, general reports, and excluding non-replicated information from a singular source. But trans-specific information is relatively sparse and small-scale and may be coming from singular media sources or regional and national NGOs¹⁶³ that collect qualitative data through interviews with local trans persons in countries of origin. It would be detrimental if trans-specific information is met with such reluctance and relegated to the bottom of an imagined hierarchy.

Summary Chapter 2.1

Trans-specific COI is sparse. Trans persons emerged late in the asylum context, as a relatively small and marginalised group. Many negative circumstances limit the amount of information and context available for the assessment of their asylum procedures. An EU resolution that highlighted this lack of attention for and quality of LGBTI-related COI led EASO to develop a practical guide to improve it in 2015. The critique of current COI in this guide is recognised in our background research and its intentions are welcomed.

The scarcity of information is a cause for concern. On the other hand, this research invests in background research and demonstrates that more trans-specific information can be collected within the current limitations. This is done in a way that resembles the strategies suggested by EASO. Trans-related prior knowledge and insight is important for understanding relevant research questions, search terminology, local contexts, different sources, and obtaining alternative sources of information. The sparseness of information is seen here as an argument for

¹⁵⁸ EASO, 2015 A, p 10.

¹⁵⁹ Jansen, S., 2018, English edition, 2019, p. 8.

¹⁶⁰ EASO, 2018, p. 8.

¹⁶¹ FRA, 2017, p. 6.

¹⁶² State Secretary of the Department of Security and Justice, 2019. “Advisory Request for ‘Country Related Information’ for Asylum Requests to the Chairman of the Advisory Commission for Third Country Foreigners’ Affairs”. Reference number 2628625. Available at: https://www.tweedekamer.nl/kamerstukken/brieven_regering/detail?id=2019Z14827&did=2019D30421; last accessed 14 July 2021.

¹⁶³ Organisations like Otrans, REDlactrans, Fundación Arcoiris or Colombia Diversa.



the Dutch government to be open to smaller and more local information sources that document lives and circumstances of trans persons and that can corroborate trans persons' narratives in asylum procedures.

2.2 Risks for trans Latinas

Chapter 2.1 demonstrates the shortage of knowledge and information about trans Latinas' experiences and circumstances. This section presents a compilation of mainly qualitative information about the risks for trans Latinas of all types of exclusion, discrimination, and violence.

It is important to repeat here what has been stated in the Reading Guide, in Chapter 1.1. Specific remarks in COI and background research information on the higher degree of discrimination and abuse suffered by trans persons are often made in comparison to the wider LGBTI group. When such comparative information is included in this research, as part of the sparse information available, it is done to specify the severity of trans Latinas' situations and to correct misinterpretations. This differentiation is not intended to downplay or diminish the severity of the circumstances and experiences of persons with an LGBTI identity in any way.

According to the United Nations (2016 A), measures to address discrimination and violence faced by trans people lag far behind those adopted for people who are LGB, and policies and measures adopted for LGB are often not relevant or have no impact on human rights conditions for trans people.¹⁶⁴ Strickler (2017) separates gender identity from sexual orientation in the LAC region because most anti-discrimination legislation does not include gender identity. This exclusion from anti-discrimination exemplifies the more difficult conditions that trans persons must overcome.¹⁶⁵ Corrales and Sabatini (2018) and Johnson, McCandless, and Renderos (2019) confirm that legal provisions for trans people in the LAC region are among the weakest.¹⁶⁶

Bianchi et al. (2014), on the other hand, sees that trans Latinas face more labour and housing discrimination compared to men that have sex with men.¹⁶⁷ Human Rights Watch (HRW) (2009) indicated that those men who were able to keep a job as a "gay man," lost that job once they "started to identify as transgender"¹⁶⁸ and present in female clothing.¹⁶⁹ Divan et al. (2016)¹⁷⁰ state that workplace-related research shows that trans people worldwide are affected most by workplace discrimination and marginalisation. The Inter-American Commission on Human Rights (2018 B),¹⁷¹ Lanham et al. (2019),¹⁷² Blondeel et al. (2018),¹⁷³ Otrans et al. (2018),¹⁷⁴ Colombia Diversa and IGLHRC (2015 A),¹⁷⁵ and the United States Department of State (2018)¹⁷⁶ have all observed that physical and sexual violence present in the LGBTI group is markedly higher for trans Latinas. Blondeel's study, a large-scale, systematic

¹⁶⁴ UN, United Nations, 2016 A. "Living Free and Equal: What States are Doing to Tackle Violence and Discrimination against Lesbian, Gay, Bisexual, Transgender and Intersex People" (New York & Geneva: UN), pp. 1-157, esp. pp. 13 and 14. Available at: <https://www.ohchr.org/Documents/Publications/LivingFreeAndEqual.pdf>; last accessed 27 December 2020.

¹⁶⁵ Strickler, J. 2017. "Variation in Latin American LGBT Rights", PhD, University of Miami, pp. 1-95, esp. p.12. Available at: https://scholarship.miami.edu/discovery/fulldisplay/alma991031447666002976/01UOML_INST:ResearchRepository; last accessed 4 April 2019; IACHR 2015 C, para. 413.

¹⁶⁶ Corrales, J. and Sabatini, C. 2018. "The Gap Between Legal Progress and Daily Realities for LGBT People in Latin America", *World Politics Review*. Available at: <https://www.worldpoliticsreview.com/insights/23961/progress-and-setbacks-in-securing-lgbt-rights-in-latin-america>; last accessed 10 December 2020; Johnson, R., McCandless, S. and Renderos, H. 2019. "An Exploratory Study of Transgender Inmate Populations in Latin America", *Public Integrity*, 0, pp. 1-14, esp. p. 6. Available at: <https://www.semanticscholar.org/paper/An-Exploratory-Study-of-Transgender-Inmate-in-Latin-Johnson-McCandless/9c4fb4a686d88ffae8e661b9ea4e50aabc01a3d>; last accessed 11 December 2020.

¹⁶⁷ Bianchi, F. et al. 2014. "Sex Work Among Men Who Have Sex with Men and Transgender Women in Bogotá", *Archives of Sexual Behaviour*, 43 (8), pp. 1637-1650, esp. pp. 1638-1639. Available at: <https://link.springer.com/article/10.1007/s10508-014-0260-z>; last accessed 10 December 2020.

¹⁶⁸ This quotation is a less than optimal representation of trans persons. For most trans persons, the identity is present early in life, the moment described is the moment they started expressing, living their female identity explicitly, not the moment they started identifying as such. "Trans (gender) person" is preferred over "transgender". The identity is a part of a person's whole; it is not an autonomous presence.

¹⁶⁹ HRW, Human Rights Watch, 2009. "Not Worth a Penny: Human Rights Abuses Against Transgender People in Honduras", pp. 1-48, esp. p. 16. Available at: https://www.hrw.org/sites/default/files/reports/honduras0509web_0.pdf; last accessed 23 December 2020.

¹⁷⁰ Divan, V. et al. 2016, p. 2.

¹⁷¹ IACHR, 2018 B. *In its report on Violence against LGBTI People, the IACHR found that trans women are the most vulnerable social group in the region*; IACHR, 2015 C, paras 275-281.

¹⁷² Lanham, M. et al. 2019, p. 38.

¹⁷³ Blondeel, K. et al. 2018. "Violence Motivated by Perception of Sexual Orientation and Gender Identity: A Systematic Review", *Bulletin of World Health Organisation*, 96, pp. 29-41E. Available at: <https://biblio.ugent.be/publication/8544094/file/8544095.pdf>; last accessed 10 December 2020.

¹⁷⁴ OTRANS et al. 2018, p. 7.

¹⁷⁵ Colombia Diversa and IGLHRC (The International Gay and Lesbian Human Rights Commission), 2015 A. "Shadow Report on the LGBT Community in Colombia Presented to the Committee against Torture", pp. 1-14, esp. p. 8. Available at: https://www.ecoi.net/en/file/local/1314722/1930_1436348336_int-cat-css-col-20164-e.pdf; last accessed 10 December 2020; Colombia Diversa, Caribe Affirmativo and Santamaría Fundación, 2015 B. "Excluded Bodies, Faces of Impunity: Report on Violence against LGBT people in Colombia", pp. 1-3, esp. p.1. Available at: <https://colombiadiversa.org/ddhh-lgbt/EN/>; last accessed 10 December 2020.

¹⁷⁶ USDOS, 2018. "Venezuela 2017 Human Rights Report", pp. 1-44, esp. p. 35. Available at: <https://ve.usembassy.gov/wp-content/uploads/sites/105/VENEZUELA-2017-HUMAN-RIGHTS-REPORT.pdf>; last accessed 21 December 2020.

review covering research across continents, is one of few quantitative sources. It includes 76 studies, each with a minimum of 50 participants. Findings reveal that the incidence of physical and sexual violence for trans persons is much higher – indeed in the range of twice to four times higher – when recorded separately than the incidence of such violence as recorded for the combined group of sexual and gender minorities.

Several sources observe police violence to be more frequent against trans Latinas.¹⁷⁷ HRW (2009) clearly observes that being a trans Latina and being involved in sex work increases the risk of police violence compared to other groups. According to UNHCR (2016 A and B, 2018) and USDOS (2016),¹⁷⁸ trans women in Colombia, El Salvador, Honduras, and Guatemala are the group within the LGBTI community most affected by police violence. The police violence described references targeting specific and vulnerable parts of the body, like the breasts and gluteal area, since trans women typically may choose to align these areas with their female gender identity.¹⁷⁹ Ritterbusch (2016) mentions how sexual orientation and gender identity have previously been conflated. Her empirical observation is that violence against trans persons is often triggered by gender presentation and transgression of gender norms and severely restricts the lives of trans women in Bogota, who reside in a small, confined area of the city. Ritterbusch sees the need to prioritise the lived experiences of trans persons and trans sex workers separately from the larger LGBTI group.¹⁸⁰

According to Bianchi (2014), trans female sex workers often face additional challenges compared to the “men who have sex with men” population. Trans Latinas have fewer chances of finding alternative employment and, therefore, are more likely to be sex workers. They face greater stigmatisation, including by other sex workers, have the lowest status among sex workers, work in the least desirable locations, generate less money, and have a higher incidence of violence and discrimination related to sex work. Consequently, trans sex workers often have to limit themselves to tolerance zones and are more likely to remain in sex work out of economic necessity.¹⁸¹ Globally, HIV infections are, on average, very high for trans women (19 per cent) and trans sex workers (27.3 per cent).¹⁸² In Peru, for instance, HIV infection rates for trans Latinas are three times higher than for “men who have sex with men.”¹⁸³

In situations of conflict and instability trans Latinas may be at heightened risk.¹⁸⁴ One of these areas of conflict and instability is the Northern Triangle of Central America comprising El Salvador, Guatemala, and Honduras. Trans Latinas are often highly marginalised and their claims may reveal experiences of severe physical, psychological, and/or sexual violence.¹⁸⁵ Another circumstance leading to trans persons being vulnerable to higher risks of adverse experiences is the higher visibility attributed to their appearance in their environment.¹⁸⁶

Three trans-specific themes that contribute to a high burden of exclusion, discrimination, and/or violence should be mentioned here (and will be discussed further in other chapters): 1) an absence of LGR and abusive precon-

¹⁷⁷ HRW, 2009, p. 13: “Detentions under the Law on Police and Social Affairs” is a law which the police used “to harass and detain transgender people, who arguably find themselves at the bottom of the heap of “vulnerable groups” facing aggression and violence by the police. Male-to-female transgender people in particular may suffer aggravated and compounded violence when they are believed to engage in sex work”; LGBTI Network of Venezuela, 2015. “Report of the LGBTI Network of Venezuela to the United Nations Human Rights Committee on the Fourth Periodic Report of Venezuela Concerning the International Covenant on Civil and Political Rights During the 114th Period of Sessions. Human Rights Situation of Lesbian, Gays, Bisexual, Trans and Intersex Persons in Venezuela”, pp. 1-35, esp. paras 20 and 22. Available at: https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/VEN/INT_CCPR_CSS_VEN_20596_E.pdf; last accessed 10 December 2020; IACHR, 2015 C, paras 26 and 93; Johnson, R., McCandless, S. and Renderos, H. 2019, p. 5.

¹⁷⁸ UNHCR, 2016 A. “HCR/EG/SLV/16/01, Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from El Salvador”, pp. 1-48, esp. p.39. Available at: <https://www.refworld.org/docid/56e706e94.html>; last accessed 21 December 2020.; UNHCR, 2016 B. “HCR/EG/HND/16/03, Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Honduras”, pp. 1-68, esp. p.57. Available at: <https://www.refworld.org/docid/579767434.html>; last accessed 21 December 2020; UNHCR, 2018. “HCR/EG/GTM/18/01, Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Guatemala”, pp. 1-59 esp. p. 49. Available at: <https://www.refworld.org/docid/5a5e03e96.html>; last accessed 21 December 2020; USDOS (United States Department of State), 2016. “Colombia 2015 Human Rights Report”, pp. 1-57, esp. p. 46. Available at: https://www.justice.gov/sites/default/files/pages/attachments/2016/04/15/dos-hrr_2015_colombia.pdf; last accessed 17 December 2020. In its 2015 Human Rights Report on Colombia, the USDOS confirms that the majority of complaints about police abuse comes from transgender individuals.

¹⁷⁹ Colombia Diversa and IGLHRC, 2015 A, p.11.

¹⁸⁰ Ritterbusch, A. 2016. “Mobilities at Gunpoint: The Geographies of (Im)mobility of Transgender Sex Workers in Colombia”, *Annals of the American Association of Geographers*, 106 (2), pp. 422-433, esp. p. 424. Available at: <https://www.tandfonline.com/doi/abs/10.1080/00045608.2015.1113112>; last accessed 8 March 2019.

¹⁸¹ Bianchi, F. et al. 2014, pp. 1638-1639.

¹⁸² Poteat, T. et al. 2014, p. 274.

¹⁸³ Corrales, J. and Sabatini, C. 2018, last paragraph.

¹⁸⁴ Myrntinen, H. and Daigle, M. 2017, p. 6.

¹⁸⁵ UNHCR, 2015 B, pp. 27-30.

¹⁸⁶ Myrntinen, H. and Daigle, M. 2017, pp. 10, 16 and 21.

ditions;¹⁸⁷ 2) a lack of trans-specific healthcare, pathologisation by medical classifications, compulsive treatment packages, and the lack of access to and discriminating healthcare provisions in many countries; and 3) imprisonment on the basis of birth sex and the predictable and associated risks of cruel, inhuman, or degrading treatment or punishment and torture.

Summary Chapter 2.2

It is clear that the differentiation and specification of trans Latinas' circumstances and experiences from the LGB-TI group is crucial. Legal protections for trans Latinas and measures against their exclusion, discrimination, and violence lag behind in the LAC region. They are at higher risk of exclusion, discrimination, physical and sexual violence, face more violence from police forces, and are vulnerable in times of conflict and/or displacement. Even in sex work their marginalisation, discrimination, and risk of violence is higher. The targeting of trans Latinas is connected both to being feminine/female and to their higher visibility as gender non-conforming. Trans-related themes clearly contribute to a high incidence of adverse experiences among trans persons.

2.3 Limits of LGB information in assessing trans Latinas' circumstances

Having established that a lower level of protection, a higher frequency and severity of hardships, and multiple themes must be considered in trans persons' asylum procedures, it is clear that there is an urgent need to differentiate information and topics relating to the trans community from the larger LGBTI group. This chapter presents examples from participants' asylum procedures where the use of undifferentiated information based on the larger LGB(TI) group was applied incorrectly in judgements when assessing trans participants' situations in countries of origin.

Knowledge about the laws in a country and how they do or do not protect LGBTI minorities is important when assessing asylum procedures. These laws are being used as facts that determine whether or not a trans Latina is protected by law. If she is judged as having legal protection, she will be expected to find redress for any wrongs in the legal system of her country of origin. It is important, however, to determine whether particular laws do or do not apply to trans Latinas. Strickler (2017)¹⁸⁸ argues that trans people face more discrimination while gender identity is not included in most anti-discrimination legislation in Latin America. He therefore separates gender identity from sexual orientation in the LGBTI rights index for the LAC region. The Transgender Law Center¹⁸⁹ warns against conflating the social group of transgender women with other, potentially less persecuted, members of the LGBT community in Mexico and elsewhere. In asylum procedures, Berg and Millbank (2013)¹⁹⁰ reported that all too commonly trans persons are seen as having a particular sexual orientation, leading to erroneous comparisons, analysis, and the use of the incorrect COI when claiming risk of persecution. Jansen (2018)¹⁹¹ also sees a need for distinction between the various subgroups when using COI, and recommends, for instance, not judging the situation for transgenders as good because same-sex marriage has been legalised in the country of origin.

Example one

In this case, when coming to a decision in an asylum procedure concerning a trans woman, the immigration service referred to legal provisions in the country of origin that do not protect trans persons. The legal provision referred to is said to prohibit discrimination based on "sexuality":

¹⁸⁷ Abusive preconditions are obligations that have to be fulfilled by law to have access to legal gender recognition, e.g. compulsory sterilisation, other medical treatments, and restrictions to the right to remain in a marriage or spouses/children losing certain rights. Abusive preconditions can also be present in healthcare, in mental health diagnoses and in the form of compulsory treatments.

¹⁸⁸ Strickler, J. 2017, p.12.

¹⁸⁹ Transgender Law Center, 2016, p. 25, second paragraph.

¹⁹⁰ Berg, L. and Millbank, J. 2013, p. 3.

¹⁹¹ Jansen, S., 2018, English edition, 2019, p. 175.

Decision by the immigration service:

Although discrimination and sometimes violence do take place against “transgenders”, the constitution of [country] prohibits the discrimination on the grounds of “sexuality”. (See for instance [country specific] [year] Human Rights Report of the US Department of State, published on [date].) The person concerned can therefore request protection by the authorities if necessary.

However, the US Department of State Human Rights report that is referred to by the immigration service states that the constitution contains provisions regarding equality before the law for “sex and social condition” but “sexuality” or sexual orientation is not mentioned. It is not clear that gender identity is protected. Contrary to what the immigration service suggests, it cannot be inferred from the referenced report that she can request protection from the authorities.

Example two

From an “intention” published by the immigration service:

Concerning the rights of “sexual minorities” in [country],¹⁹² we also refer to two articles on the website of Outright,¹⁹³ which have been attached.

A header in one of the referenced “Outright” articles claims that [country] is one of the first countries to provide anti-discrimination protection for LGBTI persons in the LAC region. But the text of the article reveals that the federal law protects from discrimination based on sexual orientation and not in cases of discrimination due to a trans identity. In this case, a mix up/lack of differentiation between sexual orientation and gender identity led to the mistaken claim that trans Latinas were afforded legal protection.

It is not only the immigration service or journalists who conflate sexual orientation and gender identity. As the Transgender Law Center (2016) in the United States has observed, immigration judges often conflate the particular social groups of trans women and gay men, “sometimes giving excessive weight to reports of minor societal advancements for gay communities without thorough examination of actual conditions for trans woman.”¹⁹⁴

Example three

This case involves a statement made by a Cuban participant in a hearing that, “I would actually describe myself as a woman that is only attracted to men.” She clearly identifies as a heterosexual trans woman. Although the immigration service deems her credible in her trans identity, they use male pronouns (he/him/his) in the material fact¹⁹⁵ and her identity is described as “sexual orientation.” The immigration service assessment claims that the law in Cuba provides protection for those discriminated against for sexual orientation and therefore suggests that, as part of the LGBTI group, she can receive protection.¹⁹⁶ But her motive for seeking refuge is a trans identity and Cuban law does not protect against discrimination based on gender identity.¹⁹⁷ The failure to differentiate sexual orientation and gender identity and the use of male pronouns by the immigration service contributed to mistakes

¹⁹² The country of origin cannot be revealed and therefore the article on the Outright website cannot be specified.

¹⁹³ OutRight Action International is an international NGO advocating LGBTIQ rights around the world.

¹⁹⁴ Transgender Law Center and Cornell University Law School LGBT Clinic, 2016. “Report on Human Rights Conditions of Transgender Women in Mexico” (Oakland, CA: Transgender Law Center), pp. 1-47, esp. p. 4. Available at: <https://transgenderlawcenter.org/wp-content/uploads/2016/05/CountryConditionsReport-FINAL.pdf>; last accessed 11 December 2020.

¹⁹⁵ Material fact: “A circumstance or fact in the asylum procedure concerning at least one topic or narrative related to being a refugee or article 3 ECHR” (Translation). Separate material facts are a starting point for assessments in asylum procedures. ACVZ, 2016, p. 33. Definition by EASO: “Material facts are facts that are directly linked to the definition of refugee (Article 1(A)(2) of the 1951 Geneva Convention and Article 2(d) QD) or of person eligible for subsidiary protection (Article 2(f) and Article 15 QD) and go to the core of the application”. EASO, 2015 B. “Practical Guide: Evidence Assessment”, EASO practical guide series, pp. 1-36, esp. p. 2. Available at: https://www.easo.europa.eu/sites/default/files/public/EASO-Practical-Guide_-_Evidence-Assessment.pdf; last accessed 28 June 2021.

¹⁹⁶ Intention: “Furthermore, the Cuban law on labour (Código de Trabajo) recognises the prohibition of discrimination due to sexual orientation” and “The possibility in Cuba to complain or request protection against wrongdoing or discrimination for belonging to the LGBTI group in Cuba.”

¹⁹⁷ ACCORD, Austrian Centre for Country of Origin and Asylum Research and Documentation, 2017 A. “Cuba: Travel Regulations and Civil and Political Rights”, ACCORD COI compilation, pp. 1-211, esp. p. 175. Available at: <https://www.refworld.org/docid/59a689634.html>; last accessed 11 December 2020.

being made in assessments. The claim by the immigration service and the State Secretary¹⁹⁸ that a trans person can file a complaint in their country of origin is tenuous given the absence of protection against discrimination. In addition, in cases where the chances of a trans woman being legally acknowledged as a woman is very small,¹⁹⁹ this also blocks the possibility of her gaining protection from gender-based violence.

Example four

This written assessment, included in an immigration service “intention,” is evidence of trans peoples’ claims being incorrectly categorised based on sexual orientation:²⁰⁰

Questioning the person concerned further about sexual orientation, the latter indicates they are ‘transsexual’ [...] Considering the extensive statements of the person concerned regarding this issue, the latter is deemed credible based on sexual orientation (LGBTI).

In its assessment of whether there is discriminatory treatment due to sexual orientation, the immigration service takes into account the standards and values for hetero- and homosexuals that are valid in situ.

We encountered this issue repeatedly in immigration service “intentions” and decisions. This language, which categorises gender identity under the LGBTI umbrella and then goes on to exclusively use “sexual orientation” to depict trans people, is typical in the immigration service working guidelines 2015 and 2018.²⁰¹ Such contradictions are a recipe for confusion and inaccuracy when assessing trans Latinas’ situations.

Example five

In this case, the assumption that it is “indeed possible to sustain oneself in life as a trans woman in [country of origin]” is substantiated by a reference to the presence of gay marriage in [country] and the fact that gay couples can “even adopt children who are minors,” among others.

It is a legitimate aim to advocate the equal right for gay and bisexual persons to be married and for LGBTI persons to adopt children. It is one of many topics in the struggle for equal rights for LGBTI persons. The equal right to marriage has become a prominent theme and a symbol for the struggle for equal rights of the total group.²⁰² There is a risk, however, that this symbol is becoming a “uniform measurement of progress” for the total LGBTI group. One might call this interpretation a “generalised expectation” that is, in fact, undifferentiated. Examples show that progress related to gay marriage can lead to a backlash against trans women in the LAC region. In Mexico²⁰³ and Colombia,²⁰⁴ for example, the recent legal changes regarding same-sex couples have sparked resistance against the LGBTI group. Within this group, trans Latinas are often the most visible and marginalised, resulting in an exacerbation of violence against them in these countries. Knowing this, the arguments pertaining to gay couples used in “intentions”, obscure the lived realities for trans Latinas in those countries.

¹⁹⁸ This claim is also made in communications by the State Secretary: AbRvS (Administrative Law division of the council of state, 2018. ECLI:NL:RVS:2018:2168, par. 2.1. Available at: <https://www.raadvanstate.nl/uitspraken/@7664/201801423-1-v2/#highlight=ECLI%3aN-L%3aRVS%3a2018%3a2168>; last accessed 11 December 2020.; State Secretary of the department of Justice and Security, 2018. “Letter to the Chair of the Dutch Parliament”, Dossier- en Ondernummer 19637 nr. 2398”. Available at: <https://zoek.officielebekendmakingen.nl/kst-19637-2398.html>; last accessed 11 December 2020.

¹⁹⁹ The restrictions in legal gender recognition will be discussed in 3.2 “gender care in Cuba” and 3.3 “The LGR status of our participants.”

²⁰⁰ UNHCR, 2012, p 17. “Information can be especially scarce for certain groups, in particular bisexual, lesbian, transgender and intersex people. It is critical to avoid automatically drawing conclusions based on information about one group or another.”

²⁰¹ To be discussed in Chapter 2.5.

²⁰² Stack, L. 2016. “The Challenges that Remain for LGBT People After Marriage Ruling”, *New York Times*, 30 June. Available at: <https://www.nytimes.com/2016/07/01/us/the-challenges-that-remain-for-lgbt-people-after-marriage-ruling.html>; last accessed 11 December 2020.

²⁰³ Transgender Law Center, 2016, pp. 14-17.

²⁰⁴ Espitia, M. 2017. “Escaping a Homophobic War in Colombia”, *Latin American News Dispatch*. Available at: <https://latindispatch.com/2017/04/15/escaping-a-homophobic-war-in-colombia/>; last accessed 11 December 2020.; UNHCR, 2015 C. “HCR/EG/COL/15/01, Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Colombia”, pp. 1-56, esp. p. 48. Available at: <https://www.refworld.org/docid/56001fc4.html>; last accessed 21 December 2020.

Example six

Doan and Higgins (2011) point to another generalised expectation.²⁰⁵ They observed that “gayborhoods” (neighbourhoods with a large gay presence) were expected to be spaces where trans people could also find refuge. In fact, gayborhoods evolved through gentrification, turning formerly poor neighbourhoods into high end “places to be” with homo-normativity and high real estate prices. In many gayborhoods, there was a decreased tolerance for trans individuals who did not fit into the “upscale vibe”. We encountered several hearings in the asylum procedure where trans Latinas were asked about gay parades and their connection with the LGB community. But generalised expectations do not match the lived realities of trans Latinas. Several of our participants did not perceive gay meeting places as safe spaces where they could be themselves. For example:

I think they [immigration service] have a different idea because they classified us as ... they put us within the LGBTI group and I think that we are ... we are very different, I mean ... because even the LGBTI community themselves discriminate against us. At least, that is what happens in [country], LGBTI at gay clubs will not let us in ... gay people themselves discriminate against us so I think we are a more vulnerable group, we are more discriminated against in [country]. For people nowadays it is very normal to see gay guys kissing, gay marriage and all those things ... but a transsexual is something different; they see us as ... like ... something ... like the devil ... like something from another world ... we are very different from each other so that's why I think ... their priority is different.

Trans Latinas justly voiced the risks of them being seen as belonging to a larger homogeneous LGBTI group or being observed as “gay” in interviews or hearings. It is mistaken not to recognise the severity of their situation or to make overly positive estimates based on the larger group.

Summary Chapter 2.3

We observe an undifferentiated, conflated approach to themes and information concerning LGB and trans persons in their asylum procedure. Manifold reasons lead to such an approach, for instance bundling information about different LGBTI identities into a group, or using inappropriate terms like “sexual identities” for trans and intersex persons, or using dominant information and generalising it. It can also be a lack of specific knowledge about and insight into the different identities under the LGBTI umbrella. The consequences observed here include minor and major misinterpretations of many issues in trans Latinas’ asylum procedures. This is detrimental to a differentiated, specific assessment, not least when considering legal protection. Anti-discrimination laws were mistakenly deemed to be applicable to five trans participants’ country of origin. Such damaging misinterpretations are exacerbated by the importance given by the immigration service to such laws in assessments procedures and e.g. the level of protection trans persons can receive in countries of origin. We call for a differentiation and specificity of themes and information concerning persons with a trans identity and/or expression from the LAC and other regions in Dutch asylum procedures. This is not meant to suggest, however, that trans persons should be entirely divorced from the LGBTI group.

²⁰⁵ Doan, P. and Higgins, H. 2011. “The Demise of Queer Space? Resurgent Gentrification and LGBT Neighborhoods”, *Journal of Planning Education and Research*, 31, pp. 6-25, esp. p. 8. Available at: https://www.researchgate.net/publication/258154853_The_Demise_of_Queer_Space_Resurgent_Gentrification_and_the_Assimilation_of_LGBT_Neighborhoods/link/57717f1808ae10de639dea32/download; last accessed 11 December 2020.; Doan, P. 2016. “The Tyranny of Gendered Planning: The Need for Transgendered Safe Spaces” introduction to a presentation to the Faculty of Architecture, University of Manitoba, Winnipeg, Canada. Available at: <https://umanitoba.ca/faculties/architecture/events/2016-2017events/Doan.html>; last accessed 11 December 2020.

2.4 Addressing trans persons in asylum procedures

Having observed the need for differentiation of trans themes from the larger LGBTI group in Chapter 2.3, we will now examine the use of pronouns, which can be seen as, among other things, an element of differentiation. Specifically, we ask whether trans Latinas were addressed in hearings and represented in writing by stakeholders in accordance with their gender identity?

The UK guidelines regarding gender identity issues in asylum claims take self-identification regarding gender identity and expression as the usual starting point. A transgender applicant who lives by a name other than their birth name, should be treated with respect and referred to by their chosen name and gender identity. If in any doubt, an applicant should be asked at interview which personal pronoun he or she uses. Correspondence should be prepared using the applicant's preferred salutation.²⁰⁶ Jansen (2018) recommends addressing transgender persons using the personal pronoun for their preferred gender in interviews and in documentation such as the intention to reject, the decision, and in court judgements.²⁰⁷ Berg and Millbank observe how framing identity incorrectly, i.e. towards sexual orientation, renders the experience of gender non-conformity invisible. It can misdirect the analysis in asylum procedures to other areas of the claim, such as persecution or failure of state protection, and it can lead to an inappropriate use of COI.²⁰⁸ The authors also state that "the refusal to address people by the gender of their choice could interfere with both the quality of evidence obtained and the ability to properly assess it if it infuses the analysis of the claim."

The Dutch guidelines²⁰⁹ do not provide guidance regarding a gendered approach and representation of trans persons in asylum procedures.

One of our participants entered the country with correct identity papers and she was mostly addressed using female pronouns in the documentation, but male pronouns were used on three occasions in the "intention" document in her case. Seven trans women from the LAC region entering the Netherlands with a passport that depicts them as a man have been registered as male in their procedures. In their hearings, four of the seven were asked if they used a different name in daily life. Six out of seven were depicted in hearing reports with male pronouns. This is called misgendering.²¹⁰ In the immigration service's "intentions" and decisions, five of these seven participants are addressed using male pronouns. There is evidence that lawyers try to use correct pronouns but there are occasional slips in this regard. Courts are very consistent in using female pronouns for those identifying as feminine/female.

Not ensuring a correctly gendered approach in hearings, written documents, and the assessment of a trans person fails to address the gender identity and/or expression, which is the primary reason for seeking international protection. This raises serious questions about the consequences for trans Latinas' asylum procedures. Are immigration officers addressing, writing about, or assessing trans persons trained for the task? Do they have sufficient knowledge? Are they able to assess a trans person's application without bias and resistance if they fail to respect the asylum seeker's trans identity? How does it affect the quality and the outcome of a procedure? How can a trans woman open up to or trust a hearing officer who fails to address her correctly? It is very likely that the deciding officer in an asylum procedure is a different person than the hearing officer, given the Advisory Committee for Aliens Affairs' ²¹¹ (2016) advice to separate strictly between the hearing officer and the deciding officer. It is likely that the second, deciding officer in the asylum case will have read the hearing reports but has never met the trans woman that is being misgendered. Thus, the misrepresentation of the trans person's identity by the first officer may be amplified by the second, deciding officer, leading to misjudgements.

²⁰⁶ UK Government, asylum policy guidance, 2011, pp. 2 and 13.

²⁰⁷ Jansen, S., 2018, English edition, 2019, p. 174, see recommendation 13.

²⁰⁸ Berg, L. and Millbank, J. 2013, pp. 3 and 27.

²⁰⁹ Dutch Government, asylum policy guidance, 2015 and 2018.

²¹⁰ Misgendering is the intentional or unintentional referral to, or interaction with, a trans person using language to describe that person that is not in accordance with the gender this person identifies with. For example, referring to a person identifying female as "he" or calling her a "guy" is an act of misgendering. Clements, KC. 2018. "What Does It Mean to Misgender Someone?", *Healthline*. Available at: <https://www.healthline.com/health/transgender/misgendering>, last accessed 11 December 2020.

²¹¹ ACVZ, 2016, pp. 4 and 62.

The sex assigned at birth is the central point of departure for building gender-normative expectations regarding, for instance, the way someone dresses, behaves, or what intimate partners are deemed appropriate. In general, a transgender identity and or expression is contrary to current gender norms in the vast majority of cultures. Misgendering holds on to the sex assigned at birth instead of a person's gender identity and can be a sign of gender-normative opposition and/or holding onto gender norms. For this reason, we will now examine gender normativity further.

Gender normativity and gender non-conformance

Gender normativity²¹² is an important topic when considering a trans identity and/or expression²¹³ as the primary motive in asylum procedures. The enforcement of gender norms²¹⁴ is seen as the root cause of transphobic violence and the discrimination and punishment of trans persons²¹⁵. Perpetrators claim the right to impose judgements and punish those whom they observe as transgressing and violating gender norms. The combination of the trigger of gender non-conformance²¹⁶ and the high visibility ascribed to trans persons²¹⁷ exacerbates problems in the life and self-realisation of a trans person. It is important, therefore, for adjudicators, lawyers, judges, and others to be aware of their own internalised gender norms and the effect that gender normativity in countries of origin has on the lives of trans persons.²¹⁸

Firstly, it must be a prerequisite to trans persons asylum procedures that stakeholders, whether lawyers, judges, adjudicators, or otherwise, become aware of, reflect on, and "tune down" their own gender norms.²¹⁹ Everybody has incorporated stereotypes and it is a general mechanism that these stereotypes are resistant to change.²²⁰ All stakeholders involved are capable of (unconsciously) perceiving a trans asylum seekers' gender non-conformance as a violation of (unwritten) gender norms, which might cause an observer "discomfort"²²¹ or cause feelings of threat and/or aversion. Such feelings risk a prejudiced adjudication in procedures. Gender norms are strongly connected to, start from, and build on the assigned sex at birth. Gender, referring to the social/cultural concept of how persons assigned male or female are supposed to act, what role and tasks they have, is important in understanding and assessing the opposition trans persons face in asylum procedures. The UNHCR advises that the Guidelines on International protection No. 9 are read in conjunction with UNHCR's Guidelines on International Protection No.1 on gender-related persecution.²²² Indications that stakeholders are holding onto gender norms can reveal themselves in the misgendering of trans persons, sticking with the sex assigned at birth. It is necessary for all involved in asylum procedures to let go of the habitual expectation that a person will or must act and express according to their assigned sex. Acknowledging the preferred pronouns and first names both in verbal and written communication is a necessary step in moving past the internalised gender normativity of those involved in trans asylum cases.

²¹² Gender normativity: to enforce gender norms.

²¹³ Of course, gender normativity can also lead to violence against females, gay persons, bisexuals, or persons with an intersex variance.

²¹⁴ Gender norms is understood here as: social standards regarding how those assigned a physical sex at birth should behave, express, and develop (gendered behaviour) including those norms relating to cis gender identity and heterosexuality.

²¹⁵ Madrigal-Borloz, V. 2018, paras 40 and 48; Ritterbusch, A. 2016, p. 424.; Asia Pacific Forum of National Human Rights Institutions and the UNDP, 2016. "Promoting and Protecting Human Rights in Relation to Sexual Orientation, Gender Identity and Sex Characteristics: A Manual for National Human Rights Institutions", (Bangkok: UNDP), pp. 1-244, esp. pp. 8 and 9. Available at: <https://www.refworld.org/pdfid/58c2b57f4.pdf>; last accessed 22 December 2020.; IACHR, 2015 C, executive summary; para. 9. and Chapter 2, paras 24 to 30.; Currah, P. and Minter, S. 2000. "Transgender Equality, a Handbook for Activists and Policymakers", Policy Institute of the National Gay and Lesbian Task Force, pp. 1-104, esp. p. 8. Available at: <https://www.ncrlrights.org/wp-content/uploads/2013/07/transseq.pdf>; last accessed 22 December 2020.

²¹⁶ Myrntinen, H. and Daigle, M. 2017, pp. 10, 16 and 21; Katyal, S. 2002, p. 143.; HRW, 2014. "Not Safe at Home: Violence and Discrimination against LGBT People in Jamaica", p. 10. Available at: <https://www.refworld.org/docid/544a1c7f4.html>; last accessed 11 December 2020.

²¹⁷ PAHO et al., Pan American Health Organization, 2014. "Blueprint for the Provision of Comprehensive Care for Trans Persons and Their Communities in the Caribbean and Other Anglophone Countries" (Arlington, VA: PAHO), pp. 1-88, esp. p. 15. Available at: <https://www.paho.org/hq/dmdocuments/2014/2014-cha-blueprint-comprehensive-anglo-countries.pdf>; last accessed 11 December 2020.; Human Dignity Trust, 2019, p 47; REDlactrans, 2012, pp. 11, 38.; Katyal, S. 2002, p. 144.

²¹⁸ LaViolette, N. 2010, pp. 180-184.

²¹⁹ Dutch Government, ACVZ, 2016, p. 48; Dutch Government, WODC, Wetenschappelijk Onderzoek en Documentatie Centrum, 2019 B. "De Geloofwaardigheidsbeoordeling van Asielaanvragen met een LHBTI- of Bekeringsmotief, Memorandum 2019-2", pp. 1-83, esp. p. 14. Available at: https://wodc.nl/binaries/Mem%202019-2_Volledige%20tekst_tcm28-391710.pdf; last accessed 11 December 2020.

²²⁰ Ellemers, N. 2018. "Gender Stereotypes", *The Annual Review of Psychology*, 69: pp. 275-98, esp. pp. 278-280. Available at: <https://www.gleichstellung.uzh.ch/dam/jcr:44da8d64-a5a8-41fd-9fa8-7eb0a2adef75/annurev-psych-2018-Ellemers-gender%20stereotypes.pdf>; last accessed 11 December 2020.

²²¹ McLeod, S. 2018. "Abnormal Psychology", *Simply Psychology*, under the header "Violation of social norms". Available at: <https://www.simplypsychology.org/abnormal-psychology.html>; last accessed 11 December 2020.

²²² UNHCR 2012.; UNHCR, United Nations High Commissioner for Refugees, 2002. "Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees", pp. 1-11. Available at: <https://www.refworld.org/docid/3d36f1c64.html>; last accessed 19 December 2020.

Secondly, stakeholders require awareness and insight about the way gender normativity works in countries of origin when considering trans Latinas' asylum cases. Gender norms are often separated into domains, also in an asylum context. The first domain, dealing with sexual orientation, sees heterosexuality, its heterosexual relationships, and possible procreation therein as superior, natural, and normal. The second domain deals with gender roles and unequal power relationships. It is central to the advancement of women's equality and its relevance for LGBTI persons and gender-based violence has also been recognised recently.²²³ The third domain, based on norms concerning gender identity and/or expression, is the expectation that gender identity and expression should follow the sex assigned at birth²²⁴ and this sex is seen as "immutable, true, and guiding." Transgressions in gender expression, binary and non-binary, and bodily affirmation of the gender identity are opposed to gender norms and are seen as unnatural. The fourth domain relates to the norm that a body has only two, binary versions.

In real life, gender norms are intertwined²²⁵ and their division will not be completely in accordance with lived reality. As such, separation risks incomplete understanding. A perpetrator is unlikely to differentiate such domains when targeting someone. Moreover, a trans person can be perceived as inhabiting all the aforementioned domains of gender-norm violations.²²⁶ For instance, when a male partner is violent towards a trans woman, it may be an expression of gender-related violence against women. She may also face violence, torture, and murder if outed or perceived as violating a gender identity and expression norm, i.e. being female while the birth sex is male.²²⁷ In addition, a trans woman may also face violence if her partner believes she is homosexual and he fears being seen as such as well. A trans man may face "corrective rape" or forced marriage, which can signal gender-related violence as a result of being perceived as a woman, but it may also be directed at him for being perceived as a lesbian. The total context and the trans person themselves should be the primary source of information about which norm has been violated. It is important for stakeholders involved in the adjudication of trans asylum cases to be mindful of all domains of gender normativity and their interplay.²²⁸

Summary Chapter 2.4

The majority of trans participants was misrepresented in asylum procedures in writing, with names and pronouns used that are not in accordance with their gender identity and/or expression. We question the quality of an assessment when the core reason for seeking asylum, an asylum seeker's trans identity and/or expression, is disrespected and misrepresented. Misgendering of trans persons by adjudicators and other stakeholders can also signal a lack of self-distancing from gender normativity and poses a risk to the adjudication of trans persons' asylum procedures. How can an immigration officer who holds gender normative views ask about, focus on, be open to, and assess the severity of a trans person's situation or gain the trust of a trans Latina? Knowing that the enforcement of gender norms is the root cause of transphobic violence and the discrimination and punishment of trans persons, it is important to understand their significance in a trans person's well-founded fear of persecution. Realising the role that different domains of gender normativity and their interactions can play in this regard, makes it imperative for adjudicators and other stakeholders to be informed about and sensitive to gender normativity and to practice self-distancing from their own gender normativity. There is an absence of guidance in the Dutch immigration service working guidelines about the use of names and pronouns when approaching trans persons in hearings, written documentation in asylum procedures, and when issuing "intentions" and decisions. The 2011 UK government guidelines offer an example of good practice on gender identity and instruct stakeholders to respect a trans person's identity and/or expression by acknowledging the preferred name and pronouns in asylum procedures.

²²³ Hagen, J. 2016, pp. 313-332.

²²⁴ What is less knowable and not included when assigning sex at birth is the total constellation of the body, i.e. chromosomes, brain, hormones, intersex variations, sexual and gender identity.

²²⁵ Wilets, J. 1997. "Conceptualizing Private Violence Against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective", *Albany Law Review*, 60 (3), pp. 989-1050, esp. the article excerpt. Available at: <https://www.questia.com/library/journal/1G1-19491009/conceptualizing-private-violence-against-sexual-minorities>; last accessed 11 December 2020.

²²⁶ Bettcher, T. 2007, p. 47: "Rage at having 'been deceived' may play a role in some transphobic hostility, interwoven, of course, with homophobic and possibly sexist attitudes."

²²⁷ Holden, A. 2020. "The Gay/Trans Panic Defence: What it Is, And How to End It", American Bar Association. Available at: <https://www.american-bar.org/groups/crsj/publications/member-features/gay-trans-panic-defense/>; last accessed 11 December 2020.; Mock, J. 2015. "A Note on Visibility in the Wake of 6 Trans Women's Murders in 2015". Available at: <https://janetmock.com/2015/02/16/six-trans-women-killed-this-year/>; last accessed 20 April 2020.

²²⁸ IACHR, 2015 C, paras 31-34.; Berg, L. and Millbank, J. 2013, p. 1.

2.5 Trans-specificity in working guidelines

Another topic that informs us about the state of trans-specificity and the differentiation of trans persons from the larger LGBTI group in asylum procedures are the Dutch immigration service's Working Guidelines. The guidelines WI 2015/09 and, later, WI 2018/09²²⁹ should provide guidance about the hearing of and deciding on asylum claims of persons whose LGBTI identity is the central motive for applying for protection. We therefore examined these guidelines with a view to assessing their specificity for trans people.

The Working Guideline 2015/9 (hereafter, WI 2015) and the newer 2018/9 (hereafter, WI 2018) do not specify the assessment of people with a trans identity and/or expression in the Dutch asylum procedure. Trans-gender identity is approached from the perspective of the wider LGBTI group and comes under the header sexual orientation/sexual identity. We evaluated the use of certain words in WI 2015 and WI 2018.²³⁰ In WI 2015, "sexual orientation" is used 29 times and in WI 2018 it is used 21 times. WI 2015 refers to "homosexuality" 11 times. The word "transgender" is mentioned only once. "Gender identity" is used twice, but only in reference to the UNHCR and in a citation of the Yogyakarta Principles. In WI 2018, the word "transgender" is used once and "gender identity" is used once in the main text. An overview of these word scores can be found in Appendix 2. "Sexual orientation" is a recurring theme in the context of assessment in WI 2015 and 2018 and it is referred to in direct relation to homosexuality, sexual activities, and relationships. We wonder how the repeated use of "sexual orientation" and "sexual identity" in the WI 2015 and 2018 guidelines affects the mindset, line of questioning, and interpretations of those conducting hearings and carrying out assessments in the asylum procedure when dealing with a trans person.

The focus of WI 2015 and 2018 is clearly on sexual orientation when elaborating on issues²³¹ that require investigation when assessing the credibility of a sexual identity as part of the asylum procedure. These themes are apparently partly derived from documents referenced in the working guidelines and, in particular, LaViolette (2004)²³² provides a model for questioning gay men and lesbian women²³³ in the asylum procedure. This model appears to be the main source for the working guidelines. The article deals exclusively with sexual orientation, which is not surprising for articles published at the beginning of this century. LaViolette's article was written before the (late) inclusion of trans persons in the asylum context and does not specifically address trans themes relating to asylum procedures. WI 2015 and 2018 also refer to the UNHCR guidelines (2012),²³⁴ which do consider sexual orientation and gender identity as different topics.²³⁵ Despite this, WI 2015 and 2018 does not separate them. The UNHCR guidelines provide a definition of being a trans person that points to some themes in trans identity: "To dress and act (speech, movement, 'gendered aspects of behaviour') in a manner that is perceived contrary to the role expected" and "[t]ransition, to alter one's birth sex is not a one-step process and may involve a range of personal, legal and medical adjustments." The UNHCR guidelines clearly hint at the fact that "transition"²³⁶ can involve multiple aspects. These transition-related aspects can be relevant and can be asked about in the asylum procedure.²³⁷ The themes around "transition", with its legal and medical implications, are not only important for the credibility of identity assessment. They must be a starting point for questions relating to the assessment of severity, since legal and medical restrictions also shape and determine violations against trans people. There are two more themes from the UNHCR guidelines to touch upon here. One is a warning not to deem those

²²⁹ Dutch Government, asylum policy guidance, 2015; Dutch Government, asylum policy guidance, 2018.

²³⁰ In the period of our research, the Dutch Government, asylum policy guidance WI 2015/9 was mostly in force but replaced by a 2018 version. We included WI 2018/9 in our subsequent evaluation as it has become the new standard. The WI 2019/17 is mentioned for the sake of completeness, it was published after the active research period. There were no relevant changes in WI 2019/7 regarding the relevant topics discussed in this research.

²³¹ Dutch Government, asylum policy guidance, 2015, p. 2, points 2.2.1-2.2.3.

²³² LaViolette, N. 2004.

²³³ The word search mode reveals that both "bi" and "bisexual" only occur once, and both "trans" and "transition" also once. "Gay" occurs 87 times and "Lesbian" 51 times.

²³⁴ UNHCR, 2012, p. 4.

²³⁵ *Ibid.*, p. 4: "Transgender is a gender identity, not a sexual orientation and a transgender individual may be heterosexual, gay, lesbian or bisexual," and "[i]t is also important to be clear about the distinction between sexual orientation and gender identity", p.5: "They are separate concepts and present different aspects of the identity of each person."

²³⁶ Transition: All that a trans person does to affirm their gender identity and/or expression. A process of involving in one, several or all legal, personal, social or medical steps by a trans person to bring the presentation/expression and/or the bodily characteristics closer to one's gender identity and/or gender expression. It is not limited in time or restricted to medical aspects. It can involve a multitude of different kind of changes. Not all trans persons want access to surgery or to involve in transition.

Transition can also be called gender affirmation in this research.

²³⁷ *Ibid.*, p. 17: "It may be appropriate to ask questions about any steps that a transgender applicant has taken in his or her transition."

who have not taken transitional steps as having a less credible identity.²³⁸ The second theme concerns “evidentiary matters”. The guidelines state that, “medical evidence of transition-related surgery, hormonal treatment or biological characteristics (in the case of intersex individuals) may corroborate their personal narrative.” We agree that medical evidence of transition-related surgery and hormonal treatment can support credibility. On the other hand, it is clear that this involves questioning transgender people about very private matters.

Summary Chapter 2.5

It can be concluded that the current WI 2015/9 and 2018/9 are shaped around LGB asylum seekers. Themes that are specific to people with a trans identity and/or expression are not addressed in the working guidelines. On the contrary, addressing trans persons as if they are LGB facilitates misunderstanding and misjudgement. Not focusing questioning regarding the credibility of trans identities on trans-specific issues is likely to misdirect the focus of immigration service officers. It also increases the risk of mistakes being made beyond the part of a hearing that is directed at determining credibility of identity. It can result in the neglect of trans-related themes and an overall trans-specific approach, both of which are highly relevant for assessing the severity of a trans person’s circumstances.

The UK government’s 2011 guidelines concerning gender identity and/or expression are a rich source of trans-specific information and an example of better practice in trans asylum procedures that can be of use to inform the Dutch guidelines. The UNHCR guidelines, cited as a reference by the immigration service in WI 2015 and 2018 for use when considering LGBTI cases, are not applied in an informed way, despite their trans-specific content.

2.6 Questioning the credibility of a trans identity

As shown in Chapter 2.5, there is no specific approach in the immigration service working guidelines regarding how the credibility of a trans person’s identity should be questioned. In this section, we will examine the practice of questioning in second hearings of trans participants’ asylum procedures. Eight research participants were all deemed credible in terms of their trans identity and/or expression in the asylum procedure. This was also the case in all five trans persons’ credibility assessments in Jansen’s 2018 research²³⁹ and in 41 of 42 cases in Berg and Millbank (2013).²⁴⁰ But what are these positive assessments of credibility based on?

We considered seven out of eight participants’ second hearings.²⁴¹ The questions related to trans identity that feature in the immigration service’s second-hearing reports are primarily informed by Chapter 4.2 (“further questions”) or Chapter 3 (“reason for asylum request”) of the Working Guidelines. A clear subdivision in topics could only be made in three out of seven cases. One of these three is clearly aligned with the working guidelines line of questioning for LGB claimants.

For the purpose of this research, we have divided the questions into two parts. Firstly, a general part of the questioning in the hearings is applicable to both sexual orientation and gender identity. Questions in this part can be about self-awareness, inner struggle, self-acceptance, coming out, reactions within the claimant’s environment, and knowledge of and contact with LGBTI people and organisations in the country of origin and in the Netherlands. A specific part of the questioning of three trans participants circled around sexual orientation along the lines of the questions in the Dutch Working Guidelines. But in four participants’ hearings the questions used were not described in the guidelines and were trans-specific to some degree. They related to the expression of gender in clothing, make-up, behaviour, physical affirmation of gender identity, and questions about legal gender recognition.

The topics in the questions posed in this “general part” are similar to those asked in Jansen (2018) about LGB iden-

²³⁸ *Ibid.*, p. 4.

²³⁹ Jansen, S., 2018, English edition, 2019, p. 46.

²⁴⁰ Berg, L. and Millbank, J. 2013, p. 9.

²⁴¹ One participant’s second hearing report could not be obtained, and therefore could not be evaluated.

tity and sexual orientation. We recognise Jansen's observations on the questioning emphasising an inner process of consciousness, inner struggle, and self-acceptance that is supposed to be present and relevant in trans Latinas' lives to some extent. We identified questions that evoke these themes in our participants' hearings:

"Did you feel attracted to boys/men from a young age on?"

"Have you had relationships with men ever since?"

"In what way and how did you experience the realisation of falling in love with boys?"

"How did you experience your youth with respect to your homosexuality?"

"Can you explain to me how much you want to be a woman?"

"Can you guide me through your thoughts and emotions when you realised you preferred being a woman?"

"Can you tell me something about the feelings you experience of being born in the wrong body?"

"Can you explain how you came to accept yourself? What preceded this self-acceptance? What process did you go through?"

In the following two exchanges, the participants' responses do not follow the expected elaborations on inner processes but instead are brief statements of self-acceptance. It should be noted that these two persons had the least education of all participants and had problems understanding and answering questions. We see a strong resemblance with Jansen (2018)²⁴² with respect to education level and a capacity to react to abstract (Western) concepts of identity formation:

Q: What did you think about "transgenders" when realising you were "transgender"?

A: When I dressed in female clothes, I felt very good. I lived with my mother. Out of respect for her, I did not dress in women's clothes but I felt wonderful if I did.

Q: You were born a man. When did you realise you would rather have been a woman?

A: I felt attracted to girls' things as a child, playing with dolls and hair. When I was 12 years old, I knew I was different. I loved dancing, singing, dressing female. I liked to do all things boys considered stupid.

Q: How did you deal with that?

A: I felt fine. It was nothing abnormal to me.

We recognise the criticism that Jansen (2018) voices on the use of the concepts of inner struggle and self-acceptance in identity credibility assessments. In our research, the above two participants in particular, who have less cognitive capacity and education, did not fulfil these stereotypical notions.

When looking at the "specific topics" in the line of questioning on the credibility of identity it is useful to separate the specific topics into three domains. Firstly, the domain of expression, i.e. how someone aligns their presentation to bring it closer to the desired expression of their gender identity and/or expression. This domain elicited questions about clothing, make-up, and behaviour. Secondly, the domain of bodily affirmation of the gender identity (hereafter, gender affirmation). The immigration service asked about sex reassignment surgery, hormones, breast augmentation, and **transition** in general.²⁴³ Thirdly, the domain of questioning about legal gender recognition.

Trans-specific questions were virtually absent in three out seven participants' cases. In two cases a participant was asked a question about legal gender recognition, and two participants were asked when they started dressing as women. Concurrently, all three participants were asked about sexual orientation such as: "have you had relationships with boys ever since?" "In what way and how did you experience it when you discovered being attracted to boys?" "How did you experience your youth in relation to your homosexuality?" followed-up with "What was pleasant or unpleasant about it?". "Who you love" is not a criterion in trans identity, but rather "how you identify" yourself. Attraction to men can be present²⁴⁴ but it is not a defining criterion; moreover, focusing on sexual orientation risks conflation of LGBTI themes in the mind of the assessor.

²⁴² Jansen, S., 2018, English edition, 2019, pp. 60-70. Jansen observes a possible relationship between the level of education and the probability of whether or not a narrative is judged as credible.

²⁴³ The bodily affirmation by using silicone injections that some of our participants underwent was not asked or spoken about.

²⁴⁴ Trans people may fall in love with men, women, or other.

Four other participants' hearings featured trans-specific questioning in line, to some degree, with the above-described domains. All four participants were questioned about clothing and behaviour and about physical alterations, hormones, sex reassignment surgery, and, in one case, about breast augmentation. In two of these four cases, there were almost no questions about sexual orientation and only some in the other two. There was a significant difference in the direction of questioning within these two subgroups with three persons being questioned about "sexual orientation" and the subgroup of four receiving trans-specific questions. Given our understanding of the consequences, failing to include questions on legal gender recognition is an essential omission.

Below is an impression of the trans-specific questions asked in each domain:

Domain one:

Did you wear make-up, women's clothes and other items that appear female?
How did you dress and act in daily life in [country]?

Domain two:

What measures did you take in [country] to induce a physical change?
How did you know you needed these specific hormones to induce the change you wanted?
You have received breast implants in [country]. Is that correct?
In what hospital were you operated on?
Was it a private clinic?
You say life in [country] is hard for "transgenders", but you were able to have the procedure. Can you explain that?
Why did you do it when there is a considerable risk?
How sure are you that you want to take hormone pills and have a sex change?
I suppose that you also talked to others, for instance other "transgenders", about what to expect after the operation, not only in a medical respect but also socially and psychologically, is that right?

Domain three:

Could you request a passport as a woman?
How did other "transgenders" adapt their personal details in your country, do you know anything about it?

Considerations

Below is our response to some of the questions that were asked during hearings.

The question "How sure are you that you want to take hormone pills and have a sex change?" is puzzling. The participant's response was succinct and practical: "100% sure". But what is the purpose of the question? Is there a consequence if the person is not sure? Is the interviewer aware of whether trans persons are always sure of such actions? Do they have to be sure? Is not being sure less credible or reasonable? What if the person does not want a "sex change"?²⁴⁵ Is this less credible? Does the person have to elaborate on their convictions? Choices related to physical transition (and otherwise) are highly personal and relate to intimate aspects of identity and physical self. It is not a matter of being more or less trans.

A second puzzling question is: "In [date] you went to [country] to have a surgical procedure on your breasts, did this procedure work out without a lot of problems"?

The fact of the surgical intervention appears to be established. Is she expected to elaborate on medical problems as a way of demonstrating credibility? Is the question asked out of compassion? The purpose of the question is not clear. Her reply shows she is willing to add details about the surgery. "My breast, but also my nose, neck, and Adam's apple were operated on and my testicles were removed; the procedure went well." She goes into very intimate details. Was this necessary for the asylum procedure? Did she respond of her own will? Did she feel comfortable answering in this way? Did she feel coerced into being open? The participant is very explicit and does not protect

²⁴⁵ Sex change is not an acceptable expression. Sex Reassignment Surgery (SRS) or Gender Affirmation Surgery (GAS) is more appropriate. GAS represents the alignment of the body to the innate identity by surgery in the most respectful way but since GAS may encompass different surgeries, in addition to SRS, we will use SRS in this research.

boundaries of privacy in her response to the question of whether the operation had passed without problems. Under the Working Guideline WI 2015/9, any sexual details in LGB relationships revealed during a hearing should be excluded and the applicant should be informed that such information will not be considered in the asylum procedure. We observe that the immigration service failed to respond in a similar way and when the line of questioning led to the claimant revealing intimate details they did not stop her. These details were subsequently included in their reports.

As stated in chapter 2.5, the UNHCR (2012)²⁴⁶ believes that such questions can be informative and points to transition-related measures as evidence in an asylum procedure: “medical evidence of transition-related surgery, hormonal treatment or biological characteristics (in the case of intersex individuals) may corroborate their personal narrative.” We agree that medical evidence and narratives of transition-related surgery and hormonal treatment may strongly support the credibility of a trans identity. Consequently, it may be tempting for the immigration service to ask for such evidence and for the trans person to provide it. On the other hand, we miss any consideration for and weight being given to individual privacy and integrity when asking trans persons, who are in a vulnerable and dependent position, about such evidence during asylum procedures. The issue of the admissibility of or limits to such questions should be considered by the UNHCR and asylum authorities.

Another concern when emphasising the physical alterations of transitioning trans Latinas is the risk of stereotyping of trans people. It can lead to the idea that trans people who do not choose, or who are unable, to access transition-related measures are a lesser version of the “transitioning kind”. This may influence the credibility assessment negatively.

Summary Chapter 2.6

The focus on sexual orientation in hearings to determine the credibility of three participants’ identity confuses trans persons with gay persons and resembles the LGB-directed approach in the immigration service’s Working guidelines. Four other participants were asked questions that, to some extent, touched on trans-specific themes, thereby exceeding the approach set out in the current Working Guidelines. Thus, it is not clear how it was determined what questions should be asked in trans asylum procedures hearings.

It is important to be aware that there is not one set of questions that fits all identities under the trans umbrella. A stereotyped emphasis on physical, gender-affirming steps may undermine the credibility of those who choose not to or are unable to access such steps. Limits to the admissibility and function of questions about the physical, gender-affirming steps of a trans Latina in the asylum procedure should be clear. Moreover, there is a need for a differentiated, trans-specific approach to the asylum procedure where gender identity is the primary reason for requesting international protection, starting with the working guidelines and by providing the necessary education and training for immigration service officers.

2.7 Summary Chapter Two

Chapter 2 illustrates the lack of and clear need for a differentiated and specific approach to the circumstances and experiences of trans persons from the LAC region.

Such an approach is needed because legal protection and measures against exclusion, discrimination, and violence lag behind for trans persons in the LAC region. Trans Latinas face a higher burden of exclusion, discrimination, and physical and sexual violence, also from police forces, and they are vulnerable in times of conflict and/or displacement. Even in sex work they experience greater marginalisation, discrimination, and violence than non-trans sex workers. A combination of gender normativity as a motive for excluding, discriminating, or attacking individuals who are considered gender non-conforming, and the potential high visibility of trans people as such, constitutes a strong trigger for violence against this group. This is especially true for trans women, who are also targeted for being feminine/female. Furthermore, the issues related to trans-related themes, i.e. an absence of legal gender recognition, gender-affirming healthcare, and the imprisonment along the lines of sex at birth, mean that trans persons face problems at every step in their lives. All this is evidence to support the urgent need for a differentiated, trans-specific approach, including differentiated trans-specific COI, in trans asylum procedures.

²⁴⁶ UNHCR, 2012, p. 17.

COI should enable the assessment of a person's situation in the country of origin concerning, among other things, human rights, legal situation, security, political circumstances, and social attitudes.²⁴⁷ Unfortunately, many circumstances clearly limit the presence of relevant COI information and context for the assessment of trans asylum procedures. This lack of trans-specific COI is sustained by, for instance, the absence of anti-discrimination provisions for trans persons, the absence of data on violence and crimes, authorities not reporting such incidents, or not labelling a filed complaint as transphobic or concerning a trans person. The absence of such data, statistics, or research, combined with insufficient awareness about themes important to trans persons and a lack of acceptance, perpetuates "non-existence through marginalisation." Moreover, trans persons surfaced late from marginalisation into the asylum context, as a relatively small group with additional trans-related themes and a high burden of adverse circumstances and experiences. Different stakeholders, including the EU, have indicated a lack of good LGBTI-related COI. Background research reveals that current COI is scant, incomplete, and generic in nature, with a focus on minority situations in general and an overrepresentation of information on gay men. It does not incorporate intersecting factors like gender, race, socioeconomic status, sex work, (non-) conformity to norms. In response to an EU resolution, EASO²⁴⁸ developed a practical guide for the improvement of LGB-related COI research in 2015. This guide acknowledges the critique on current LGBTI-related COI. Regrettably, EASO's guide is focused mainly on LGB persons and does not pay attention to issues relating to trans and intersex persons, because they are "not so common." The problems that EASO and other stakeholders have identified with respect to collecting COI are even more relevant to the situation of trans persons. Precisely because the smaller group of trans people have been added to the larger LGBTI group, their high burden of exclusion, discrimination, and violence is frequently overlooked. There is concern about the State Secretary's search for a hierarchy to assess the reliability of COI. This may be exacerbated by a reluctance on the part of EU member states to rely on information by non-governmental organisations.²⁴⁹ If selection criteria favour large and general sources this may disadvantage smaller, more specific, qualitative sources from local NGOs advocating information from local trans activists and others. The need for differentiated and trans-specific COI is not being met within the current constraints.

The way trans Latinas are approached in the immigration service working guidelines and in their asylum procedures, provide no reassurance that a differentiated and trans-specific approach is being achieved.

The current Working Guidelines, WI 2015/9 and 2018/9,²⁵⁰ are meant to guide asylum hearings and decisions concerning persons whose LGBTI identity is the central motive for seeking protection, but the whole set up is clearly focused on addressing LGB identities. The consistent categorising of trans persons as belonging to the domain of "sexual identities" is misguided. Trans persons are mentioned only once in the main text of the working guidelines and are subsumed within the larger group. The proposed questioning in the working guidelines relating to the credibility assessment focuses on sexual orientation, attraction, and relationships. Themes like gender expression, steps taken towards the bodily affirmation of gender identity, or legal gender recognition are not addressed consistently. The focus on sexual orientation increases the risk of neglecting the overall trans-specific approach relevant for the assessment of severity and also trans-related themes.

The main source informing the working guidelines appears to be LaViolette (2004), which also focuses solely on sexual orientation. This work was published at a time when gender identity and/or expression still had to surface in the asylum context and most research. The UNHCR's 2012 guidelines are referenced in the working guidelines but their trans-specific content is ignored. The UK government's 2011 gender identity guidance is not referred to in the Dutch documents and its contents have not been used despite its differentiated and trans-specific focus with respect to e.g. looking into circumstances that result in high severity, the absence of legal gender recognition, abusive healthcare preconditions, and the need for differentiated COI.

Comparing the working guidelines to the way the assessment of the credibility of trans Latinas' identity is conducted in hearings reveals a difference between the two. The credibility assessments of half of the participants focused on sexual orientation and they confused trans Latinas for gay men. This resembles the LGB directed approach in the immigration service Working guidelines. The other half of our participants were asked questions that touched on trans-specific themes that are not present in the Working Guidelines. It is not clear what motivated these trans-specific questions in the hearings by the immigration service.

We did not observe any limits to questioning about the physical gender-affirming steps of a trans Latina. The UN-

²⁴⁷ EASO, 2018, p.8.

²⁴⁸ EASO, 2015 A.

²⁴⁹ FRA, 2017, p. 6.

²⁵⁰ Dutch Government, asylum policy guidance, 2015; Dutch Government, asylum policy guidance, 2018.

HCR (2012)²⁵¹ interprets such questioning as useful corroboration of credibility but fails to set limits in this regard. This raises the question of whether asking about intimate medical interventions amounts to an infringement of human rights, privacy and a lack of respect for a trans person's integrity? Is it analogous to the limitations that are set in the ABC judgement (2014) with respect to asking about and revealing sexual practices to assess the credibility of a sexual identity?²⁵²

The immigration service's approach to the credibility assessment should have been unambiguous and consistent. Furthermore, trans Latinas who are approached as gay men are seriously misrepresented.

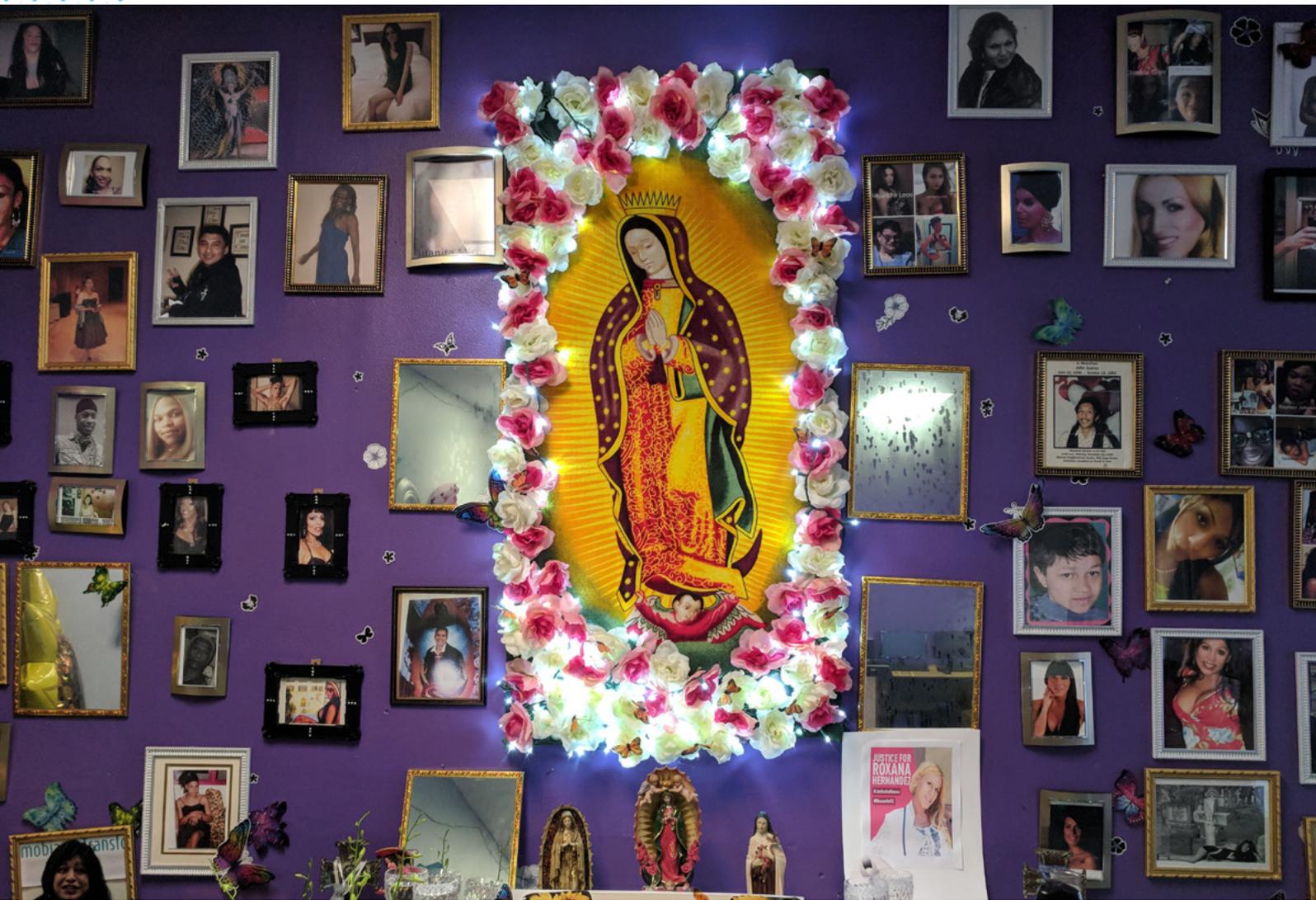
It should be noted that there is no definitive set of questions that can be applied to all identities under the trans umbrella. Questions asked should avoid the stereotypical idea that all trans persons will or want to embark on gender-affirming healthcare. Such an idea risks undermining the credibility of those who do not (want to) take these steps. In future, consideration should be given to the admissibility and function of questions regarding physical gender affirmation in the asylum procedures of trans Latinas.

In the Dutch asylum system, most trans women are misgendered as men, him/he/his/mister. Using male pronouns and names disrespects and misrepresents their identity in hearings, in writing, intentions, and decisions. Our research reveals that lawyers misgender trans persons much less and the courts consistently used the pronouns appropriate for the gender identity of a trans person. Misgendering by immigration service officers can be viewed as an act of holding onto the sex assigned at birth and may be caused by a lacking of self-distancing from gender normativity. This denial of and disrespect for identity can lead to a trans person not being able to open up and represent themselves properly in a hearing. Such misgendering is not only inappropriate, it also raises questions about whether such officers can consider trans asylum cases in a sensitive, informed, and unbiased way. Moreover, the enforcement of gender norms and punishing trans Latinas for their perceived gender non-conformance is the root cause of transphobic violence and discrimination against them. A predator's motive for excluding, discriminating against, and violating trans women can be related to the gender normative domains of sexuality, gender role, and gender identity or a combination/interaction of these domains. It is therefore important for stakeholders to be informed about and sensitive to gender normativity and able to distance themselves from their own gender normativity. Guidance is absent in the Dutch working guidelines about the use of names and pronouns when approaching trans persons in hearings, written documentation, intentions, and decisions in asylum procedures. The UK government's 2011 guidelines are an example of better practice on gender identity but are not used. They provide instructions on respecting a trans person and their identity and/or expression by acknowledging the preferred name and pronouns in asylum procedures in all contacts and in writing.

The baseline observations for this research show that while a differentiated and trans-specific approach and COI are urgently needed, it is currently far from being realised.

²⁵¹ UNHCR, 2012, para. 65.

²⁵² European Court of Justice, 2014, ABC judgement.



© Adriana Camarena. Image showing a memorial altar in the “El/La Para TransLatinas” community center for trans persons who have died.

3. Central themes when considering trans identity in asylum procedures

In this chapter, nine central themes in the lives of trans Latinas will be discussed, one central theme in each subchapter. These themes were selected based on the combined results of semi-structured interviews, refugee status hearings, and background research. Each theme relates to the experiences and circumstances that contribute to the exclusion, discrimination, and violence that trans Latinas face and that contribute to a dangerous, untenable situation and a well-founded fear of persecution in their countries of origin. The central themes, which are the assessment framework of this research examining the asylum procedure, are: circumstances and experiences in youth and early adulthood; healthcare and the possible abusive preconditions; legal gender recognition and its possible abusive preconditions; violence towards trans Latinas by state authorities; being involved in sex work; prison conditions; (self-) restriction; instability and/or repression in a country of origin; and individual disparities and/or circumstances intersecting with a trans identity and/or expression. Three of the nine central themes are trans-related: legal gender recognition; gender-affirming healthcare; and prison conditions.

Knowledge gained from background research information and participants' experiences will be combined to situate each theme. This is followed by an examination and discussion of the way the immigration service deals with these topics in the asylum procedure and to what extent participants' lived experiences and circumstances are represented/questioned in the hearings and assessed with respect to the intention and decision. In this way, the full scope of trans Latinas' adverse circumstances and experiences are analysed in the asylum context.

It should be noted that the research approach does not follow the systematics of the asylum procedure process and that the analysis is not done with the intention of disputing individual final asylum outcomes.

As an introduction to Chapter 3, general background research information is provided on the LAC region and on the climate of gender normativity in the region. Furthermore, some observations are made on the way circumstances in the region have influenced participants' descriptions and perceptions of themselves. Themes that will be discussed more deeply in the different subchapters are omitted from this general text.

Positioning the LAC region

According to Hathazy and Müller (2016) and REDlactrans (2014),²⁵³ the LAC region remains the most unequal region in the world. In 2014, the richest ten per cent of people in the LAC region had amassed 71 per cent of the region's wealth. Generalised violence in the LAC region is high, with five of its countries among the 14 countries in the world with the highest number of violent deaths per 100,000 inhabitants: Colombia with 27 violent deaths per 100,000; Guatemala with 43; Venezuela with 45; Honduras with 48; and El Salvador with 60.²⁵⁴ In the federal systems of Argentina, Mexico, and Brazil, the most populous LAC region countries, the political climate is neoliberal. Downsizing and decentralising policies have enhanced the powers and responsibilities of governors and mayors. This has exposed the latter to even greater citizen pressure to deal with crime and violence. Punitive neoliberal politics have led to an increase in sanctions and harsh law-and-order policies of "zero tolerance."²⁵⁵ The "War on Drugs", currently in its fourth decade, has had a huge impact on security operations and judicial and prison systems.²⁵⁶ Several sources argue that a large gap exists between undeniable advances in the legal position of LGBTI people

²⁵³ Hathazy, P. and Müller, M. 2016. "The Crisis of Detention and the Politics of Denial in Latin America", *International Review of the Red Cross*, 98 (3), pp. 889-916, esp. p. 895. Available at: <https://international-review.icrc.org/articles/crisis-detention-and-politics-denial-latin-america>; last accessed 11 December 2020; REDlactrans, 2014, p. 8.

²⁵⁴ REDlactrans, 2012, p. 13.

²⁵⁵ Hathazy, P. and Müller, M. 2016, p. 898.

²⁵⁶ *Ibid.*, p. 901.

and the reality of a lack of law enforcement.²⁵⁷ Malta et al. (2019) observe a divide in the LAC region with respect to progress in the legal position of LGBTI persons, with strong progression in South America and underdevelopment in Central America and the Caribbean. The implementation and execution of the rights of LGBTI persons is not self-evident in the majority of countries in the LAC region and are dependent on political, cultural, and societal pressure with only a few national courts respecting all signed international laws.²⁵⁸

Gender normativity in the LAC context

According to Corrales and Sabatini (2018),²⁵⁹ there is a growing conservative political backlash in the LAC region putting LGBTI and trans rights under pressure. Being trans in the LAC region challenges the entrenched concepts of socially appropriate gender behaviour: “machismo” and “marianismo”.²⁶⁰ These are often referred to as hegemonic concepts. Though often not lived up to, and depending on the context, they remain powerful tropes in the gendered social imaginary. These concepts inform misogyny and the normativity of gender roles. They drive hatred and violence against trans people, among others, and this hatred and violence is particularly hostile to any sign of femininity in a “man.” Gender-based violence is highly present and femicides are frequent in the LAC region. Though femicide is relevant in terms of its impact on trans women,²⁶¹ REDlactrans (2012) reports how trans women are excluded from considerations on gender-based violence and femicide.²⁶² Religious strictures and legal provisions both reinforce and justify this revulsion and rejection.²⁶³ Grattan (2018), Human Rights Watch (2009),²⁶⁴ and UNAIDS (2018) also point to the presence and effect of machismo in state authorities in Colombia and Honduras. Conservative and transphobic culture ostracises and stigmatises trans people, posing a serious threat to their health, security, life expectancy, and employment prospects. With few options or support, many engage in sex work. As sex workers with no legal protections, they are at a greater risk of (sexual) violence and substance abuse. Without recognition, many cases of violence and murder go undocumented.²⁶⁵

As previously stated, 2,349 trans people have been murdered (mostly trans women) in the LAC region since 2008. This amounts to 79 per cent of the total 2,982 registered murders of trans persons worldwide,²⁶⁶ compared to 33 per cent of homicides on the “general” global population, which occur in the LAC region.²⁶⁷ The murders of trans persons regularly show signs of torture and mutilation, in particular of body parts that are central to their gender affirmation, e.g. their hair, face, breasts, and genitals, indicating transphobia and misogyny.²⁶⁸

On November 18, 2016, the beheaded body of a trans human rights activist was found. Her body showed signs of horrific abuse: her teeth were missing and her hair had been brutally ripped out, and forensic

²⁵⁷ OutRight Action International, 2016. “Mapping Trans Rights in Colombia”, (New York: Outright Action International), pp. 1-41, esp. pp. 3-4. Available at: https://outrightinternational.org/sites/default/files/TransRpt_Colombia_En.pdf; last accessed 11 December; Grattan, S. 2018. The Emerging Challenges and Opportunities for the LGBT+ Population in Post-Accord Colombia”, PhD, The University of Leicester, pp. 1-62, esp. pp. 10-12, 20 and 30. Available at: https://www.researchgate.net/publication/328281853_THE_EMERGING_CHALLENGES_AND_OPPORTUNITIES_FOR_THE_LGBT_POPULATION_IN_POST-ACCORD_COLOMBIA; last accessed 11 December 2020.; Corrales, J. and Sabatini, C. 2018.; Espitia, M. 2017; Immigration and Refugee Board of Canada, 2018. “Mexico: Societal Norms on Gender Identity Expressions, Including in Indigenous Communities”, under header 2. Available at: <https://www.refworld.org/docid/5b9bdb404.html>; last accessed 13 December 2020.; Letra S. et al. 2014. “Human Rights Violations Against LGBTI People in Mexico: A Shadow Report Submitted for Consideration at the 11th Session of the Human Rights Committee”, pp.1-14, esp. p. 1. Available at: https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/MEX/INT_CCPR_ICS_MEX_17477_E.pdf; last accessed 13 December 2020.; Avelar, K. 2015. “Life as a transgender woman in El Salvador: I am always afraid”, Amnesty International. Available at: <https://www.amnesty.org/en/latest/news/2015/07/ser-mujer-trans-en-el-salvador-tengo-miedo-constantemente/>; last accessed 13 December 2020.

²⁵⁸ Malta, M. et al. 2019. “Sexual and Gender Minorities Rights in Latin America and the Caribbean: A Multi-Country Evaluation”, *BMC International Health and Human Rights*, 19 (31), pp. 1-16, esp. p. 14. Available at: <https://bmcinthealthhumanrights.biomedcentral.com/articles/10.1186/s12914-019-0217-3>; last accessed 13 December 2020.

²⁵⁹ Corrales, J. and Sabatini, C. 2018.

²⁶⁰ Immigration and Refugee Board of Canada, 2018, under header 1; Myrntinen, H., Naujoks, J. and El-Bushra, J. 2014. “Re-thinking Gender in Peacebuilding”, (London, International Alert) pp. 1-27, esp. p. 8. Available at: https://www.researchgate.net/publication/313860063_Re-thinking_Gender_in_Peacebuilding; last accessed 13 December 2020. Myrntinen describes “**machismo**” as being associated with masculinity focusing on hetero-sexual male privilege, often linked to the readiness to use violence to restore one’s masculine honour, to being the sole breadwinner, being “hard”, muscular, sexually virile and, at times, engaging in heavy drinking. “**Marianismo**,” equally vaguely defined, refers to ideas of women as being chaste, morally unblemished virgins before marriage, caring mothers thereafter, subservient to their husbands and bound to the household.

²⁶¹ Transgender Law Center, 2016, p. 22.

²⁶² REDlactrans, 2012, pp. 30, 41.

²⁶³ HRW, 2009, p. 15.

²⁶⁴ Grattan, S. 2018, p. 9; HRW, 2009, p. 25.

²⁶⁵ UNAIDS, the United Nations AIDS organisation, 2018. “The Injustices Faced by Transgender Women in Peru”. UNAIDS. Available at: <https://www.unaids.org/en/resources/presscentre/featurestories/2018/april/injustices-faced-by-transgender-women-in-peru>; last accessed 13 December 2020.

²⁶⁶ TvT, Trans respect versus Transphobia, 2018 A. “TMM Update Trans Day of Remembrance 2018”, tables, Transgender Europe. Available at: https://transrespect.org/wp-content/uploads/2018/11/TvT_TMM_TDoR2018_Tables_EN.pdf; last accessed 18 December 2020.

²⁶⁷ Muggah, R. and Aguirre Tobón, K. 2018, p.2.

²⁶⁸ OTRANS et al. 2018, p. 10; Colombia Diversa and IGLHRC, 2015 A., p. 8.

evidence indicated that she had been poisoned. Her torture and murder took place even though the Inter-American Commission on Human Rights had called upon Guatemala, since February 3, 2006, to implement precautionary measures to assure her safety. Before her murder, she had been an activist with OTRANS.

ILGA (2019) reports on the recent use of the concept of “**gender ideology**”. This tool, used to oppose to LGBTI rights, has taken firm root in the LAC region (and Eastern Europe). ILGA argues that the Vatican has played a significant role in the production of the idea of “gender ideology”. Anti-human rights, conservative, and religious groups have developed a tactic that undermines gender-related rights struggles by labelling them “ideological.” Such groups see gender ideology as: “the dangerous promotion of gender as an idea and the belief that gender can be shaped by social factors and power relationships²⁶⁹ that has to be countered by seeing biology as the ‘fact’ that determines roles and hierarchies.” They argue that people who have a broad definition of gender beyond “sex” are using a dangerous “gender ideology.”

Background research reveals clearly how this “gender ideology” tactic is deployed against equality for LGBTI persons: In elections in Colombia, Chile, Uruguay, Panama, Peru, Guatemala, and El Salvador it is used to create panic. The use of this concept contributes to misinformation about trans children, school uniforms, and the use of bathrooms to great effect, causing public anxiety and fear during election cycles.²⁷⁰ In Brazil, Chile, Colombia, the Dominican Republic, Mexico, and Peru, homophobic and transphobic groups (mostly led by Catholic and evangelical leaders) claim to uphold “family values” and defend children. They challenge efforts to promote sexual tolerance as a type of “ideology of gender” lacking basis in science.²⁷¹ In Colombia, the first peace accord in 2016 was rejected, partly because of its attention for LGBTI rights and an education manual update that included sexual orientation and gender identity. This attention spiralled into protests about family values and presumed “gender ideology,” thus revealing the huge sensitivities surrounding the topic of gender and themes concerning LGBTI identities.²⁷² In Guatemala, a proposed “Life and Family Protection” bill pushed back against the rights of LGBTI people, defining marriage as a union between a man and a woman “by birth,” excluding trans people. Sexual diversity is portrayed as incompatible with the biological aspects of human beings. “Freedom of conscience and expression” protects people from being “obliged to accept non-heterosexual conduct or practices as normal.” This potentially means that people can be denied services on the basis of sexual orientation and gender identity.²⁷³ In Mexico, President Peña Nieto’s own party turned against him in 2016, blocking his constitutional bill on marriage equality in congress.²⁷⁴ In Peru, the opposition derailed a proposed LGBTI-inclusive curriculum and, most recently, people have rallied in Paraguay and Ecuador, claiming a need to defend the “traditional family” from “gender ideology.”²⁷⁵

Confronting the LAC region environment

Trans Latinas confronting and living in the above-described environment often experience social exclusion and marginalisation because of the way they express their gender identity.²⁷⁶ For example:

(interviewer = I; participant = P).

P: There is always uneducated people, who really criticize you, humiliate you, and mistreat you. They can throw at you stones, eggs, it has happened many times.

I: Did that happen to you?

P: Yes. Many times. And wors[e] things, sometimes they throw petrol at you, gasoline and many more things.

P: On a societal level one is discriminated against all the time. One cannot go to a shopping mall or to an

²⁶⁹ ILGA, 2019, p. 30; Berezowsky Ramirez, D. 2018. “Latin America Could Lead the Way for LGBTI Rights”, Human Rights Watch. Available at: <https://www.hrw.org/news/2018/02/06/latin-america-could-lead-way-lgbt-rights-2018>; last accessed 13 December 2020.

²⁷⁰ ILGA, 2019, p. 85.

²⁷¹ Corrales, J. and Sabatini, C. 2018.

²⁷² Grattan, S. 2018, p. 20; Espitia, M. 2017.

²⁷³ HRW, Human Rights Watch, 2019. “Guatemala, Events of 2018”. *World Report 2019 HRW*, under the header “Sexual Orientation and Gender Identity”. Available at: <https://www.hrw.org/world-report/2019/country-chapters/guatemala>; last accessed 13 December 2020.

²⁷⁴ ILGA, 2017, p. 99.

²⁷⁵ Berezowsky Ramirez, D. 2018.

²⁷⁶ UNAIDS, 2014 B. “The Gap Report”, (Geneva: UNAIDS) pp. 1-422, esp. p. 217. Available at: https://files.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2014/UNAIDS_Gap_report_en.pdf; last accessed 16 December 2020.

institution to arrange something without being discriminated against. People simply do not want to help you. People do not want to address you. If you stand before a ticket booth, they ignore you. They make fun of you. Or they are physically aggressive towards you. They make remarks. A lot of things. And the discrimination is continuous. I was in a row for customs on an airport. People started making fun of me, shouting things at me, pointing, "look he has tits". Respectless and without anyone doing anything to stop it.

P: Once a man even ... well, he wanted to take my wig/he wanted to remove my wig [...] he wanted to prank me because he saw I was a transvestite [...] and the people don't help you, the opposite they all laugh [...] mostly as I say, it starts with the men, from their machismo. The women will start laughing of what the men do, of the offenses they are committing towards us [...] sometimes it gets to you because ... because they don't let you live the life that I want. I feel good being trans, I love looking like a woman.

P: The gangs, and everything, they are armed as it is. They ride with guns, or they walk with knives [...] they once assaulted me, they told me to give them the money. [...] when I turned over to see, what I saw was the gun on my forehead. My blood left me; I even froze. [...] With a knife they have also assaulted me. [...] Thank God, that has not happened anymore. Only the blow they inflicted on me, but with the grip, which is the handle of the gun [...] the reality is that when they pull out arms, I do not say anything. I stay quiet.

Most trans Latinas are confronted with a hostile environment every day, around every corner.

Cultural influence of the LAC region on self-representation

As the following paragraphs illustrate, both the different living conditions and the cultural context in the LAC region can produce a different positioning of terms and concepts in trans Latinas' narratives. Generally, the terms and concepts used by stakeholders in the European asylum procedure to understand and communicate trans-related topics are those from a (dominant) Western perspective.²⁷⁷ It is important that stakeholders also incorporate LAC positioning when dealing with trans Latinas.

In interviews, hearings, and/or the private sphere, trans participants talk about early trans-specific experiences of a different gender identification, and a need to express this. Some describe brief recollections, others recall more detailed memories, but there is rarely access to information or a trans identity context to organise these feelings. In cases where context was available that allowed trans persons to experience themselves as being "different," it was usually in the form of interactions with gay people. This involvement and association are perhaps not surprising given that all our participants' sexual orientation is towards men and that others might also infer the trans participants to be gay. Frequently living within a repressive religious and social gender normativity and/or an environment of poverty and instability, trans Latinas only later became more explicit about their trans identity, having already spent time socialising with gay persons. This may influence trans women's belief that to be(come) a trans person is to differentiate oneself from the gay group. This separation from "being gay" usually involves transitioning, for instance, starting to express a female identity in daily life, using hormones, or live using a female name.

Given this lived context, it is not surprising that some trans Latinas describe themselves as being a gay person as well as being "trans, travesti or transsexual" whereas the Western concept is much stricter with respect to being either gay or trans. In such cases, they know themselves to be trans-identifying persons, with correlating feelings, memories, and wishes and they have experienced how expressing this differentiates and distances them from the gay community. Similarly, trans Latinas can have the idea that a trans person has to differentiate from being "a transsexual" by engaging in sex reassignment surgery to be(come) or identify as a woman. Consequently, if they do not aspire to such surgery, they can be reluctant to define themselves as women. If a person describes themselves as a transsexual, it is possible that they do not want sex reassignment surgery. Not claiming to be a woman, however, does not mean they do not identify as a trans person.

The use of the word transsexual (person) by trans Latinas is very different from the Western medicalised, binary

²⁷⁷ This is not to say that trans persons are a "Western" identity or idea. On the contrary, many cultures in the world historically give space to those expressing outside the gender normativity of their society.

concept, but also from the official LAC one.²⁷⁸ This medicalised concept contains the idea that a transsexual person is someone who knows from an early age that they are of “the opposite sex,” and who engaged in play as a child according to that identification, disliking their own bodily features, and later embarking on a complete binary transition including sex reassignment surgery.

Looking at the asylum procedure through a “Western” lens, the above description of how trans Latinas may identify themselves could translate in the eyes of others as having a less stable trans identity, discredited by self-depiction as gay, and a failure to fully confirm that they are a woman, or by claiming to be a transsexual person but not engaging in a full transition. This may cause unease, be seen as incongruent or contributing to the confusing of gay and trans themes. Given the reality of the lived context in the LAC region, however, these trans persons’ self-depictions are entirely congruent and make perfect sense.

It is useful to make some remarks about the culture of the LAC region here. The LGBTI acronym can be extended in this context to LGBTTTI, in order to differentiate between “Travesti, Transgênero y Transexual” persons.²⁷⁹ Travesti is a concept that developed in the Latin American context in the 1970s²⁸⁰ and relates to persons assigned a male gender at birth who express themselves as female. The literal translation from Spanish is transvestite²⁸¹ but this does not cover the meaning. The concept of “travesti” does not match with the Western categorisation of trans identities. Following Álvares Ferreira (2018),²⁸² it can be taken to mean trans-feminine persons who are attracted to men, who engage in bodily affirmation through silicone injections and self-medication, but who do not have sex reassignment surgery. This group generally does not define as gay but also not exactly as women. They are often involved in sex work²⁸³ and come from a poor background. The term “travesti” has developed based on class, race, and gender, and those who identify as such resist and subvert gender-conforming concepts and demand equality as they are. The way some participants in our research describe themselves resonates with this concept. For this reason, it is important to note in the asylum context that if a trans Latina uses the word “travesti”, it might easily be mistranslated as “transvestite” by a translator or other official.

There are also groups of trans persons present in countries in the LAC region who are associated with, but independent from the Western concept of a trans identity and/or expression in terms of their tradition and development. They are assimilated into their local society and, to some extent, play a role in it.²⁸⁴ For instance, the Tida Wena from the Warao people in Venezuela, Muxhe from Juchitán in Mexico, and Omeggid in Panama.

The gap between legal and lived reality

Background research revealed the existence of a significant gap between the legal position of LGBTI people and the lived reality in (states in) the LAC region.

Outright (2016)²⁸⁵ describes the disconnect between law and reality in Colombia. On the one hand, there is a constitution and a Supreme Court willing to provide protection; on the other hand, prejudiced legal and administrative authorities use their discretionary powers to ignore trans people’s needs and rights. Grattan (2018) and

²⁷⁸ Martínez, J. 2014. “Travesti, Transexual, Transgénero... Algunas Definiciones Útiles”, *Sentiido*. Available at: <https://sentiido.com/travesti-transexual-transgenero-algunas-definiciones-utiles/>; last accessed 13 December 2020.

²⁷⁹ Servicio Público Provincial de Defensa Penal, 2015. “Instructivo en Materia Derechos del Colectivo de Personas LGBTTTI”, pp. 1-32. Available at: <https://www.defensasantafe.gob.ar/institucional/instructivo-lgbttti.pdf>; last accessed 14 December 2020.

²⁸⁰ García, M. and Piha Lehman, Y. 2011. “Issues Concerning the Informality and Outdoor Sex Work Performed by Travesti’s in São Paulo, Brazil”, *Archives of Sexual Behaviour*, 40 (6): pp. 1211-1221, esp. pp. 1211-1212. Available at: <http://nepaids.vitis.uspnet.usp.br/wp-content/uploads/2010/04/Issues-concerning.pdf>; last accessed 14 December 2020.

²⁸¹ Anon, 2019 A. “Travesti”, Gender Wiki. Available at: <https://gender.wikia.org/wiki/Travesti>, last accessed 14 December 2020.

²⁸² Pelúcio, 2005 cited in Álvares Ferreira, A. 2018. “Queering the Debate: Analysing Prostitution Through Dissident Sexualities in Brazil”, *Contexto Internacional*, vol. 40(3), pp. 525-5473, esp. p. 526. Available at: <https://www.scielo.br/pdf/cint/v40n3/0102-8529-cint-2018400300525.pdf>, accessed 14 December 2020.

²⁸³ García, M. and Piha Lehman, Y. 2011, pp. 1211-1212; Santana, D. 2019. “Mais Viva! Reassembling Transness, Blackness, and Feminism”, *TSQ: Transgender Studies Quarterly*, 6 (2), pp. 210-222, esp. pp. 212-213. Available at: https://www.academia.edu/39506140/Mais_Viva_Reassembling_Transness_Blackness_and_Feminism_DO_RA_SILVA_SA_NTA_NA; last accessed 14 December 2020.

²⁸⁴ Naughton, J., 2014. “Two Spirits in the Venezuelan Jungle”, *New York Times*. Available at: <https://lens.blogs.nytimes.com/2014/09/05/two-spirits-in-the-venezuelan-jungle/>; last accessed 14 December 2020; Guerra, E. 2019. “Being Muxhe in Juchitán, Mexico”, *Cultural Survival Quarterly Magazine*. Available at: <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/being-muxhe-juchitan-mexico>; last accessed 14 December 2020; Van der Ven, A. 2009. “Hoe Lang Houdt een Transgender Vriendelijke Indianencultuur nog Stand?”. *Het Continuum*. Available at: https://www.continuum.nl/artikel/zapatistas_voor_transgenicos; last accessed 14 December 2020; Bevilacqua, C. 2020. “Omeggid, San Blas Indigenous Transgenders, Panama”, *Visura, Platform for Visual Storytelling*. Available at: <https://visura.co/cbevilacqua/stories/omeggid-san-blas-indigenous-tr>; last accessed 14 December 2020.

²⁸⁵ OutRight Action International, 2016, pp. 3-4.

Espitia (2017) confirm this sharp contrast between constitution and practice; Grattan, moreover,²⁸⁶ confirms a lack of acceptance in Colombia, especially in rural areas. Crimes against the trans population are not reported, resulting in a lack of data that prevents analysis. Furthermore, “traditional values” groups are on the rise, campaigning to repeal laws relating to LGBTI persons. Espitia (2017)²⁸⁷ writes that “the legal country and the actual country are two completely different things.” Deep-rooted prejudice produces violence and rights are seen as largely meaningless. Bloque Capital, a Colombian paramilitary group is one of a number of groups seeking to socially cleanse the country of “homosexuality.” In Venezuela, the contrast between a Supreme Court ruling and a lack of procedures to implement it is part of this disconnect between law and reality.²⁸⁸

A similar narrative emerges from Mexico. On the one hand, a constitutional amendment and federal legislation now prohibit discrimination on the basis of sexual orientation but, with the exception of Mexico City, this excludes gender identity. On the other hand, homo- and transphobia remain prevalent and Mexico has fallen short of its obligations to respect and ensure rights.²⁸⁹ Corrales and Sabatini (2018)²⁹⁰ describe the troubling disconnect between the legal and the day-to-day realities in the LAC region. Social attitudes remain homophobic, and a crime epidemic makes LGBTI people extra vulnerable, especially trans people, who are frequently murdered. And a conservative political backlash has developed. Concerning El Salvador, trans women²⁹¹ fear this backlash and for their lives, despite the positive way the country presents itself with respect to human rights.

The UNHCR (2015) observes that even countries without discriminatory legislation can be hostile and target LGBTI persons. Background factors, such as “patriarchy,” “conservatism,” “cultural taboos,” “religion,” and/or “traditional practices” can produce hostility and discrimination towards LGBTI persons.²⁹² UNHCR guidelines (2012) state that legal provisions do not necessarily undermine the well-founded fear of persecution of an asylum applicant since:

Societal attitudes may not be in line with the law and prejudice may be entrenched, with a continued risk where the authorities fail to enforce protective laws. A de facto, not merely de jure, change is required and an analysis of the circumstances of each particular case is essential [...] 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.²⁹³

While the Dutch immigration service tends to focus on the existence of (some) legislation as a watershed moment in the asylum procedure, the lived reality revealed by background research information and by trans Latinas’ own narratives is one not merely defined by laws; it depends on a wide range of circumstances that can result in them being targeted as a social group.

²⁸⁶ Grattan, S. 2018, pp. 10-12, 20, 30.

²⁸⁷ Espitia, M. 2017.

²⁸⁸ EASO, 2020. “Venezuela Country Focus, Country of Origin Information Report”, pp. 1-158, esp. p. 122. Available at: https://coi.easo.europa.eu/ad-ministration/easo/PLib/2020_08_EASO_COI_Report_Venezuela.pdf; last accessed 27 December 2020.

²⁸⁹ Letra S. et al. 2014, p. 1.

²⁹⁰ Corrales, J. and Sabatini, C. 2018.

²⁹¹ Avelar, K. 2015.

²⁹² UNHCR, 2015 A, p. 15.

²⁹³ UNHCR, 2012, para. 37.



© Claudia Hernandez/Borderless magazine, 2021. Image showing a portrait of Susana Coreas from El Salvador.

3.1 Early problems in childhood and into adulthood

Those trans persons expressing their difference early in life are at risk of encountering adverse circumstances and experiences within families, in their social environment, and in schools, while simultaneously being dependent and vulnerable as children in the LAC region.²⁹⁴ Early life is defined here as youth and early adulthood (until the age of 25). Many sources indicate how gender-based violence, exclusion, discrimination, and violence in childhood can have a negative impact on prospects for housing, work, and health. Circumstances and experiences relating to family, social surroundings, education, housing, and work are discussed within this frame.

Five of our eight participants faced eviction from family homes in their teens. Two of them never lived with their family again, a third person tried unsuccessfully to live with her parents again having promised not to express her female identity through her clothes. Two participants returned to the family home, one of them after living under the stairs of the apartment building for half a year and the other by moving in with her grandmother. Additionally, seven of the eight participants come from families with divorced parents, contributing to economic and relational instability. Three of them come from clearly impoverished circumstances, two of them lived in a shanty town.

Family rejection and gender-based violence directed at trans children

(interviewer = I; participant = P).

P: Since a very young age, like the age of five, I was rejected by my parents. Because they realised, I was different. I was always very feminine. [...] They said I had to stop being girly. Because I was a boy. I was born a boy. That was very often the reason why they hit me. [...] I asked my mother how it was possible, that I, being a girl, had a penis. I was about seven years. My mother immediately called my father in and told him what I asked. He dragged me in front of the mirror, took my clothes off and also showed his genitals. That I was a boy since I was the same as he was. That day they gave me a big beating. [...] I can remember that one day, I told my parents how I really felt. [...] my mother said she'd rather see me dead than being a "faggot". She said she hated me. That I was the worst thing happening to her in her life and I was a very unpleasant person. And if it was my decision to commit suicide it was OK for her. I do not understand a mother being able to say this to her own child. My father insulted me and said I was a faggot. That I had to be a man [...] and then he hit me with a belt. I was so much in agony that I did not even feel the pain of being beaten. [...] Then I decided that I could not stay at home.

P: When I was little [...] because they [...] they caught me many times dressing up with my mom's clothes. [...] when I was 6, 7, 8, 9, 10, so that would be followed by beating. Or, one day my mother [...] my aunt discovered I put make-up on for Halloween [...] and I was wearing long hair. [...] my mother came and started beating me and there was a big tank of water, so my mom will sink me in the water.

I: hmm

P: to wash and it was very bad. Uh later [but before the age of 25] when I was a transvestite it was the lowest point. Both my family and my friends and kept telling me I was worth nothing [...] that really that I was worthless and that I should be thankful they, they accepted me. Um my parents sabotaged my transition uh two times.

I: Really?

P: Yes, because I had no ID in [country] [...] so, I could not save my money in the bank, so I kept sending the money to them and they spent it" [...] so it happened twice. I was fooled twice by them.

UNAIDS²⁹⁵ (2018) and the Transgender Law Center²⁹⁶ (2016) report on family rejection of trans youth. They indicate that many trans people face rejection, physical, verbal, and sexual attacks, and even murder at the hands of their

²⁹⁴ IACHR, 2018 B. In the words of the IACHR rapporteur on LGBTI rights, "the current context in the region [Latin America] is a challenging one. Trans people are among the most vulnerable social groups and suffer high levels of discrimination from childhood onward because their identity and gender is not recognized."

²⁹⁵ UNAIDS, 2018.

²⁹⁶ Transgender Law Center, 2016, p. 21.

own family. In Mexico City, 45 per cent of trans youth have experienced abuse from their families. Two sources indicate that between 44 and 70 per cent of trans women and girls in the LAC region have run away from or were thrown out of their family homes. When a trans identity is revealed early, and gender-based violence from family members occurs, it leaves the person isolated and without a safety net.²⁹⁷ This affects their self-perception and sense of self-worth.²⁹⁸ If they are then thrown out of their homes, a chain of events can be set in motion, i.e. being unable to finish school, experiencing higher rates of unemployment, homelessness, and instability. This can contribute to depression, anxiety, drug use, self-harm, and suicide. Often, trans Latinas are forced to resort to petty crime, violence, and sex work to survive.²⁹⁹

Institutional violence against trans youth in education

According to REDlactrans (2014) and OutRight (2016),³⁰⁰ primary and secondary education are hostile environments for trans people, despite the right to access to education in Colombia and most countries in the LAC region. According to the United Nations (2016), transphobic violence has a significant and long-term impact on education, employment, health, and well-being.³⁰¹ The high levels of discrimination, bullying, and school violence³⁰² against LGBTI students are the main reason they abandon their education and trans people are the most vulnerable group, for instance in Colombia³⁰³ and Cuba.³⁰⁴ Schools attempt to correct what is considered a “deviation,” and aggression and offensive attitudes against them are not addressed. Incorporating minority expressions of gender into policies is resisted, there is laxity in addressing transphobia, and state policies fail to include trans people. Universities insist on using names corresponding to the sex assigned at birth and ask intrusive and invasive questions about one’s gender identity. REDlactrans (2014)³⁰⁵ reports that 70 per cent of the trans population does not finish school in Bolivia. In San Salvador, in a relatively large sample, 34 per cent of trans people only finished primary school compared to 8 per cent of the general population and 5 per cent of gay and lesbian persons. Only 12 per cent of trans people had some college education, compared to 29 and 32 per cent in the general population and gay and lesbian persons, respectively.³⁰⁶ Lanham *et al.* (2019) mentions that, in a sample of 74 trans people from the LAC region, 85.1 per cent of respondents faced discrimination in education.³⁰⁷ In Colombia, 92 per cent experienced bullying at school; this figure is 78 per cent in Venezuela.³⁰⁸ Being expelled by family increases the risk of not finishing education.³⁰⁹ Another reason for not continuing education is an absence of legal gender recognition. In current practice, the chance of someone under the age of 18 acquiring LGR is tiny. Statements indicate that, in Cuba, trans persons who complete secondary education do not go on to do higher studies because of harassment and discrimination.³¹⁰ The majority of countries do not allow or have legislation relating to LGR for minors.

P: Going to secondary school, it was very bad. Boys hit me at lunch break. They humiliated me more and more. They harassed me, tearing apart the notebook, writings on the blackboard. [...] Even the teachers did that. The teachers addressed me, being the only one being different saying that I had to behave in order to avoid this kind of thing [...]

²⁹⁷ *Ibid.*, UNAIDS, 2014 B, p. 219.

²⁹⁸ Divan, V. *et al.* 2016, pp. 1 and 2.

²⁹⁹ Myrntinen, H. and Daigle, M. 2017, p.27.

³⁰⁰ REDlactrans, 2014, p. 34; OutRight Action International, 2016, pp. 16-18.

³⁰¹ UN, 2016 A, p. 28.

³⁰² Lanham, M. *et al.*, 2019, pp. 40-41.

³⁰³ OutRight Action International, 2016, p. 17.

³⁰⁴ IACHR, 2016. “Annual report 2016, IACHR, Chapter IV b, Cuba”, pp. 539-576, esp. para. 79. Available at: <https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.oas.org%2Fen%2Fiachr%2Fdocs%2Fannual%2F2016%2Fdocs%2FinformeAnual2016cap.B.Cuba-en.docx>; last accessed 18 December 2020.

³⁰⁵ REDlactrans, 2014, pp. 31-34.

³⁰⁶ Barrington, C. *et al.* 2012. “Social Network Characteristics and HIV Vulnerability Among Transgender Persons in San Salvador”, *AIDS and Behaviour* 16 (1), pp. 214-224, esp. p. 13. Available at: https://www.researchgate.net/publication/51094045_Social_Network_Characteristics_and_HIV_Vulnerability_Among_Transgender_Persons_in_San_Salvador_Identifying_Opportunities_for_HIV_Prevention_Strategies/link/0f31753bede4e701fc000000/download; last accessed 14 December 2020.

³⁰⁷ Lanham, M. *et al.* 2019, p. 40.

³⁰⁸ Fedorko, B. and Berredo, L. 2017. “The Vicious Circle of Violence: Trans and Gender-Diverse People, Migration, and Sex Work”, *Transrespect versus Transphobia Worldwide Publication Series vol. 16, Transgender Europe*, pp. 1-23, esp. p. 8. Available at: <https://transrespect.org/wp-content/uploads/2018/01/TVT-PS-Vol16-2017.pdf>; last accessed 13 December 2020.

³⁰⁹ UNHCR, 2015 B. “Women on the Run: First-hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras, and Mexico”, (Geneva: UNHCR) pp. 1-60, esp. p. 28. Available at: <https://www.unhcr.org/publications/operations/5630f24c6/women-run.html>; last accessed 21 December 2020; Transgender Law Center, 2016, p. 21; Divan *et al.* 2016, p. 2; Human Rights Watch 2009, p. 10.

³¹⁰ ACCORD, 2017 A, p. 182.

And other things happened, for instance peeing over me. Or smash poop all over my face. One time they grasped me as a group, brought me to the dormitory and took my clothes off and put a stick in my anus. [...] And for everyone I was the guilty one, being like I am. I could not go to my parents.

P: [...] I lasted until the second year [...] of high school. That's when I decided to declare myself, I left and I spent the last years in night school, with adults and it was easier to handle [...] I did not live in my house anymore. How I was going to support myself, how I was to attend school, where was I going to live, I did not have the head to study.

The school career of five of our eight participants was hampered. Two stopped after primary school, one due to bullying and the other had to help the family earn money. Three participants stopped their education at secondary school, due to bullying, harassment, and violence. Of these three, two went into evening adult education to finish high school, one in her teens and the other in her twenties. Of the three that finished secondary education, two had professional education and one obtained a bachelor's degree (while still closeted in respect to her trans identity).

Discrimination in the job market

Several studies emphasise the difficulties of finding a job as a result of discrimination.³¹¹ According to Divan et al. (2016), trans people reveal the most marginalisation in their exclusion from gainful employment. There is little quantification of discrimination in the job market. One source reported 43.2 per cent of the trans people responding in a survey reported that they had been denied employment opportunities;³¹² another source suggested an employment rate of 46.4 per cent in a survey of 74 trans people in four countries in the LAC region.³¹³ If a trans person can overcome the discrimination, and is not "perceived as being other than a cis gender person," the next obstacle restricting access to professional work can be the absence of legal gender recognition.³¹⁴ If an employer hires someone, the obligation to show identity papers will out trans people without legal gender recognition (in formalised work settings). Several researchers link the severe problems of acquiring a "regular" job directly with the high probability of trans people becoming involved in sex work.³¹⁵ Let us look at some experiences:

P: I know how people will react when I ask them to hire me. I will not find a job in [country] as a cashier or in catering because I am trans. Besides that, I have little chance to find a job because I never had the chance to study or finish an education.

P: I cannot work in Latin America [...] in Latin America you cannot work as a trans person [...] it is very difficult [...] not only because there are laws or something like that but people just see you. You go to the interview or something [...] or you call to set up an interview without saying what you are and they tell you to show up to the interview and when you arrive and they see you are "transgender" they simply make up excuses or say no [...] it is like a shock for them because they did not expect or want anyone who is a trans woman working for them [...] it is very uncomfortable for people. [...] I think that in all of Latin America the only thing we can do is [...] to be stylists [...] or to prostitute ourselves, which is what I had to do at some point [...] I became a prostitute because hairdressing wasn't my thing.

³¹¹ HRW, 2009, p. 16; Divan et al. 2016, p. 2; LGBTASYLUM support, 2018. "The Cuban LGBTI Black Book", pp. 1-116, in the letter of LexInter, 25 March 2018, Point 6.c. Available at: <http://lgbtasylumsupport.nl/wp-content/uploads/2018/04/The-Cuban-LGBTI-Blackbook-Total.pdf>; last accessed 14 December 2020;

Bianchi, F. et al. 2014, pp. 1641-1642.; HRW, Human Rights Watch, 2016. "Rights in Transition", *World Report 2016 HRW*, under the header "Employment and Housing". Available at: <https://www.hrw.org/world-report/2016/country-chapters/africa-americas-asia-europe/central-asia-middle-east/north-0#a15108>; last accessed 14 December 2020.

³¹² OTRANS et al. 2018, p. 4.

³¹³ Lanham, M. et al. 2019, p. 40.

³¹⁴ OutRight Action International, 2016, p. 19.

³¹⁵ OTRANS et al. 2018, p. 7; Bianchi, F. et al. 2014, pp. 1641-1642; Corporación Caribe Afirmativo et al. 2017. "Situation of LGBTI Human Rights in Colombia: Report Submitted to the Committee on Economic, Social and Cultural Rights, 62nd Session 18 September-6 October", pp. 1-7, esp. para. 10. Available at: https://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/COL/INT_CESCR_CSS_COL_28549_E.pdf; last accessed 14 December 2020; REDlactrans, 2012, p. 8.

When a job is acquired, there is still a great risk of adverse experiences and circumstances.

P: In the kitchen there were just men working – [Latin American] men. And I was working the kitchen doing whatever, and they would either put their feet for me to trip, or they would push me, or they would grab me by the back as if having sex.

I: Hmm

P: Right, and uh and they would also um pull my hair, because I had like long hair, and then if I protest or I say something, especially one of them who I will never forget, B, he would grab me by the neck until I start choking.

When legal gender recognition is established, as was the case for one participant, the possibility that someone might find out about their trans history is both a risk and constant fear in a hostile environment:

P: After I was able to conquer my fear of uh working and when I had no savings to continue surviving, I started working at a call centre where people were nice to [me as a] woman, but uh they kept making uh bad comments regarding queers and um and um trans people. They would say things like “what would you do you if you discover that your girlfriend was a man?” And they would say things like, “oh I would kill him because he’s deceiving me.” [...] things like that and the uh the girls [...] the cisgender women [...] and some gay men they kept quizzing me they kept saying, “oh Ela, wow you have such long fingers,” or “oh Ela, why you have such a square jaw?” “Hmm, oh Ela, what shoe size are you?” And I would pretend that I was like stupid or nervous or like, “aha I have really big shoes true,” like making a joke but on the inside, terrified of what will happen. In 2012, they killed a trans person from [city in country].

Two participants that finished education acquired jobs. One was hired on the condition that they dress as a male, but was fired within months because she was perceived as gender non-conforming despite this (self-) restriction. She subsequently resorted to sex work. The second person was fired because of HIV related discrimination. She returned to further education abroad and started transitioning as an adult. A third person did not find a job due to discrimination related to both her HIV and trans status. She, and a fourth person, also without a chance of employment, were supported by family, friends, and/or a partner and through involvement in sex work, one for a short period and one for a decade. Of the other four participants, one worked in gastronomy and, one as a beautician, the third was a self-employed street vendor. Two of this group were also engaged in sex work, sporadically. The fourth worked full-time as a sex worker for many years. In sum, two out of eight participants were employed for several years and one worked as a street vendor. All of them expected and had experienced discrimination and the improbability of finding a job on the formal job market. Moreover, six trans Latinas were involved in sex work over shorter or longer periods, either part-time or full-time.

Finding a place to live

Trans people routinely report being rejected when trying to rent accommodation, usually at the moment when it becomes evident that their appearance does not match the gender marker on their official documents.³¹⁶ This can lead to renting in unfavourable conditions.³¹⁷ Three of our participants had trouble finding a place to live for several years.

P: [...] people look at us as if we were monsters, clowns, as if we were demons [...] well everything but a normal person. So, if you are looking for a house to rent, people immediately look at your appearance, they think you are not a woman or a man, as if I was some weirdo so they will not give you the opportunity to rent a house.

I: How often were you discriminated wen trying to rent a room?

P: Very often. Approximately 15 times.

³¹⁶ HRW, 2016, p. 4.

³¹⁷ Hombres XX, et al. 2016. “Discrimination Due to Gender identity and Sex Characteristics in Mexico, List of Themes Suggested to be Presented to the Working Group regarding Mexico’s Report, Economic, Social and Cultural Rights Committee, 60th Session”, pp. 1-7, esp. p. 3. Available at: https://www.ecoi.net/en/file/local/1158533/1930_1484825052_int-cescr-ico-mex-26156-e.pdf; last accessed 15 December 2020.

I: How did renting in a hotel not succeed because of discrimination?

P: I was refused there much more often [...] I had to live in hotels, but in very cheap ones, because I could not achieve renting in middle class hotels anyway [...] after a while I was not accepted anymore [...] They said to me: “No, we don’t rent rooms to transsexuals”.

P: We always lived exclusively together with trans Latinas. We cannot live any other place because we are excluded. There are places where rooms are rent to trans women and that’s where we will all go because we have no other option.

Structural violence

Analysis of the rejection, discrimination, and gender-based violence experienced by trans Latinas, within the family, in education, the job market, and in terms of housing, suggests structural and pervasive marginalisation. The notion that it is structural is underpinned by many reports. In 2013, Baker described structural violence as: “the systems of institutionalized discrimination that target trans people in areas of everyday life such as health care, housing, employment, education, and legal identity status.”³¹⁸ What Baker (2013) highlights as structural violence has been described in other studies as: “a chain of events” (Myrntinen, H. and Daigle, M. 2017); “rejection on many levels” (REDlactrans 2012); “a combination of factors” or “a cycle of violence” (IACHR, 2015 C and 2018 B); “the perspective of systemic violence” (Fedorko, B. and Berredo, L. 2017); “interconnectedness”, insofar as “each circumstance relates to and often exacerbates the other”(Divan, V. et al. 2016);³¹⁹ and “intersectionality” (Madrigal-Borloz, V. 2018).³²⁰ The participants’ stories narrate the structural, invasive, and interconnected character of marginalisation that is a lived reality for the majority.

Representation and assessment in the asylum procedure

We will analyse here how and to what extent the occurring exclusion, discrimination, and violence in childhood and into adulthood are represented in asylum hearings and assessed in the immigration service’s “intention” and the decision itself. The realm of family, education, social environment, housing, and work are examined here in this regard.

The total becoming less

The inventory of participants’ experiences and circumstances relating to childhood and early adulthood that emerged in hearings and in the semi-structured interviews is seen here as “the total” of all elements relevant to an asylum procedure. But this total of experiences and circumstances is underrepresented in hearings and given even less consideration in assessments.

There were differences between what was discussed in the information collected from semi-structured interviews, where specific questions were asked about family life, education, and work, as compared to asylum procedures hearings. The most significant differences were that: two out of five participants did not mention being expelled by family in the asylum procedure; three out of five did not mention not finishing school due to bullying and violence; and one failed to mention stopping school due to economic necessity. Representation of housing and work-related problems were similar in hearings and interviews; however, of the six participants involved in sex work, this was only discussed in hearings in two cases.

Issues that were present in immigration service hearings: three persons told how they had been expelled by their parents; two persons mentioned not finishing secondary school, and one of them being obstructed at university; two participants talked of rape, one by classmates and one during a family event. Work-related problems were mentioned in seven cases and housing problems in three cases. Adverse experiences in the social environment

³¹⁸ Baker, C. 2013. “Transforming Health: International Rights-Based Advocacy for Trans Health” (San Francisco, CA: Open Society Foundations Public Health Program), pp. 1-44, esp. p. 12. Available at: https://www.opensocietyfoundations.org/publications/transforming-health#publications_download; last accessed 15 December 2020.

³¹⁹ Myrntinen and Daigle 2017, p. 27; REDlactrans, 2012, pp. 8, 25, 26; IACHR, 2018 B; *Idem*, 2015 C, paras 16 and 26; Fedorko, B. and Berredo, L. 2017, p. 4; Divan, V. et al. 2016, p. 2.

³²⁰ Madrigal-Borloz, V. 2018, paras 22 to 25.

were raised by seven out of eight participants. Only one participant who lived in “stealth”³²¹ in her surroundings did not encounter social discrimination.

Some of the adverse experiences narrated by participants in hearings were apparently not considered by the immigration service in the assessments leading to the intention and decision. Among the issues mentioned that did not ultimately make it into the immigration service’s assessment documentation were: a participant being gang raped by classmates; another being raped during a family gathering; two participants being expelled from the family home; one participant becoming homeless after being expelled; one participant stopping school due to bullying; and in three cases adverse experiences in the social environment.

In only one case did the immigration service define a separate material fact³²² pertaining to early adverse experiences that was considered in the asylum process. It was described thus: “Encountered problems in social circle because of orientation and being ‘transgender’.” In this particular participant’s asylum procedure, mistreatment by family and classmates was acknowledged as a material fact but the experience of rape was not assessed. In another participant’s case, housing and work discrimination was acknowledged.

Considerations

As observed, the total becoming less takes place in three steps: In step one, not all of the circumstances and experiences mentioned by trans Latinas in the semi-structured interviews were narrated or asked about during hearings. In particular, information relating to family, social environment, school, and involvement in sex work were omitted. In step two, not everything told in a hearing was assessed in terms of severity, despite being deemed credible in the asylum procedure. And in step three, negative experiences described by trans Latinas are sometimes interpreted conversely in the assessment as arguments supporting the tenability of life in the country of origin.

In terms of step one, it is clear that the very different setting of a semi-structured interview can produce other information than that told or asked about in a hearing. Moreover, as will be discussed later, there are aspects that might lead trans Latinas not to represent themselves fully in hearings.³²³ The impression given by participants’ hearings was that there is little attention for early adverse experiences. A critical question is whether and how the information omitted or not asked about is relevant to the asylum procedure? This question cannot be answered with certainty. Nevertheless, it is clear that the full sequence of early adverse circumstances and experiences that most participants had to deal with is less represented in the asylum procedure. This in contrast to the UNHCR: Guidelines No. 9 (2012),³²⁴ which state that the cumulative effect of such restrictions in early life on the exercise of human rights can constitute persecution in a particular case. In addition, the UNHCR Handbook (2011)³²⁵ talks of “cumulative grounds” that can amount to persecution. The UNHCR’s publication “Women on the Run” (2015 B)³²⁶ talks of those family members, neighbours, and members of the broader community who persecute trans persons as being non-state actors from whom there is often no meaningful state protection. In terms of step two, participants introduced issues in hearings that were subsequently not considered in the “intention” and decision.

Finally, step three relates to those negative experiences described by trans Latinas in hearings that were interpreted conversely in the assessment and used as arguments to support the view that their lives in the country of origin are tenable.

³²¹ Living in “stealth” is a description used when a trans person does not (want to) reveal her history of transitioning and aims to blend in with the general population. This will be elaborated in Chapter 3.7.

³²² Each circumstance and fact in the asylum procedure concerning at least one topic or narrative related to being a refugee or article 3 ECHR is considered a separate material fact to be assessed in the asylum procedure. Examples of these “material facts” are: “person declared to be from [country]”; “person declared to be transgender”; “person declares discrimination due to sexual identity.” The first two examples relate to the category “facts concerning the person.” The third example is a fact (or circumstance) related to circumstances or events that occurred in the country of origin according to the asylum seeker.

³²³ See subchapter 3.9.

³²⁴ UNHCR, 2012, para. 24.

³²⁵ UNHCR, 2011, para. 53.

³²⁶ UNHCR, 2015 B, p. 37. This publication clearly states that families and communities may threaten serious harm on LGBTI individuals, and this can constitute persecution where there is no meaningful state protection (as is often the case). Non-state actors, including family members, neighbours, or the broader community, may be either directly or indirectly involved in persecutory acts against LGBTI individuals, including intimidation, harassment, domestic violence, or other forms of physical, psychological, or sexual violence.

Negative experiences interpreted conversely

In three cases, the immigration service used the participants' negative experiences of discrimination (as narrated in the hearings) against them; specifically, as evidence that the trans participant could live successfully in her country of origin. In two cases, this related to discrimination at work and in one case it concerned education. In one case, despite telling in the hearing that she had been fired from a job after three months, having tried to conceal her identity under pressure from her superior, this was ultimately assessed by the immigration service as: "person concerned could work during a short period." Being expelled from her family home and being homeless several times translated into "has been able to find a place to stay on her own" in the assessment. Another participant's adverse experiences were also misinterpreted. In this case, after ten years of sex work, a participant tried to run a beauty salon for a period of ten months. The salon did not generate income, lacked clients, and was in an unfortunate location. Consequently, she had to resort to sex work again to generate money because the salon was not economically viable. The immigration service interpreted these 10 months of trying to run a beauty salon as an indication that she could function socially and societally and that she was not solely dependent on sex work for her livelihood.

A third participant had been forced to stop secondary education due to discrimination. She later embarked on adult education via evening classes and subsequently applied for university. The university forbid her from attending as a woman. Only her long hair was allowed. She could not conceal her identity and therefore could not attend and pursue university. She described this as discrimination. In the immigration service's decision, this is summarised as: "Ultimately, person concerned could study"; "person concerned could continue to wear his³²⁷ hair long"; and "the person concerned chose to stop university and to start working."

Sex work: The elephant in the room

The absence of the important and recurrent theme of trans women's involvement in sex work in the hearings of four out of six trans Latinas is noteworthy. Why is this issue not discussed in hearings? Observations about what might have influenced this absence are made below but the reasons for this absence cannot be fully reconstructed. Three out of six participants were also hesitant to talk about their involvement in sex work in research interviews. Only once the conversation deepened into topics like the impossibility of earning a living or surviving, not finding a job, violence connected to sex work and police violence, did they feel able to acknowledge their involvement in sex work. The two participants who did openly mention sex work towards the immigration service were among those working most intensely in it. In one of four participants not mentioning it, the involvement in sex work occurred mainly outside the country of origin but such involvement was not addressed since events in another country are not explored in hearings. The three other trans Latinas may not have discussed sex work because they had only been involved to a lesser extent due to, among other things, receiving a degree of financial support from family or partners. Of course, reluctance to discuss sex work and their HIV status was very likely. Their experiences of being stigmatised as a trans person, as a sex worker, and/or being HIV positive in their countries of origin, in combination with negative experiences with authorities, may account for their reluctance and a fear of such information negatively influencing their asylum outcome. Most trans Latinas exhibit the psychological effects of traumatic experiences from their contact with authorities. Indeed, some trans Latinas advised each other against talking about sex work during hearings. An immigration service employee even hinted to one participant that she should not talk about their imprisonment due to sex work. There is no evidence of any participants denying their involvement in sex work.

Summary Chapter 3.1

Trans persons in the LAC region can experience hardships in childhood that continue into adulthood. Those trans children expressing their difference early in life face widespread and repeated gender-based violence, social exclusion, discrimination, and violence within families, in social settings, and in schools while simultaneously being in a dependent and vulnerable position.³²⁸ The high rates of trans children being forced out of their family home and school are indicative of severe circumstances that can culminate in a well-founded fear of persecution and in which protection from their family and school is absent. Many sources indicate how these early hardships lead to

³²⁷ This misgendering in immigration service documents occurs in the majority of research participants' cases.

³²⁸ In the words of Madrigal-Borloz, V., rapporteur on LGBTI rights (2018), "the current context in the region [Latin America] is a challenging one. Trans people are among the most vulnerable social groups and suffer high levels of discrimination from childhood onward because their identity and gender is not recognized".



a high probability of homelessness and unemployment followed by a very high probability of becoming involved in sex work.

The poor representation of and lack of consideration for these circumstances have consequences. Singular adverse experiences in themselves are less visible and **the total, widespread, repetitive social exclusion, discrimination, and violence summarised as “structural violence” in this research is underrepresented in the asylum procedure.** This situation contributes to poor consideration of the severity of the chronic repetitive aspect of living in alien social surroundings. This failure to see the whole picture can also result in immigration officers ignoring the high risk of trans persons who express their identity early becoming engaged in sex work in adult life.

The absence of sex work as a topic in the hearings of four of six trans Latinas is a notable finding, in particular given that 75 per cent of the trans participants were involved in sex work, to varying degrees. This figure is not surprising at all; on the contrary, it reflects the reality of trans women in the LAC region. Involvement in sex work is seen to be caused by and/or related to the deep marginalisation and structural targeting of trans women’s gender non-conformance through exclusion, discrimination, and violence, which can start early in life. The reasons why sex work was not discussed in hearings was beyond the scope of our research interviews, but it is safe to conclude that negative experiences, also with authorities, and the combined stigma of being a trans person, involved in sex work, and HIV positive, may well produce reluctance, fear, and distrust. Consequently, as will be discussed further on in the research, trans Latinas may have felt uncertain about how trans sex work would be received and assessed in their asylum procedures.



© Milena Pafundi/Agencia presentes, 2019. Image showing a close-up of a migrant trans woman.

3.2 Absence of and restrictions on (gender-affirming) healthcare

Trans persons' experiences and circumstances lead to a clear need for a variety of healthcare services to support physical, social, and mental well-being. Their marginalisation, structural exclusion, discrimination, and violence result in psychological pressures and are known to cause general health deficits, including suicide risks and HIV, which require attention from the general healthcare system.³²⁹ However, trans people are often excluded from general healthcare and can experience discrimination and violence within this system.³³⁰ A second possible and important element – and one of the three trans-related themes in this research – is the gender-affirming healthcare specific to trans persons.

Gender-affirming healthcare

Gender-affirming healthcare³³¹ is seen here as competent, non-discriminatory treatment, care, and support that assists individuals in bringing aspects of their body closer to the identity and/or expression of a trans person. Hereafter it will be abbreviated to “gender care.” Absence of and/or exclusion from gender care often leads to self-medication, improvised, less than standard, or dangerous procedures and health risks. Generating income to pay for gender care is a problem for the majority of stigmatised trans people, who are often excluded from employment. Frequently, the only way to achieve some elements of physical transition is to engage in sex work.³³² Absence of gender care excludes trans people and results in several health risks. Ongoing exclusion, discrimination, and violence, starting at a young age, often continues in both general health care and gender care (if present). This can result in mental pressure and can lead to (post-traumatic) stress, depression, and substance abuse.³³³

The Yogyakarta Principles (2007) establish human rights in relation to gender care.³³⁴ The Principles specify the application of international human rights law on sexual orientation and gender identity, and they affirm binding international legal standards that states should comply with:³³⁵

Principle 17

The Right to the Highest Attainable Standard of Health.

Everyone has the right to the highest attainable standard of physical and mental health, without discrimination on the basis of sexual orientation or gender identity. Sexual and reproductive health is a fundamental aspect of this right.

a. States shall:

Take all necessary legislative, administrative and other measures to ensure enjoyment of the right to the highest attainable standard of health, without discrimination on the basis of sexual orientation or gender identity;

b. Take all necessary legislative, administrative and other measures to ensure that all persons have access to healthcare facilities, goods and services, including in relation to sexual and reproductive health, and to their own medical records, without discrimination on the basis of sexual orientation or gender identity;

³²⁹ Baker, C. 2013, p.4.

³³⁰ Lanham, M. et al. 2019, p. 41.

³³¹ As previously mentioned, numerous trans people choose not to/do not want to/are not in need of such care. Medical intervention is not a criterion for whether or to what degree someone has a trans identity or expression.

³³² Bianchi, F. et al. 2014, pp. 1638-1639.

³³³ Lanham, M. et al. 2019, p. 38.

³³⁴ Yogyakarta Principles, 2007. “Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity” (Geneva: ICJ, International Commission of Jurists) pp. 1-38. Available at: <https://www.refworld.org/docid/48244e602.html>; last accessed 15 December 2020.

³³⁵ Weggen, E.J.J. 2009. “The Yogyakarta Principles Soft law? Sexual Orientation and Gender Identity in International Human Rights Law”, PhD thesis, University of Amsterdam, pp. 1-28. Available at: ypinaction.org/wp-content/uploads/2016/10/Thesis_Weggen_Yogyakarta_Principles_Soft_Law.pdf; last accessed 13 March 2019: “The Yogyakarta Principles in itself do not provide new international legal rules but focus on a vulnerable group in society and the fact that the same human rights norms count for this group. By invoking the existing international human rights norms states cannot be against these Principles since they are parties to several other international human rights documents.”

- c. Ensure that healthcare facilities, goods and services are designed to improve the health status of, and respond to the needs of, all persons without discrimination on the basis of, and taking into account, sexual orientation and gender identity, and that medical records in this respect are treated with confidentiality;
- d. Develop and implement programmes to address discrimination, prejudice and other social factors which undermine the health of persons because of their sexual orientation or gender identity;
- e. Ensure that all persons are informed and empowered to make their own decisions regarding medical treatment and care, on the basis of genuinely informed consent, without discrimination on the basis of sexual orientation or gender identity;
- f. Ensure that all sexual and reproductive health, education, prevention, care and treatment programmes and services respect the diversity of sexual orientations and gender identities, and are equally available to all without discrimination;
- g. Facilitate access by those seeking body modifications related to gender reassignment to competent, non-discriminatory treatment, care and support;
- h. Ensure that all health service providers treat clients and their partners without discrimination on the basis of sexual orientation or gender identity, including with regard to recognition as next of kin;
- i. Adopt the policies, and programmes of education and training, necessary to enable persons working in the healthcare sector to deliver the highest attainable standard of healthcare to all persons, with full respect for each person's sexual orientation and gender identity.

Malta offers us an example of good practice in this regard.³³⁶ Many rights described in the principles as “positive elements” can be simultaneously read as a list of everything that can go wrong in the provision of healthcare to trans persons. These should be considered as relevant elements that contribute to the severity of trans persons’ experiences and circumstances.

Other parties than those establishing the Yogyakarta Principles (mentioned in the footnotes), like the United Nations, have discussed, interpreted, and specified what non-discriminatory, competent treatment, care, and support related to gender care means and includes. These can be organised as follows:

- Stop pathologising.³³⁷ Gender care is provided in a minority of countries in the LAC region. Even within this minority there is evidence of trans persons experiencing abusive thresholds and discriminatory situations to access such care imposed by healthcare professionals, including forced psychological, psychiatric evaluation and pathologising diagnosis.³³⁸ Progress is being made to reduce pathologisation as manuals and classifications are gradually being updated.³³⁹ Nevertheless, large differences exist between countries of origin and many of them continue to pathologise trans identities. Even in many countries in the EU, trans people are still considered to be mentally ill.³⁴⁰

³³⁶ UN, 2016 A, pp. 47 and 72.

³³⁷ The definition of the verb to pathologise is to view or characterize as medically or psychologically abnormal, see Merriam Webster dictionary, 2020 A. “Pathologise”. Available at: <https://www.merriam-webster.com/dictionary/pathologize>; last accessed 15 December 2020; Berredo, L. et al. 2018, p. 6.

³³⁸ Ritterbusch, A., Correa Salazar, C. and Correa, A. 2018, p. 1832; UN, 2016 A, pp. 49, 74-75.

³³⁹ Health professionals use classification systems DSM 5 and/or ICD 11 to classify trans people. The Diagnostic and Statistical Manual of Mental Disorders five replaced the terminology “Gender Identity Disorder” by a “softer version” called “Gender Dysphoria”. This has only limited effect on reduction of pathologisation and stigma, since it is still belonging to the chapter on mental disorders. APA, American Psychiatric Association, “Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition”, pp. 451-459. Available at: https://drive.google.com/file/d/10r_oUv_fZXQ4jU-VXQC-4UnMdaneR3TD5/view; last accessed 20 April 2021. The new “International Classification of Diseases”, ICD 11, by the World Health Organization (WHO) now describes trans identity and/or expression as “gender incongruence” and has placed it out of the mental disorder section into the section related to sexual health. WHO, World Health Organization, 2019. “ICD 11”, chapter 17, “conditions related to sexual health”. Available at: <https://icd.who.int/browse11/l-m/en#/http://id.who.int/icd/entity/90875286>; last accessed 15 December 2020.

³⁴⁰ European Parliament, 2015. “Report on the Situation of Fundamental Rights in the European Union”, 2013-2014: *Committee on Civil Liberties, Justice and Home Affairs*, pp. 1-70, para. 89. Available at: https://www.europarl.europa.eu/doceo/document/A-8-2015-0230_EN.html; last accessed 15 December 2020. The committee: “Deplores the fact transgender people are still considered mentally ill in the majority of Member States and calls on them to review national mental health catalogues, while ensuring that medically necessary treatment remains available for trans people.”

- End the compulsory sterilisation of trans people³⁴¹ in a separate, or as part of a broader, surgical procedure that ends the possibility of reproduction of trans people. Sterilisation can be obligatory in order to access gender care and/or for obtaining legal gender recognition. These are serious breaches of human rights that can be seen as cruel, inhumane, and degrading treatment or torture.³⁴²
- Sex reassignment surgery must never be forced on trans people³⁴³ for the purpose of legal gender recognition or as a condition for receiving gender care. Many countries have requirements such as mandatory sex reassignment surgery³⁴⁴ to obtain legal gender recognition, violating the rights of trans people. In addition, healthcare professionals can use mandatory protocols rather than providing care based on informed consent, as intended in Principle 17e. Treatment given as part of a compulsory package is a form of abuse.
- End the discrimination, exclusion, and violation of trans people in all kinds of healthcare, whether general healthcare or gender care.³⁴⁵

The above points illustrate the risk of discrimination, human rights violations, and thresholds/restrictions confronting trans people trying to access healthcare. Please keep in mind throughout this chapter that it is important not only to consider whether gender-affirming healthcare is available or absent, as if an on/off switch; it is also important to consider the restrictions/ thresholds/discriminations/human rights violations trans persons have to face in their access to gender-affirming and general health care. Consideration of whether any of the above applies to trans Latinas' circumstances and experiences requires specific COI. As previously discussed, this can be sparse but when it is present it is important that immigration officers take it into account in order to pinpoint elements of discrimination and/or persecution relevant to trans persons.

General healthcare and specific gender care data for trans persons in Latin America and the Caribbean

Only a few studies provide an impression of the state of affairs surrounding gender care in the LAC region. According to Berredo *et al.* (2018), there are general laws on access to healthcare in the region that might be a basis for making healthcare effective for trans people. In practice, however, the right to access healthcare is often illusory in a region with inconsistent discourses.³⁴⁶ While some healthcare protocols exist in the LAC region, e.g. in Argentina, Mexico, Colombia, and Chile, it is not on a national level and there are major implementation issues. Demands by trans communities have resulted in the development of trans-specific instruments in a few countries. In Argentina, trans people have had recourse to the Guide for the Comprehensive Healthcare of Trans People since 2015. But the economic crisis in Argentina has affected healthcare and, as a result, this has had a negative impact on programmes that focus on trans people. Similarly, in Mexico, many of these initiatives encounter implementation difficulties at state level and only Mexico City has a gender-affirmation clinic.³⁴⁷ A similar conclusion is drawn in a REDlactrans 2014 survey³⁴⁸ concerning 16 countries that have existing general legal provisions on, and free access to, the public health system. However, in practice, only those states providing legal gender recognition also protected transgender persons' right to healthcare.³⁴⁹

Ritterbusch, Correa Salazar, and Correa (2018)³⁵⁰ conducted a qualitative research in Colombia. They observed how stigmatisation of trans persons both by general society and in healthcare results in a growing reluctance to seek further healthcare. The repeated discrimination and violence against trans persons deepened the effects of their stigmatisation and it can result in an individual rejecting the system they are being excluded by. According

³⁴¹ UNDP, United Nations Development Programme, 2013. "Discussion Paper, Transgender Health and Human Rights" (New York: UNDP) pp. 1-36, esp. pp. 24-25. Available at: <https://www.undp.org/content/undp/en/home/librarypage/hiv-aids/discussion-paper-on-transgender-health---human-rights.html>; last accessed 15 December 2020.

³⁴² UN, 2015. "A/HRC/29/23, Discrimination and Violence Against Individuals Based on Their Sexual Orientation and Gender Identity". Report of the Office of the United Nations High Commissioner for Human Rights (Geneva: United Nations High Commissioner for Human Rights) pp. 1-22, esp. paras 17, 38 and 70. Available at: <https://undocs.org/A/HRC/29/23>; last accessed 15 December 2020.

³⁴³ UN, 2016 B. "A/HRC/31/57, Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment" (Geneva: OHCHR) pp. 1-23, para. 49. Available at: <https://www.undocs.org/A/HRC/31/57>; last accessed 15 December 2020.

³⁴⁴ UN, 2016 A, pp. 47-49.

³⁴⁵ REDlactrans, 2014, p. 34; Berredo, L. *et al.* 2018, p. 6.

³⁴⁶ Berredo, L. *et al.* 2018, p. 14.

³⁴⁷ *Ibid.*, pp. 8-9.

³⁴⁸ REDlactrans, 2014, pp. 36-37.

³⁴⁹ Chile is an exception to this rule, having gender related healthcare without legal gender recognition up to 2014.

³⁵⁰ Ritterbusch, A., Correa Salazar, C. and Correa, A. 2018, p. 1832.

to their study, Colombia attempted to improve access to healthcare for marginalised groups through legal reform in 2015, but the legislation was not grounded in trans care protocols and stigma-related barriers for trans people remain. Practice in Colombia is a pathologising one with a mental health diagnosis as prerequisite for treatment.

450 trans women participated in the first trans-specific HIV study in Peru.³⁵¹ Of this research population, 70 per cent were involved in bodily affirmation of their gender identity, mostly outside healthcare; 83 per cent used hormones. Of this group, 67 per cent had taken advice from a friend and 95 per cent were taking hormones without any medical follow-up. Forty per cent of the research population had resorted to injecting industrial silicone. The majority of procedures were not medically supervised (71 per cent) while 41 per cent reported at least one health problem related to these procedures, e.g. skin infections (18 per cent). According to the UNDP (2013), the absence of public health provisions is a cause for trans people being forced into unsafe alternative measures to affirm their bodies to match their gender identity. Especially in Latin America, this includes the unregulated use of hormones and the dangerous practice of injecting silicone or industrial oil by non-medical providers.³⁵² The IACHR also sees a clear relation in the LAC region between poor socioeconomic status and the incidence of unsafe and alternative bodily affirmation.³⁵³

In the 31 states of Mexico there is one gender clinic,³⁵⁴ in Mexico City. This clinic offers treatment to 1300 people. According to two sources,³⁵⁵ an estimated 0.6 per cent of Mexico's population – between 360,000 and 700,000 persons – is transgender. It is therefore safe to say that most trans persons from the Republic of Mexico lack adequate gender care. Many resort to self-medication and silicone injections.³⁵⁶ Medical care providers often do not want to provide care and/or they mock and humiliate trans women. Gender care is almost entirely unavailable in the republic of Mexico and it is not covered in the national health plan. Licenced (private) providers are rare and only available to those with the money to pay for medical expenses.³⁵⁷ Even where it is available, such care can be far too expensive for trans women already suffering the effects of economic marginalisation, as discussed earlier.

Adverse circumstances and experiences, such as ill-treatment, refusal of care,³⁵⁸ harassment, verbal abuse, violence, stigma, and discrimination are features of the healthcare system for trans persons.³⁵⁹ A lack of knowledge among medical professionals of trans people's health needs is observed,³⁶⁰ and current practice in gender care continues to pathologise trans persons and violates them with mandatory interventions.³⁶¹ Lanham et al. (2019) reports that 82.9 per cent of trans Latinas encounter transphobia and gender-based violence in healthcare, not only from healthcare providers, but also from administrative staff and even other patients. This impedes their access to services, contributes to poor health outcomes and quality of life, and discriminates against trans people. It can exacerbate their economic, health, and social vulnerabilities.³⁶² The cumulative effect of all these adverse experiences is not to be underestimated in many trans peoples lives in the LAC region. They co-exist alongside and compound many other adverse experiences that often start early in life, in the family and school environment, and so on. In a study in Chile, trans participants reported depression four times more and attempted suicide ten times more than cis gender persons.³⁶³

Having lived through exclusion, discrimination, and gender-based violence throughout their lives, trans persons may be reluctant to engage in "formal" healthcare for fear of renewed discrimination.³⁶⁴ This increases the risk of self-administered and peer-to-peer physical gender affirmation interventions as trans persons seek to be gen-

³⁵¹ Silva-Santisteban, A. et al. 2012. "Understanding the HIV/Aids Epidemic in Transgender Women of Lima, Peru: Results from a Sero-Epidemiologic Study Using Respondent Driven Sampling", *AIDS and Behaviour* 16, pp. 872-881, esp. p. 875. Available at: <https://link.springer.com/article/10.1007/s10461-011-0053-5>; last accessed 15 December 2020.

³⁵² UNDP, 2013, p. 22.

³⁵³ IACHR, 2015 C, para. 382.

³⁵⁴ Sánchez, M. 2016. "Transgender People in Mexico City Resort to Dangerous Unsupervised Procedures", *Global Press Journal*. Available at: <https://globalpressjournal.com/americas/mexico/transgender-people-mexico-city-resort-dangerous-unsupervised-procedures/>; last accessed 15 December 2020.

³⁵⁵ CONAPRED, 2019. "Ficha Temática Orientación Sexual, Características Sexuales e Identidad y Expresión de Género", pp.1-7. Available at: http://www.conapred.org.mx/userfiles/files/FichaTematica_LGBTI.pdf; last accessed 15 December 2020

³⁵⁶ Sánchez, M. 2016.

³⁵⁷ Transgender Law Center, 2016, p. 24.

³⁵⁸ USDOS, United States Department of State, 2017 A. "2016 Country Reports on Human Rights Practices – Colombia", pp. 1-57, esp. p. 46. Available at: <https://www.state.gov/reports/2016-country-reports-on-human-rights-practices/colombia/>; last accessed 16 December 2020.

³⁵⁹ UNAIDS, 2014 B, p. 219; UNDP, 2013, p. 17.

³⁶⁰ Baker, C. 2013, p. 4.

³⁶¹ UN 2016 A, pp. 71-74, 94.

³⁶² Lanham, M. et al. 2019, p. 37.

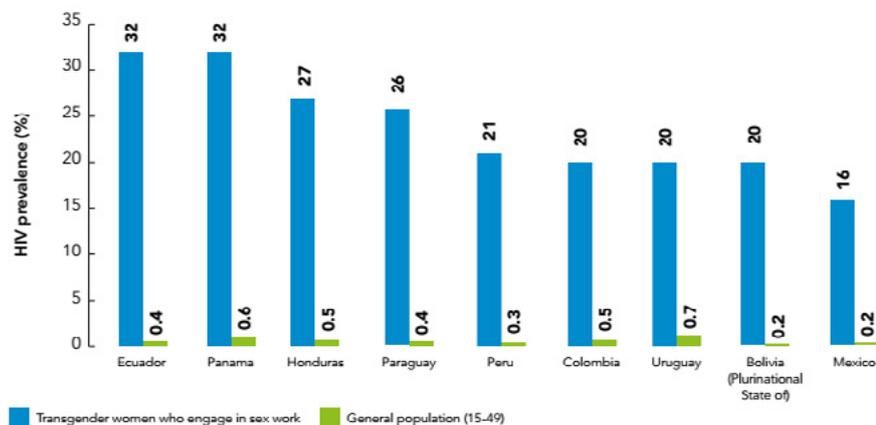
³⁶³ PAHO, 2014, p. 2.

³⁶⁴ UNAIDS, 2014 B, p. 224.

dered, approached, and respected for the person they are.³⁶⁵ They may also shy away from HIV testing as a positive diagnosis will bring about the burden of additional contacts with the healthcare system.

HIV

HIV prevalence among transgender women who engage in sex work and the general adult population in Latin America, 2013



Source: Global AIDS Response Progress Reporting 2014.

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Given the high prevalence of HIV in the trans population worldwide and the positive status of four of our eight participants, it is important to mention some key information to give an indication of the problems concerned.

There is still a knowledge gap in HIV research with respect to sexual orientation and gender identity, and especially with respect to trans people.³⁶⁷ The frequent conflation of male sex with men and trans sex workers in past research obscures the significant difference in risk even within the LAC region, which generally has good reporting on HIV prevalence.³⁶⁸ There has been little attention in published literature for the HIV-related problems of trans people in the past.³⁶⁹ Moreover, trans people living with HIV/AIDS can be difficult to reach or recruit for research and/or inclusion in health service programmes.

According to Blondeel, globally, the chance of acquiring HIV is 49 times higher for trans women than for all adults of reproductive age. Trans women not reporting participation in sex work have a 14.7 per cent HIV prevalence, which is even greater for trans sex workers, with an estimated worldwide crude HIV prevalence of 27.3 per cent.³⁷⁰ In the LAC region, the population of trans women has the highest prevalence of HIV/AIDS, averaging at 35 per cent.³⁷¹ HIV prevalence among trans sex workers is, on average, three times higher compared to “men who have sex with men,” who have a rate of ten per cent, and nine times higher than for female sex workers.³⁷²

Silva-Santisteban et al. (2012) mentions a 29.2 per cent HIV incidence in trans sex workers in Peru, a higher incidence than is recorded in the above graphic, even though “only” 63.1 per cent were engaged in sex work.³⁷³ REDlactrans (2014) mentions a HIV prevalence of 34 per cent in Argentina.³⁷⁴ In Cuba, one source states that even though HIV prevalence in general is very low compared to “the western hemisphere,” 90 per cent of trans people

³⁶⁵ Ritterbusch, A., Correa Salazar, C. and Correa, A. 2018, p. 1836.

³⁶⁶ UNAIDS, 2014 B. “The Gap Report”, (Geneva: UNAIDS) pp. 1-422, esp. p. 91. Available at: https://files.unaids.org/en/media/unaids/contentassets/documents/unaidspublication/2014/UNAIDS_Gap_report_en.pdf; last accessed 16 December 2020.

³⁶⁷ Blondeel, K., et al. 2016. “Evidence and Knowledge Gaps on the Disease Burden in Sexual and Gender Minorities: A Review of Systematic Reviews”, *International Journal for Equity in Health*, 15 (1), pp. 1-9, esp. p. 1. Available at: https://www.researchgate.net/publication/291555755_Evidence_and_knowledge_gaps_on_the_disease_burden_in_sexual_and_gender_minorities_A_review_of_systematic_reviews; last accessed 16 December 2020.

³⁶⁸ UNAIDS, 2016, pp. 80, 81; Barrington, C. et al. 2012, p. 2; Berredo, L. et al. 2018, p. 18: “many policy makers and service providers failing to address the needs of trans women as a population distinct from men who have sex with men. Only 39% of countries in 2014 had specific programmes targeting trans people in their national HIV strategies.”

³⁶⁹ Poteat, T. et al. 2014, p. 274.

³⁷⁰ Blondeel, K. et al. 2016, p. 4; Bianchi, F. et al. 2014, p. 1639.

³⁷¹ REDlactrans, 2012, p. 8.

³⁷² UNAIDS, 2014 B, pp. 217, 218.

³⁷³ Silva-Santisteban, A. et al. 2012, p. 873.

³⁷⁴ REDlactrans, 2014, p. 12.

in the TransCuba Network struggle with HIV.³⁷⁵

The causes of this high HIV risk are similar to themes discussed earlier, i.e. marginalisation, discrimination, violence, and exclusion, often starting at a young age and aggravated by involvement in sex work.³⁷⁶ HIV risks also relate to a lack of healthcare access and experiences of discrimination within healthcare, the absence of LGR leading to exclusion, and the direct and indirect criminalisation of sex work. Criminalisation of sex work and punitive environments have been shown to increase HIV vulnerability and to limit the availability, access, and uptake of HIV prevention, treatment, care, and support for sex workers and their clients.³⁷⁷ Trans women and trans men are drastically under-served by current treatment efforts and face barriers to accessing antiretroviral therapy.³⁷⁸ They often face stigma and ill-treatment in healthcare, including the refusal of care, harassment, verbal abuse, and violence.³⁷⁹ Several sources³⁸⁰ recommend systemic strategies to reduce violence against trans people on multiple levels, and to facilitate legal and policy reform that removes or reviews, among others, laws criminalising conduct seen as “indecent” or “provocative,” including laws criminalising sex work. Illnesses like HIV further increase stigma and discrimination³⁸¹ and compound existing marginalisation for being a trans person and (perceived) involvement in sex work.

Gender care in Cuba

Cuba’s National Centre for Sex Education (CENESEX)³⁸² supports education processes on sexual orientation and gender identity, health and sexual rights, and related issues within a “socialist emancipatory paradigm.”³⁸³ It is led by Mariela Castro, the daughter of former president Raoul Castro. This organisation presents itself as “the national representative of LGBTI persons.” In doing so, it excludes autonomous LGBTI initiatives in the country.³⁸⁴ Persons involved in such groups face problems as LGBTI rights activists.³⁸⁵ Since 2008, gender care is part of regular state-funded healthcare. This has received a lot of attention internationally and is described in many articles as a “landmark” and “indicator of progress,”³⁸⁶ but frequently only in the context of sex reassignment surgery. Nevertheless, access to gender care is restricted.³⁸⁷ According to the IACHR (2015 A), 39 people in 11 years have received sex reassignment surgery in Cuba, amounting to seven persons in two years. Trans people that want to access sex reassignment surgery must first sign a document committing to the government’s ideology.³⁸⁸ The surgery must be authorised by the Ministry of Health, fulfilling prerequisites such as minimum age, submission of medical and psychological findings, as well as a detailed review of medical protocols for sex affirmation surgeries.³⁸⁹ According to Eaton (2016), the current waiting list for the surgery includes 200 trans persons³⁹⁰ and Lahrichi (2016)³⁹¹ reports that it is governed by CENESEX. If we accept that seven persons every two years are receiving sex reassignment surgery in Cuba, this means that the waiting list is being addressed at a pace of two per cent a year (without looking at new admissions). According to Sananes (2016), the Trans Cuba Network is comprised of about 3,000 people.³⁹² A statistical estimate of one in 2,000 being a

³⁷⁵ Sananes, R. 2016. “TransCuba Network: The Activist Network for Trans Rights”, Pulitzer Center. Available at: <https://pulitzercenter.org/reporting/transcuba-activist-network-trans-rights>; last accessed 16 December 2020.

³⁷⁶ REDlactrans, 2012, p. 8.

³⁷⁷ UNAIDS, 2014 B, p. 189.

³⁷⁸ *Ibid.*, pp. 127, 224.; Corporación Caribe Afirmativo et al. 2017, para. 19.

³⁷⁹ Transgender Law Center, 2016, p. 24.

³⁸⁰ Divan, V. et al. 2016, p. 3.; Madrigal-Borloz, V. 2018, para. 56.; IACHR 2015 C, para. 95.

³⁸¹ Corporación Caribe Afirmativo et al. 2017, para. 19.

³⁸² CENESEX: “Centro Nacional de Educación Sexual”. It is led by the Mariela Castro, daughter of Raoul Castro.

³⁸³ Barbosa León, N. 2018. “Defending Sexual Diversity”, *Granma*. Available at: <http://en.granma.cu/cuba/2018-12-13/defending-sexual-diversity>; last accessed 16 December 2020. Granma is “the official voice of the communist party in Cuba.”

³⁸⁴ ACCORD, 2017 A, pp. 169, 172.

³⁸⁵ IACHR, 2016, paras 76 to 78, 81, and 82.; Lavers, M. 2015 B. “Amid Change, LGBT Cubans Face Lingering Challenges”, *Washington Blade*. Available at: <https://www.washingtonblade.com/2015/05/27/amid-change-lgbt-cubans-face-lingering-challenges/>; last accessed 17 December 2020.

³⁸⁶ Ravensberg, F. 2010. “El Cambio de Sexo Ya Es Una Realidad en Cuba”, *BBC News*. Available at: https://www.bbc.com/mundo/america_latina/2010/01/100123_cuba_operacion_cambiosexo_jp; last accessed 17 December 2020.

³⁸⁷ Marple, O. 2015. “A New Revolution: Progression of LGBTQ Rights in Cuba”, Council on Hemispheric Affairs, COHA. Available at: <https://www.coha.org/a-new-revolution-the-progression-of-lgbtq-rights-in-cuba/>; last accessed 17 December 2020.

³⁸⁸ IACHR, 2015 A. “Annual Report 2015, IACHR, Chapter IV b, Cuba”, pp. 583-617, esp. p. 602. Available at: <https://www.oas.org/en/iachr/docs/annual/2015/doc-en/InformeAnual2015-Cap4-Cuba-EN.pdf>; last accessed 16 December 2020.

³⁸⁹ IACHR, 2018 A. “Annual Report 2018, IACHR, Chapter IV b, Cuba”, pp. 353-386, esp. para. 91. Available at: <https://www.oas.org/en/iachr/docs/annual/2018/docs/IA2018cap.4b.CU-en.pdf>; last accessed 16 December 2020.

³⁹⁰ Eaton, T. 2016. “Transgender Cubans Struggle for Equal Rights in Macho Cuba”, *OnCuba Magazine*. Available at: <https://pulitzercenter.org/reporting/transgender-cubans-struggle-equal-rights-macho-cuba>; last accessed 16 December 2020.; ACCORD 2017 A, p. 177.

³⁹¹ Lahrichi, K. 2016. “Cuba’s Gay Community Comes Out of the Closet”, *USA Today*. Available at: <https://eu.usatoday.com/story/news/world/2016/07/10/cubas-gay-community-comes-out-%20closet/86662268/>; last accessed 16 December 2020.

³⁹² Sananes, R. 2016.

trans person seeking transition related services would amount to 5,500 trans people in Cuba.³⁹³ In terms of the actual waiting list, the 3,000 persons connected to Trans Cuba Network, and this statistical estimate, the current access to sex reassignment surgery can hardly be considered to be reasonable access to gender care. Cuba's general healthcare costs are covered by the state³⁹⁴ and the country's health system in general receives positive reviews.³⁹⁵ Despite this, general healthcare is not free of trans discrimination. In a survey by activists among 150 LGBTI persons, 13 out of 22 trans people were discriminated against in Cuba's healthcare system.³⁹⁶ Moreover, with the exception of sex reassignment surgery, surgical gender care such as breast augmentation and facial feminisation surgery is seen as cosmetic and is not covered.³⁹⁷ An article points to doctors in Cuba performing breast augmentation, liposuction, and other procedures illegally, even at night,³⁹⁸ as a kind of "alternate reality" to care not provided by the state.

Participants' experiences of gender care and general healthcare

Having examined what is known about the provision of gender care and general healthcare in the LAC region, the research now turns to the experiences of the research participants. Five of eight participants faced an absence of regular gender care and in the three of eight Cuban cases a high threshold was present, as described above. Two of eight trans Latina participants that might have wanted bodily affirmation for their gender identity did not fulfil that need. One had been advised against hormone use because of health problems, and the second person had not come out as a trans woman for fear of the consequences. All six trans women that practised bodily affirmation resorted to self-medicating without medical supervision, care, or support and some of them had engaged with improvised, inferior, and unqualified interventions for bodily affirmation. Such interventions require financial resources, are unsafe, are of inferior quality, and lack support if health issues occur.

Five of the six participants using self-administered female hormones started taking them between the ages of 16 and 19, mostly following peer advice, although one person received direction while pursuing HIV-related healthcare. Pharmacies supplied medications without doctors' prescriptions and without medical regulation. The type and administration of the hormones could vary depending on availability at a given moment. One trans Latina had non-regulated surgery in an unhygienic, improvised setting. A second trans woman who had surgery paid a lesser fee because the doctors were practicing their surgery technique on her. A third person wanted a breast augmentation and expected help after joining the organization CENESEX, but after waiting in vain for three years, her hopes were dashed. Two trans Latinas were given injections of industrial silicone to modify the shape of their hips and buttocks,³⁹⁹ resulting in pain, skin irritation and redness, and hard lumps under the skin. This information was not shared with the immigration service in one case, in the other it is not verifiable since the documentation relating to her second hearing is missing. Four participants were HIV positive, one of whom was fired from her job because of her status. All four were receiving HIV medication. The availability of HIV care in the LAC region is better and not comparable to other health care provisions for trans people. One participant had an illness in addition to HIV. Seeking treatment for this condition in her country of origin, instead of the preferred injections she had to resort to "second choice" pills. In Cuba, two participants used medication for psychological complaints that started following a period of imprisonment. According to all Cuban participants, gender care in Cuba was restricted by CENESEX. One of them was deemed to have "a wrong political position,"⁴⁰⁰ one did not have access because she did not want to submit to full mandatory treatment with compulsory sex reassignment surgery, and another one did not receive breast augmentation as desired after years of waiting.⁴⁰¹

³⁹³ A more liberal country like Belgium reports one in 2,000 people are aiming at transition related services. Anon, 2020 A. "Cijfers", Transgender infopunt. Available at: <https://transgenderinfo.be/f/pers/cijfers/>; last accessed 16 December 2020. Cuba has 11 million inhabitants.

³⁹⁴ Ravensberg, F. 2017. "Who Pays for Health Care and Education in Cuba?" *Havana Times*. Available at: <https://havanatimes.org/opinion/who-pays-for-health-care-and-education-in-cuba/>; last accessed 16 December 2020.

³⁹⁵ Fuente, A. 2017. "How does Cuba Manage to achieve First-World Health Statistics?" *El País*. Available at: https://english.elpais.com/elpais/2017/02/10/inenglish/1486729823_171276.html; last accessed 16 December 2020.

³⁹⁶ ACCORD, 2017 A, p. 184.

³⁹⁷ *Ibid.*, p. 177.

³⁹⁸ Eaton, T. 2016.

³⁹⁹ This was only revealed in the research interviews and was not known by the immigration service.

⁴⁰⁰ This argument was not deemed credible in the assessment by the immigration service. In contrast to this assessment, there is information supporting such a claim that CENESEX demands allegiance with the communist ideology before considering giving care to trans persons: IACHR, 2015 A, p. 602.

⁴⁰¹ Lavers, M. 2015 A. "Cuban Trans Advocate: Government Seeks to 'Destroy Us'", *Washington Blade*. Available at: <https://www.washingtonblade.com/2015/05/20/cuban-trans-advocate-government-seeks-to-destroy-us/>; last accessed 16 December 2020.

All interventions besides the medication for psychological complaints were paid for by trans Latinas themselves. Good gender care encompasses a wide range of interventions. Other than those discussed here, additional interventions, such as puberty blockers for trans youth, testosterone blockers, facial feminisation surgery, facial and other hair removal, or speech therapy were completely absent for participants.

Below are excerpts from participants' research interviews related to some of these issues (R = researcher; I = immigration officer; P = participant):

P: The steps to my transition are a bit rough [...] first you have to deal with your family, having to leave your house to be able to carry out your life as a woman, then well, you have to face society, having to become a prostitute to carry on forwards with your life. After that comes the surgeries that are most of the times if not always done clandestinely by "surgeons." Surgeons, in this case, insert weird substances into our bodies, like silicon and things like that, we call them underground (garage) surgeons, because they are surgeons who set up a clandestine clinic, things like that.

R: So, you are saying there is no system in place like there is in the Netherlands for a trans woman to opt for transition?

P: Not at all, that does not exist at all. Even we tend to self-medicate and prescribe ourselves hormones, we get them ourselves. In [country] there is no such thing as going to a, what do you call them?

R: Psychologist, endocrinologist?

P: Endocrinologist, none of that, we self-medicate.

P: I have seen many cases of friends of mine who have been left to die because they were trans [...] they arrived at the hospital and no, no one wanted to take care of them, they were simply left to die.⁴⁰²

R: For being trans?

P: For being trans, also because they were objects of ridicule for the doctors and nurses [...] for example, there were cases of girls who got silicone in the buttocks and arrived asphyxiated with embolisms [...] and the clinics "oh but they got themselves into this, who sent them" [...] well they would say things like that and let them die.

R: Can you say something about the steps you have taken regarding your transition?

P: I have only taken hormones, since I was 16 years old [...]

R: Can I ask you about hormones, who prescribed them to you?

P: Nobody, I bought them at the pharmacy.

R: So, during the transition process, were you not advised by professionals?

P: No.

P: The fact of having silicone injected in my buttocks, that obviously is a foreign body, which since I put it in, I now have a long-lasting reaction in that part of my body [...] they are red [...] they even say it can cause bone cancer. Well, until now I am fine, but I am really scared I will develop a strong reaction later on.

In a hearing:

I: You state that life for "transgenders" is hard in [country], but you were able to have surgery. Can you explain this?

P: That's because of money. [country] is one of the Latin American countries where most plastic surgery is applied. It does not matter who they operate on as long as they show the money. That is what they want, money. But I cannot have surgery everywhere. The "clinic" where I went was more of a "barn." The surgeon did not do a good job. He did not give me any guarantee it would be pretty. I had to sign a document that said he was not responsible in any way. In [country], we call them butchers. He made one breast higher than the other and made very large scars.

I: Why did you do it then, because it is quite a risk?

⁴⁰² This matches observations by Ritterbusch, A., Correa Salazar, C. and Correa, A. 2018, p. 1835.

P: I did have the operation because we, as trans, do not have a lot of choice.

Cuban experiences:

I: What do you mean, one has to be affiliated with “the centre” [CENESEX]?

P: That is where Mariela Castro organises meetings for homosexuals. I did not talk about it because it is all a “façade.” For example, the breast surgery. I have tried to do that for [several] years, but nothing came of it. It is all show. And it is being used to fight for their own interests. They do nothing. I decided to withdraw from there and not to take part anymore.

I: In what way is it checked if you are a communist [by CENESEX]?

P: Through the CDR [Committee for the Defence of the Revolution] that are present in every neighbourhood [...] People that are involved in activities to the benefit of Communism.

I: And how many people have access to CENESEX [in Cuba]?

P: Well, when I was there, almost 200 people.

I: And all of them had access to transition?

P: No, it’s step by step but, in reality, the steps [...] are never to be accomplished. Of those 200 people eh, maybe four or five can fulfil them, max.

P: You want to be a woman, look like a woman but you do not want to have a vagina because you enjoy sexuality with what you were born with. So, it’s a very big frustration [...] in Cuba. Trans people who do not want to have surgery do not have any kind of rights; they do not have any kind of opportunity.

P: In Cuba, you do not get any of that, to get breasts, or [surgery on] your buttocks or hips, none of those things, all those things are illegal [...] you have to pay 500 or 1000 dollars so they do it to you. [...]

I: So, it is illegal to do this type of trans surgeries, plastic surgeries. And yet, there are [people] doctors who perform them?

P: Yes.

I: Ahem, and they perform operations in any place?

P: In their homes or any place they may have, a warehouse for doing those kinds of things.

I: If you [...] have an infection that you got because you just got breast implants and you need a doctor?

P: You go to the hospital, but as soon as you arrive [...] the hospital doesn’t want to be responsible for what may happen to you, you understand? Then there has to be more information to the police about you having breast implants, that you are a “transgender” and that you shouldn’t have breasts [...] and then things escalate until the doctor arrives. The doctor goes to jail and that’s it.

I: So, the person that operates you goes to jail?

P: Yes, and loses their licence, because it is illegal.

These participants’ experiences resonate with our trans-specific background research information, which corroborates the lived reality of trans Latinas. The absence and/or inaccessibility of gender care in combination with a desire to avoid discrimination and humiliation in healthcare leads to improvised, risky, inferior, and unqualified bodily affirmations.

How are healthcare aspects (in Cuba) considered in the asylum procedure?

In the cases of five trans Latinas, three of whom originate from Cuba⁴⁰³ and two from other LAC region countries, the immigration service held the opinion that the applicants had access to healthcare. The immigration service voiced this opinion as part of the severity assessment, briefly listing indicators supporting the view that the lives of these trans Latinas in their country of origin were tenable. It is not clear what information was used for this assessment.

The research showed that for these five, access to competent, non-discriminatory gender care was absent. The fact that three of them were from Cuba meant that they had no access to gender care, which is under the control of CENESEX, for reasons mentioned earlier. All five trans women turned to improvised self-medication and two of them had substandard and/or improvised body affirming procedures.

The immigration service was aware that trans Latinas organised self-medication and, in one case, improvised breast augmentation⁴⁰⁴ in non-competent, unorthodox gender-affirming methods. These trans women clearly needed gender care and the adoption of unorthodox measures is a tell-tale sign of the absence of or high thresholds for gender care according to human rights standards. The Yogyakarta Principles states that providing access to competent and non-discriminating gender care is a government responsibility not being fulfilled in these trans women's countries of origin. We can conclude, therefore, that the immigration service misinterpreted these participants' access to healthcare.

The lack of consideration for this trans relevant theme is in strong contrast to the current problems regarding gender-affirming healthcare for trans Latinas in many countries in the LAC region. No traces were found of the immigration service's informed consideration of the specific circumstances of gender care in any of the five participants' hearings, or in any reference to COI relating to the provision of gender care, or in any argumentation underpinning intentions or decisions.

It is worth noting that, as of 2017, EASO provides Medical Country of Origin data (MedCOI) on request in individual asylum cases to national asylum authorities in Europe for the purpose of asylum procedures. This system may offer the opportunity in individual cases to access information on gender-affirming healthcare in countries of origin.⁴⁰⁵

Consideration of Cuba's CENESEX

The State Secretary has formally mentioned the "funding by the Cuban state of 'sex change' surgery"⁴⁰⁶ on two occasions.⁴⁰⁷ Was the immigration service's assessment that "three trans Latinas had access to healthcare" based on this statement? We do not know, but this very short and positive mention is not representative of the situation reflected in the background research information, which shows very restricted access to gender care in Cuba. Moreover, we observe the positive interpretations by the State Secretary of CENESEX, the gatekeeper to gender care in Cuba, to be one-sided. In addition to the observations already mentioned that indicate a highly restricted access to gender care in Cuba, we want to look at a specific COI compilation.

The country of origin information about Cuba, compiled by ACCORD in 2017,⁴⁰⁸ contains a larger section about CENESEX, the Centro Nacional de Educación Sexual and its director, Mariela Castro. We consider its content here, also as a positive example of COI that digs further into LGBTI-related themes even though it is inconclusive. Castro and the organisation are closely intertwined and connected to the Cuban state and the provision of gender care. On the one hand, there are some indications of progress and greater visibility for LGBTI issues in this COI compilation; on the other hand, there is significant criticism and doubt about whether CENESEX's communications and actions concerning LGBTI persons have a real impact. The criticism observes the organisation to be a conscious state effort to create a positive image of Cuba. LGBTI activists encounter antagonism from CENESEX and its gender care is seen as restricted and lacking capacity. The ambiguity of this COI precludes clear conclusions about the

⁴⁰³ A third trans woman's claim that she had been excluded by CENESEX for "not being a good communist" was found to be credible.

⁴⁰⁴ The immigration service was unaware of the use of silicone injections in this case.

⁴⁰⁵ EASO, 2017. "EASO MedCOI Transfer Project". Available at: <https://www.easo.europa.eu/information-analysis/country-origin-information/ea-so-medcoi-transfer-project>; last accessed 16 December 2020.

⁴⁰⁶ The State secretary highlights "sex change surgery" but this is only one aspect of a larger package of gender care. The expression "sex change" is insensitive, the term sex reassignment surgery is preferable.

⁴⁰⁷ AbRvS 2018, para. 2.1; State Secretary of the department of Justice and Security, 2018.

⁴⁰⁸ ACCORD, 2017 A, pp. 165-173.

organisation in our opinion. It should be noted that the information on CENESEX in COI and background research does resonate more with participants' experiences of this organisation as a gatekeeper that obstructs their access to gender care for different reasons and does not resonate with the State Secretary's position. Given the above, the immigration service's positive interpretation of CENESEX is misplaced and the aforementioned remark by the State Secretary must be called into question.

Summary Chapter 3.2

The majority of countries in the LAC region fail to meet the human rights standard for gender-affirming and/or general healthcare set out in Principle 17 of the Yogyakarta Principles (2007). In practice, the right to access health/gender care is often not implemented and in some countries, there are high thresholds and abusive preconditions such as pathologisation, the absence of informed consent in treatment, sterilisation, and mandatory sex reassignment surgery, these last two amounting to serious human rights violations.

We cannot follow the assessment made by the immigration service in the asylum procedures of five trans Latinas that they "had access to healthcare." These assessments are not supported by a motivation and are contrary to background research information and the narratives of participants. The immigration service has missed in participants' cases to uncover facts about and consider the accessibility problems of gender care and its abusive preconditions. Healthcare provision in trans persons' asylum cases should not be deemed accessible when access and restrictions to gender care are problematic.

All the improvised, substandard medical procedures that involve significant health risks and high costs should have been added in assessments to the negative experiences that can accumulate to persecution instead of deeming healthcare to be present. The only small exception to the limited consideration of gender care was a remark by the State Secretary "that Cuba finances sex changes." Taken at face value, this statement is true, but a reconstruction of the facts reveals that what is on offer is of little benefit to trans persons in Cuba. Unfortunately, the remark by the State Secretary resonated through Council of State verdicts that are used by the immigration service in their decisions in asylum cases.

The high percentage of trans Latinas infected with HIV revealed in background research information is also a general indication of the high burden of marginalisation they already face. Participants were reluctant to disclose and talk about their HIV status also indicating the stigma they faced and/or feared.



© Isaac Esquivel/cuartoscuro.com ,2018. Image showing a trans woman presenting her new birth certificate outside the civil registry.

3.3 Legal gender recognition

The previous chapter illustrated, among other things, the issues arising from the immigration service approaching the existence of gender care in a country of origin in terms of an “on/off switch,” i.e. it exists or it doesn’t. Consequently, the burden of exclusion and discrimination inherent in healthcare systems where gender care is characterised by restrictions, an abusive nature, and violation of human rights, remains hidden. This is equally true for the second trans-related theme of legal gender recognition (LGR) that will be addressed in this chapter. Even when present, access to LGR can be connected to thresholds that may amount to human rights violations.⁴⁰⁹

Yogyakarta Principles

Legal gender recognition is the official recognition in public registries and key documents⁴¹⁰ of a person’s gender identity, including gender marker and name(s). The Yogyakarta Principles (2007)⁴¹¹ are also a benchmark for our considerations on legal gender recognition. In particular, Principle 3, sections (a) to (f) proclaim that states shall:

- ensure that all persons are accorded legal capacity in civil matters and the opportunity to exercise that capacity.
- Take all necessary legislative, administrative and other measures to fully respect and legally recognise each person’s self-defined gender identity.
- Take all necessary legislative, administrative and other measures to ensure that procedures exist whereby all State-issued identity papers which indicate a person’s gender/sex — including birth certificates, passports, electoral records and other documents — reflect the person’s profound self-defined gender identity.
- Ensure that such procedures are efficient, fair and non-discriminatory, and respect the dignity and privacy of the person concerned.
- Ensure that changes to identity documents will be recognised in all contexts where the identification or disaggregation of persons by gender is required by law or policy.
- Undertake targeted programmes to provide social support for all persons experiencing gender transitioning or reassignment.

Which countries provide legal gender recognition?

We considered data from Malta *et al.* (2019), Berredo *et al.* (2018), and the ILGA (2017)⁴¹² when defining which countries fulfil the requirements for legal gender recognition mentioned below. The 21 countries in this research were selected⁴¹³ from ILGA’s “Trans Legal Mapping Report”⁴¹⁴ and include: Argentina; Bolivia; Brazil; Chile; Colombia; Costa Rica; Cuba; Dominican Republic; Ecuador; El Salvador; Guatemala; Haiti; Honduras; Mexico; Nicaragua; Panama; Paraguay; Peru; Saint Lucia; Uruguay; and Venezuela. The Dominican Republic, Guatemala, and Paraguay, which allow people to change their name but not their gender marker are considered to fall short of providing legal gender recognition in this research.

Seven countries of the 21 provide unconditional legal gender recognition: Argentina; Brazil; Chile; Colombia; Costa Rica; Mexico (six out of 31 states); and Uruguay.

Five countries provide legal gender recognition with different forms of restriction: Bolivia demands a psychological examination to be eligible for LGR. Cuba has restricted access by imposing sex reassignment surgery (SRS), demanding medical certification and a judicial procedure. Panama also demands mandatory SRS in order to be eligible for legal gender recognition. Ecuador places a permanent marker on documents that reveal gender changes and thus reveal the private information of a person’s trans history. Peru demands a judicial procedure.

⁴⁰⁹ REDlactrans, 2014, p. 10.

⁴¹⁰ Birth certificates, identity cards, passports, educational certificates, and other similar documents.

⁴¹¹ Yogyakarta Principles, 2007, p. 11.

⁴¹² Malta, M. *et al.* 2019; Berredo, L. *et al.* 2018; ILGA, 2017.

⁴¹³ Selection as described in 1.3, Method and Data, under the header “the region.”

⁴¹⁴ ILGA, 2017, pp. 85-105.

If a state imposes SRS, sterilisation, or other mandatory medical interventions as a condition for access to LGR, it should be taken into account not only that this violates a trans person's privacy and integrity, but also that the absence or limited access to these medical interventions can obstruct or delay access to LGR. Nine countries do not provide legal gender recognition: Dominican Republic; El Salvador; Guatemala; Haiti; Honduras; Nicaragua; Paraguay; Saint Lucia; and Venezuela.

How to provide legal gender recognition

Various organisations have emphasised the importance of legal gender recognition.⁴¹⁵ Its provision should be quick, transparent, accessible, without financial thresholds, and based on the way a person declares their own gender identity. The procedure should be accessible to all, irrespective of age, medical status, or police record. It should be free of abusive preconditions like compulsory sterilisation, other medical treatment, mental health diagnosis, restrictions on the right to remain in a marriage, or spouses and/or children losing certain rights. There should be consideration of a third legal gender option for those seeking it.⁴¹⁶ The Inter-American Commission on Human Rights sees the way legal gender recognition is implemented in Argentina⁴¹⁷ as a good model for countries within the American continents.⁴¹⁸ It abides by the recommendations described above except for a third legal gender option.

Problems for trans Latinas when legal gender recognition is absent

According to the UN (2016), legal gender recognition is a gateway to and "critical to the protection of all of the human rights of trans persons, including protection from violence, torture and ill treatment and discrimination, rights to health, education, employment, housing and access to social security, and freedom of expression, peaceful assembly and association."⁴¹⁹

What does it mean for trans Latinas not to have (access to) legal gender recognition in their countries of origin? From the moment they start expressing their gender identity participants will face continuous and repeated difficulties in many situations when having to legitimise themselves in public life, e.g.: entering into a phone contract; travelling by plane; crossing borders; being stopped at checkpoints; obtaining a public transport pass; opening a bank account; picking up a package or medication; claiming a heritage; proving kinship to family in hospital; applying for a job; healthcare contacts; renting a space or a hotel room; or registering for and taking part in education. All such situations have the potential for exclusion, discrimination, or violence.⁴²⁰ Trans Latinas are often stopped and searched by state authorities and producing identity papers with a masculine gender marker can aggravate such situations. It is hard to find protection and justice from authorities in cases of gender-based violence,⁴²¹ arbitrary arrest on the grounds of "presenting false identification," or a trans woman being imprisoned as a man, i.e. according to the sex assigned at birth. In the LAC region, the latter usually involves incarceration in overcrowded male prisons. The known and predictable occurrence of discrimination, gender-based and sexual violence that these trans Latinas are frequently confronted with and are not protected against, amounts to cruel, inhuman, or degrading treatment or punishment.⁴²²

Examples in the lives of trans Latinas

Below are five examples from our research interviews about a lack of legal gender recognition (interviewer = I; participant = P).

⁴¹⁵ IACHR, 2015 C, p. 270; UNAIDS, 2014 B, p. 223; Baker, C. 2013, p. 4; HRW, 2016, pp. 1-2.

⁴¹⁶ TGEU, 2016 B, p. 13.; UNDP, 2013, p. 25.; IACHR, 2019. "IAHCR Welcomes Progress on Recognition of the Rights of Trans Persons in the Region". Available at: https://www.oas.org/en/iachr/media_center/PReleases/2019/085.asp; last accessed 14 December 2020.

⁴¹⁷ TGEU, 2012. "English Translation of Argentina's Gender Identity Law as Approved by the Senate of Argentina on May 8, 2012". Available at: <https://tgeu.org/argentina-gender-identity-law/>; last accessed 17 December 2020.

⁴¹⁸ IACHR, 2015 C, para. 419.; UN, 2016 A, p. 94 on Argentina and Malta.

⁴¹⁹ *Ibid.*, p. 94.

⁴²⁰ UNDP, 2013, p. 23.

⁴²¹ REDlactrans, 2012, p. 30.

⁴²² UN, 2016 A, p. 41.

On name change without gender marker adaptation.

I: So, you can change your name but not your gender, ah ok.

P: And that's like [...] that's worse because it generates more confusion. You get to the entities [authorities] and you show them your ID card, and they see you [...] and, as I previously said, people tend to discriminate against you, so they will realise I'm trans and so they will look at what gender it is shown on my ID card [...] and that is just worse because it creates misunderstandings and they take advantage of you and make you go through a hard time.

On public transport and checkpoints without LGR:

I was traveling on public transport every day, half an hour outward and half an hour back. The national police have checkpoints. During the travel there are several checkpoints from the national police. Those workers would say, for instance, that all men had to get off the bus. Though I looked like a woman, my identity card says that I am a man, so I got off the bus. I would be laughed at and made a fool publicly by making me do my shirt up and see my bra. I had to take the bra off. They said there might be things in it that I was not allowed to take along. I told them "you cannot do this" and that their behaviour was bad. They replied that they could, that it was according to the law and that I was simply a man, and they were not aware what I had put in my empty bra. Imagine how one feels in such a moment. I felt humiliated and insulted. They search and touch your buttocks and all. They excuse themselves by saying you're a man, but touch you just a bit longer because you look like a woman. I saw that I was the only one being treated that way, unlike the other men in the row. They misused their authority. This happened twice a week for as long that I travelled that way.

On legal gender recognition and education:

I had started with a study in university. I was not accepted as the female I am. I did not have to cut my hair off but I had to dress as a man. I was not allowed to appear in women's clothes.

On fear of imprisonment with men:

I could no longer take part in manifestations because I was scared to be arrested. If I would be arrested by the police, I would be put in a cell with men, or in a male prison. I don't have to tell what happens between men in a prison. I refer to rape.

In a research interview, another participant states:

P: I had it coming, because you do transvestism, why you dress as a woman if you are a man. It's what the police tells you. And I had a problem with a police officer who beat me, because they were registering me, and I was dressed up as a woman and everything. And then when I showed them my identity, because my identity is not, the person they were looking at. And then they started to bother me and everything [...]

I: Who?

P: The policemen.

I: The police themselves? what did they say to you?

P: They told me, because [...] that this was not me. That why what they are seeing is a woman and the identity card says that I am a man. Well, I told him that I was trans. And he asked me why I was dressed like that, if god had sent me a man [...] And what he did that he pushed me, so obviously I had to push back, and he answered by hitting me with his gun. He hit me in the head, and others kicked me. Then it was a situation that well, I had to go to the doctor, to get medical attention, cure the wound that was made in my head. That they had broken something.

In a second hearing in the asylum procedure, another participant told her story of what happened when she was in a male prison ward. The questioner summarised this participant's narrative:

In [year] you were arrested and were detained in prison for a year. You had to dress forcibly as man and your women's clothes were taken away. You were raped three times by the chef.

The lived experiences mentioned here clearly illustrate trans Latinas' vulnerability for exclusion, discrimination, and violence when the difference between the gender marker and the identity expressed in their documents are interpreted in a negative and discriminatory way.

The LGR status of our participants

Seven participants lived without official recognition in public registries and key documents in their country of origin: Two of these participants came from a country where there is no possibility whatsoever of obtaining legal gender recognition.

Four participants come from countries that have abusive preconditions to achieving legal gender recognition, including obligatory sex reassignment surgery and restrictions to accessing this surgery.

The three Cuban participants did not fulfil the requirements to access healthcare through CENESEX. Not being able to get healthcare also means not being able to fulfil the mandatory sex reassignment surgery⁴²³ to obtain legal gender recognition. Furthermore, according to Marple (2015)⁴²⁴ and Romero Moreno (2018),⁴²⁵ those forced to file a lawsuit (another violation of rights according to the Yogyakarta Principles) to obtain legal gender recognition have to await the uncertain outcome of contradictory legal procedures. Having submitted to sex reassignment surgery does not necessarily mean that the new identification will be approved or provided. The fourth participant had not come out as a trans women in the country of origin, where there is no public gender care available and sex reassignment surgery is mandatory in order to obtain legal gender recognition.

One participant came from a country where, since 2015, there has been a legal possibility of obtaining LGR. However, she was unaware of this when returning to her country one year later. She already lived openly as a trans woman and survived by doing sex work in neighbouring countries. She did not apply for LGR believing there was little chance of success. According to an international non-governmental organisation, the legal gender recognition available in this country is often obstructed by discretionary legal and administrative powers.⁴²⁶ She fled her country of origin one year later.

Only one of eight participants has obtained documents that show her female names and gender marker in the country of origin. This was not obtained by legal gender recognition, however.

The issue of how legal gender recognition is dealt with in the asylum procedure will be discussed below.

Approach to legal gender recognition in asylum procedures

How is the issue of legal gender recognition present in and considered by the asylum procedure?

Observations show that, at no point in our participants' asylum procedures, were the absence of, restricted access to, and/or abusive preconditions to acquiring legal gender recognition in their countries of origin asked about or taken into consideration. In fact, our participants' narratives made clear that there are serious and negative consequences for a trans Latina who is asked to provide identification in public while not being legally recognised. The immigration service consistently failed to connect such incidents with an absence of LGR.⁴²⁷ Furthermore, the immigration service showed no signs of awareness, inquiry, or consideration for the way mandatory sex reassignment surgery, sterilisation, and other demands by governments are serious infringements of the human rights of the trans women involved. This apparent lack of awareness or understanding is pressing since the absence of

⁴²³ ILGA, 2017, p. 94.

⁴²⁴ Marple, O. 2015.

⁴²⁵ Romero Moreno, L. 2018. "Cuerpos Abyectos y Violencia Policial", *Cuba Posible*. Available at: <https://cubaposible.com/cuerpos-abyectos-violencia-policial/>; last accessed 17 December 2020.

⁴²⁶ We cannot reveal the document without revealing the country of origin.

⁴²⁷ Madrigal-Borloz, V. 2018, par. 43.

adequate legal gender recognition by their governments also contributes to incidences of arbitrary arrest and/or violence by state authorities. This was often done under the pretext of “presenting false identification.” It was hard for trans Latinas to find protection and justice from authorities on such occasions. Trans women seeking protection against gender-based violence as women were often obstructed. Furthermore, it was impossible for trans Latinas to avoid being incarcerated according to the sex assigned at birth without legal gender recognition. Imprisonment of trans women in male prisons amounts to cruel, inhuman, or degrading treatment or punishment. Again, this risk was not considered as a risk to cause a well-founded fear of persecution upon return to the country of origin.

In two asylum procedures, the immigration service considered legal gender recognition to a very limited extent, namely in their interpretation of whether or not an LGR provision existed “theoretically” in the country of origin, as an on/off switch.

Case one

The first case concerns a trans Latina who possessed identification with female names and gender marker. She applied for the identification using a forged birth certificate, which her family bought from a civil servant in her country of origin. She anticipated the problems of not being able to identify herself properly, and would have been confronted with, among others, exclusion and discrimination in healthcare, housing and work, no legal protection, and no right to vote. Someone told her how others managed to obtain modified identification by buying a forged birth certificate. The only legal route was too expensive, in another state within the Republic, with a highly uncertain outcome, and with no guarantee that one’s own state of origin would recognize the outcome. She felt that buying the certificate was the only way she had of surviving as a trans women in her country of origin.

Poor country of origin information

In this case, the immigration service relied on information from sources⁴²⁸ that assumed the existence of a legal route (established in 2004 and enhanced in 2008) to legal gender recognition in only one state of a much larger republic. The state in question was not the participant’s state of origin. While initial steps were taken to open up a route to legal gender recognition in this particular state, the information from these sources did not specify any of the onerous conditions that had to be fulfilled and the uncertainty of whether legal gender recognition would actually be granted (this was the case until 2015). The information portrayed legal gender recognition as an on/off switch. The immigration service dealt with the trans Latinas case based on this misrepresentation of access to LGR. It overlooked that other COI, presented by the immigration service itself, included contradictory information and that confirmed that the provisions entailed high costs, an uncertain outcome, and mandatory sex reassignment surgery.

In the “opinion”⁴²⁹ in response to the immigration service’s “intention”, her lawyer explained that at the time she needed legal gender recognition, it might have been possible on paper, but in practice it was nearly impossible to acquire. It was also very expensive and the participant did not have the funds to pay for it. Unfortunately, the lawyer did not provide further documentation to support this correct “opinion,” which was rejected by the immigration service.

Our background research reveals that other information, not used by the immigration service and the lawyer, specified the many and huge hurdles and the uncertain outcome of the legal route mentioned in the asylum procedure: The only option between 2004 and 2015, the period when she needed legal gender recognition, was the following: A trans person from another state had to move to the only state in the republic where the legal procedure could be started. Moving into unknown territory and having no connections is especially hazardous to trans women. It is also a highly urbanised state where most violence and murders against trans persons occur. Without identification that reflects their gender identity, most trans Latinas are confined to working in the informal sector (often sex work) to earn money and finding a place to sleep is very difficult. Landlords force them to pay extortionately high

⁴²⁸ One source was an international NGO and the second was a Wikipedia page. The international NGO was contacted twice via email about this research with respect to the differences between their information and our research background information. We did not receive a reaction.

⁴²⁹ The lawyer has the right to react after the “intention” to a decision by the immigration service giving a “opinion,” which must be considered in the final decision.

rents without a formal lease and evictions occur at the whim of the landlord. This was a problem since, to start a legal procedure for legal gender recognition, trans people needed to prove their residence in the state by being formally registered at an address. Those unable to prove residence were thus excluded from this process.

Trans persons had to file a lawsuit against the civil registry in order to change the entry on their birth certificate. The financial costs involved were enormous. The trans person needed a lawyer and had to be under the care of two medical experts for a year. The medical experts had to produce documentation on and testify to the trans woman's medical and hormonal status. Medical transition, including mandatory gender reassignment and sterilisation, had to be completed and paid for herself.⁴³⁰ In addition to the money involved in medical transition, the expenses for legal costs were between 6,000 and 8,000 US dollars. On top of this she had to pay for living and accommodation costs in an expensive city. The process would take about a year, with an uncertain outcome, since the change to the birth certificate was at the judge's discretion. Even if a positive verdict was achieved in this one state, it was still uncertain whether the state where the trans Latina was born would ratify this verdict and subsequently change the birth certificate.

This background research information did not find its way into the participant's asylum procedure, either through the immigration service or the lawyer. The complexity of acquiring legal gender recognition, including the many conditions and the uncertain outcome, were never considered in the assessment.

In sum, in this case, the legal route was not a realistic option. It would have been a gamble with very high costs and a high risk of a negative outcome for someone from a poor rural background originally from another state. Obtaining a forged birth certificate was the main route and is frequently taken by trans persons seeking to survive.

Deemed not credible

The participant informed the immigration service honestly about the forged birth certificate, on her own initiative, at the first moment possible in the asylum procedure. The immigration service did not believe that the birth certificate was forged. The presence of a fingerprint on a "declaration of behaviour" provided by the participant led to the assumption that the authorities would have checked fingerprints and identity when approving the document. This, in turn, led to the idea that the identification had been checked in the country of origin and could not originate from a forged birth certificate. Secondly, a rather vague 2004 news article by an international non-governmental organisation provided information that misrepresented the possibility of legal gender recognition in one particular state in the republic.

The participant was deemed not to be credible in terms of having acquired a forged birth certificate. Instead, the immigration service assumed that "the Minister is misled about her identity and nationality by declaring in a non-credible way that she obtained the current identity fraudulently." Moreover, the immigration service assumed that "the purpose of this [non-credible] declaration was to obtain a better position hoping to be eligible for asylum." The reasoning behind the assessment of non-credibility in the decision by the immigration service was rebutted by the district court. Despite this, the second time the immigration service provided a decision it followed the same reasoning again. This second decision was withdrawn by the immigration service before a second court appeal. In the third round of intentions and decisions in this asylum case, it was deemed credible that a forged birth certificate was obtained by the participant.

The two "cycles" in the asylum procedure of this trans Latina were dominated by the assessment that her story of a forged birth certificate was not credible and, as shown above, she was explicitly accused of deliberate action to enhance her eligibility for asylum.

In sum, this situation could have been prevented if there had been a better estimate in the COI of the improbability of gaining legal gender recognition, combined with good insight on the desperate situations that can lead a trans Latina to turn to unconventional measures to survive. In short, her narrative could have been deemed credible from the outset.

⁴³⁰ Alarcon, D. 2015. "Redefining Gender in Mexico City", *The New York Times*. Available at: <https://www.nytimes.com/2015/03/08/magazine/redefining-gender-in-mexico-city.html>; last accessed 22 December 2020.

Case two

In the second case of a trans person **not** in possession of legal recognition, the COI on access to LGR was also misinterpreted and no attempt was made by the immigration service to informing themselves further about details that revealed severe restrictions. Furthermore, immigration service stated that, “in [state] it is possible to adapt your name data in legal documentation.” This inaccurately represents legal gender recognition as “name data adaptation” while a change in the gender marker is also required.

Summary Chapter 3.3

Legal gender recognition without abusive prerequisites, as defined in Principle 3 of the Yogyakarta Principles, is a critical provision and protection that is essential for obtaining other fundamental rights. Roughly half of all countries in the LAC region provide for legal gender recognition, but several of these countries have legislated abusive preconditions that violate human rights, including gender reassignment surgery, sterilisation, and a mandatory medical trajectory.

Nearly all participants carried documents defining them as men while identifying and expressing their gender identity as women. Not having a realistic chance to acquire identification according to their identity left them extremely vulnerable to discrimination, violence, cruel, inhuman, and degrading treatment, also by state authorities. This situation was either due to an absence of legal gender recognition, or abusive legal and medical preconditions, limited healthcare access, and/or government restrictions of the type previously seen in Cuba.

The issue of legal gender recognition is not easily assessed. Considering it in terms of an on/off switch, as either present or absent, is not enough. As seen in this chapter, LGR can be made dependent on conditions such as sterilisation and sex reassignment surgery. Trans Latinas thus require access to gender care, which, in many cases, is inaccessible, absent and/or also subject to preconditions. Making legal gender recognition conditional on the completion of medical processes can mean a delay of several years before a trans person can achieve the degree of protection that LGR can provide. It is evident that other abusive legal requirements can also hinder trans persons’ access to legal gender recognition, including forced divorce, the need for extra legal procedures, the demand for additional medical or other reports (and associated costs) in such procedures, and outcomes of procedures being dependent on a court’s discretion.

Each country can have a specific set of restrictions. Clear examples of this complexity can be observed in this research with respect to Cuba and the country of origin of the aforementioned trans Latina with the forged birth certificate.

It is obligatory for the immigration service to assess whether a trans Latina can receive protection in her country of origin. Given this, it is important that a country’s circumstances regarding legal gender recognition are considered. Specific COI research about a trans asylum seeker’s country of origin and its use in uncovering this complexity is seen here as highly relevant to the assessment of the severity of the applicant’s circumstances and experiences.

The absence of awareness about issues connected to legal gender recognition means important considerations are omitted in asylum procedures. Restrictions with respect to trans Latinas’ fundamental human rights, resulting in exclusion, discrimination, violence and cruel, inhuman, and degrading treatment are not currently recognised by the immigration service, despite their pervasive and structural nature. Taking such hardships into account would provide crucial insight into, for example, why obtaining a forged birth certificate is essential to survival in a number of countries in the LAC region.

It is important to note here that discussing legal gender recognition does not mean that all trans persons want to change their legal gender, for instance when the legal options provided do not fit a non-binary person’s identity.



© Camilo dos Santos, 2018. Image showing a person presenting the message "Ley Trans Ya", Trans Law Now, on their clothing and banner.

3.4 State violence towards trans Latinas

Most trans Latina participants experienced discrimination and violence from the police, and some at the hands of prison guards, in their countries of origin. In addition, military armed forces may also contribute to this since they engage in civil law enforcement tasks in the LAC region.⁴³¹ In this research, state authorities include police, prison guards, and military forces. Since this is an extensive theme, we have separated it into two subchapters, the first containing the background research information and participants' experiences, and the second dealing with the representation and assessment of this violence in asylum procedures. A combined summary covering both parts is provided at the end of Chapter 3.4.

3.4.1 Information about and experiences of state violence towards trans Latinas

Background research information

Collecting specific information on adverse experiences and circumstances is frequently done by local trans persons/organisations in the LAC region, despite the risk to their own lives.⁴³² It is assembled here together with the sparse relevant information on the experiences and circumstances of trans people in connection to state authorities.⁴³³ "Visibility" contributes to a trans person's risk of being subjected to violence by state authorities. When visible as a trans person, a sex worker, a displaced person, or someone from a lower socioeconomic class,⁴³⁴ an individual is prone to harassment, humiliation, and exploitation by the police and others. Laidlaw (2016) mentions state authorities' tendency to stereotype and profile transgender people as criminals, thus subjecting them to heightened surveillance and increasing the likelihood of them being drawn into the criminal system.⁴³⁵ Trans Latinas (believed to be) involved in sex work are at high risk of being mistreated by state authorities.⁴³⁶ Trans sex workers are targeted constantly, susceptible to violence, arbitrarily arrested, and face greater discrimination and illegal arrests by state authorities.⁴³⁷ Environments such as police stations, prisons, detention centres, refugee camps, and border facilities often heighten the risk of LGBTI persons being harassed, violated, and abused by state authorities, among others.⁴³⁸ Lanham et al. (2019) reports, in a qualitative research with 74 trans women in the LAC region that 80 per cent experienced gender-based violence from the police. Participants in four countries in the LAC region reported that the police commonly refused to help them or were negligent in their duties when trans women sought assistance.⁴³⁹ Internal instability in, or repression of the population by the state is present in several countries in the LAC region and is an aggravating factor in terms of police violence against trans people and "social cleansing."⁴⁴⁰ The resulting displacement may increase their vulnerability and exposure to violence even further.⁴⁴¹ The United Nations points to state authorities posing a risk to LGBT persons in the form of cruel, inhuman, or degrading treatment or torture in all kinds of detention settings.⁴⁴² At the same time, the Office of the United Nations High Commissioner for Human Rights stated in 2016 that the focus on cruel, inhuman, or degrading treatment or punishment and torture had failed people who transgress sexual and gender norms and gaps should

⁴³¹ Pion-Berlin, D. and Carreras, M. 2017. "Armed Forces, Police and Crime-fighting in Latin America", *Journal of Politics in Latin America*, 9 (3), pp. 3-26, esp. p. 4. Available at: <https://journals.sagepub.com/doi/pdf/10.1177/1866802X1700900301>; last accessed 17 December 2020.

⁴³² REDlactrans, 2012, ch. 3; USDOS, 2016, p. 16; Divan, V. et al. 2016.

⁴³³ Johnson, R., McCandless, S. and Renderos, H. 2019, p. 2.

⁴³⁴ Myrntinen, H. and Daigle, M. 2017, p. 21.

⁴³⁵ Laidlaw, L. 2016.

⁴³⁶ HRW, 2009, p. 10, 13.; ACCORD, 2017 B. "Mexico: Sexual Orientation and Gender Identity (SOGI), COI Compilation" (Vienna: Austrian Red Cross/ACCORD) pp. 1-47, esp. p. 20. Available at: <https://www.ecoi.net/en/document/1401522.html>; last accessed 17 December 2020.; Baker, C. 2013, p. 4.

⁴³⁷ IACHR, 2015 C, paras 94 and 281.

⁴³⁸ Myrntinen, H., Naujoks, J. and El-Bushra, J. 2014, pp. 14, 15.

⁴³⁹ Lanham, M. et al. 2019, pp. 37, 41.

⁴⁴⁰ Myrntinen, H. and Daigle, M. 2017, pp. 6, 8, 10, 21, and 29; Colombia Diversa, Caribe Affirmativo and Santamaría Fundación 2015 B, pp. 2, 3; Anon, 2014. "Los 'paras' Nos Mataban Por Ser Homosexuales", *Verdadabierta.com*. Available at: <https://verdadabierta.com/los-paras-nos-mata-ban-por-ser-homosexuales/>; last accessed 17 December 2020.

⁴⁴¹ Bixby, S. 2018. "Migrants Fled Persecution Back Home. Then They Fled the Caravan", *Daily Beast*. Available at: <https://www.thedailybeast.com/lgbt-migrants-fled-persecution-back-home-then-they-fled-the-caravan>; last accessed 17 December 2020; Anon, 2019 B. "Queer in the Caravan: The Dangers LGBT Migrants Face in Search for Asylum", *El Tecolote*. Available at: <http://eltecolote.org/content/en/features/queer-in-the-caravan-the-dangers-lgbt-migrants-face-in-search-for-asylum/>; last accessed 17 December 2020.

⁴⁴² UN, 2016 A, p. 40.

be identified and corrected.⁴⁴³

Information on state violence in specific countries

The scope of this research is not exhaustive. Rather, we hope to indicate the situation in those countries of origin in the LAC region where information is available and critical situations may exist. The information from **Colombia** collected by the LGBTI organisation Colombia Diversa and IGLHRC (2015 A), mentions 212 cases of police violence against the LGBTI community between 2008 and 2014, with trans women being severely affected while, at the same time, there is no state mechanism for gathering data on LGBTI related crimes and their investigation. Colombia Diversa and IGLHRC also report on the types of police violence experienced, including: physical violence on parts of the body trans women might modify;⁴⁴⁴ abuse of power; verbal and discriminatory language; forced displacement to prevent trans sex workers from working; arbitrary arrest and detention; sexual assault; cruel, inhuman or degrading treatment or punishment during detention and in public spaces, such as hair cutting; verbal aggressions; sexual favours demanded; extortion for sex or money; theft; and expulsion from public spaces.⁴⁴⁵ According to Espitia (2017), crimes against LGBTI persons are underreported and the Colombian police code of conduct has not been updated since 1970, when same sex relationships were still illegal.⁴⁴⁶ One hundred per cent of trans sex workers in Colombia have experienced police harassment;⁴⁴⁷ 78 per cent of trans people said they had been victims of the police, and 51 per cent were victims of private security agents.⁴⁴⁸ According to the United States Department of State, police officers refused to accept government-issued identification with transgender individuals' names and photographs.⁴⁴⁹ Grattan (2018) reports that machismo in Colombia within the police force has always been present and frequent violence against homosexuals and especially trans people is frequent, in particular in relation to sex work. The use of sexual violence against the LGBTI community is sometimes performed as social cleansing, resulting in the forced displacement of the subjects in question. This can also explain the high level of non-Bogotá native trans sex workers in the capital's red-light district.⁴⁵⁰ In **Mexico**, police officers and the military have been implicated for decades⁴⁵¹ in cases of arbitrary detention, torture, and other human rights violations that often go unpunished. They subject trans women to arrest, extortion, and physical abuse. Many trans woman have been victims, or know someone who has been a victim, of police violence. The research on Mexico⁴⁵² also adds some information on the pretexts for arrest, such as disturbing the peace, wearing female clothing, being perceived to be sex workers even if they were not, failing to carry a valid health card, and for allegedly carrying drugs. In Baja California, police detain and extort trans sex workers, making use of Police and Governance codes featuring an article that prohibits a person from being "disguised or dressed up in public."⁴⁵³ **Guatemala** is in a precarious situation with recent opposition to LGBTI rights. The murders of LGBTI persons are not documented in the police registries, and the exceptions that are registered go unpunished. Trans people also face great obstacles to accessing justice. Police officers that should protect members of the trans community from violent attacks are frequently perpetrators of violence themselves. Twenty-nine per cent of trans women stated that police officers were the principal agents of discrimination against them.⁴⁵⁴ According to Human Rights Watch (2009), **Honduras** is very violent in general and trans people arguably find themselves at the bottom of the heap⁴⁵⁵ of "vulnerable groups" facing aggression and violence from the police. Senior police officers in Honduras have acknowledged that the police force reproduces the stereotypes and roles that patriarchal society imposes and machismo and homophobia are a problem. They also mention that it is difficult to discuss topics concerning LGBTI persons with lower-ranking officers, because they assume that talking about these topics might mean that they themselves are part of this group.⁴⁵⁶ Human Rights Watch have documented police actions in Honduras that violated fundamen-

⁴⁴³ UN, 2016 B, par. 5.

⁴⁴⁴ Colombia Diversa and IGLHRC, 2015 A, pp. 11-13; Participant citation: "I have friends that have cysts and lumps in their breasts from the violence. They were hit on their breasts."

⁴⁴⁵ *Ibid.*, pp. 8, 11; Lanham, M. et al. 2019, p. 37; Ritterbusch, A. 2016, p. 429; Martánez, W. 2016. "Mockery Or Murder: The Horrors Of Being Transgender In Colombia". *Worldcrunch*. Available at: <https://www.worldcrunch.com/world-affairs/mockery-or-murder-the-horrors-of-being-transgender-in-colombia>; last accessed 17 December 2020.

⁴⁴⁶ Espitia, M. 2017.

⁴⁴⁷ Balzer, C., LaGata, C. and Hutta, J. 2015, figure 6, p. 21.

⁴⁴⁸ REDlactrans, 2012, p. 14.

⁴⁴⁹ USDOS, 2017 A, p. 45.

⁴⁵⁰ Grattan, S. 2018, p. 9.

⁴⁵¹ Transgender Law Center, 2016, p. 19.

⁴⁵² *Ibid.*, p. 18.

⁴⁵³ ACCORD, 2017 B, p. 19.

⁴⁵⁴ OTRANS et al. 2018, p. 7.

⁴⁵⁵ HRW, 2009, p. 13.

⁴⁵⁶ *Ibid.*, pp. 24-25.

tal human rights protections against torture and cruel, inhuman, and degrading treatment or punishment and due process.⁴⁵⁷ Policemen used their power to demand sex and to extort money from transgender people, often on pain of violence. They regularly fail to investigate crimes and provide protection to transgender people.⁴⁵⁸ Bixby (2018)⁴⁵⁹ argues that though some legal protection exists in Honduras (and El Salvador and Guatemala), it is largely negated by lax enforcement and a bottom-up police structure that puts a great deal of power in the hands of local law enforcement, many of whom are involved in criminal activity. Bixby also cites the IACHR's observation that most murders in Honduras are committed with apparent impunity. Trans women in particular may suffer aggravated and compounded violence regardless of whether or not they are engaged in sex work.⁴⁶⁰ In **Cuba**, trans women are constantly victims of abuse by the police. Being unable to access jobs and receiving no government support, they are often involved in sex work. Trans women are extorted for money or to provide sexual services in order to prevent arrest.⁴⁶¹ The IACHR calls for the protection of trans women against cruel, inhuman, and degrading treatment by the police.⁴⁶² The "Estado Peligroso," "dangerous state" article 72ff. of the Cuban criminal code is also criticised.⁴⁶³ It is a provision used by the police against, among others, trans women.⁴⁶⁴ The information on Cuba is particularly sparse. Legally, police have wide discretion to stop and question citizens, request identification, and carry out search-and-seizure operations.⁴⁶⁵ In Lima, in **Peru**, 46 per cent of the assaults reported were at the hands of the security forces, the Serenazgo, in night patrols, another 31 per cent were by the Policía Nacional, National Police, and a further seven per cent were the result of joint action by the two groups. In **Venezuela**, 97 per cent of trans women reported having experienced occasional police harassment and 56 per cent saying that they experienced police harassment often.⁴⁶⁶ There are clear indications that state authorities are targeting trans women in many ways, for many reasons, in many countries in the LAC region.

Participants' experience of state violence

Some quotes by participants:

P: I was arrested and put in a cell alone. A police officer came in who said: I feel like sex. What do you want? To have sex or to stay a few days to be mistreated and to get robbed, it's your choice. I chose the first. The sex was in the cell and afterwards I was allowed to leave. Another time, I said no. Why would I want sex with you? Because they all want sex without condom. I prefer being incarcerated. Thereafter, the officer leaves. He feels like a hero, "he tried to help you." So, he says, "I only wanted to help you." Thereafter several officers came to mistreat me, hit me, swear, belittle and provoke me. It is hard to keep that up for two days. At a certain point in time, you have to yield to that, to the sex.

P: Two months ago, the police took me to the police station. They said that I had women's hair and my hair should be that of a man. They handcuffed me and shaved the two sides of my head.

Remark immigration service: Claimant shows it by taking off her hairpiece.

P: Thereafter, I received a fine again.

P: The first time it happened I was walking down the street. He stopped me and asked me for my identification. And then he said to me, I do know what you are doing here. And I said, I do nothing at all. I am a [country] citizen and I am just walking here. Then he said, no you are just a prostitute. And that's why I am going to arrest you. And then he kicked me in the belly. And he pushed me to the ground. And then hand-

⁴⁵⁷ *Ibid.*, p. 18.

⁴⁵⁸ *Ibid.*, p. 28.

⁴⁵⁹ Bixby, S. 2018.

⁴⁶⁰ IACHR, 2015 B, "Situation of Human Rights in Honduras", pp. 1-230, esp. para. 133. Available at: <http://www.oas.org/en/iachr/reports/pdfs/Honduras-en-2015.pdf>; last accessed 24 December 2020.

⁴⁶¹ ACCORD, 2017 A, pp. 176-179.

⁴⁶² LGBT asylum support 2018, attachment 7, paras 73, 75, and 76.

⁴⁶³ IACHR, 2016, p. 554.; IACHR, 2017. "Annual report 2017, IACHR, Chapter IV b, Cuba", pp. 627-661, esp. p. 645. Available at: <http://www.oas.org/en/iachr/docs/annual/2017/docs/IA2017cap.4bCU-en.pdf>; last accessed 18 December 2020.

⁴⁶⁴ Romero Moreno, L. 2018.

⁴⁶⁵ USDOS, 2017 B. "Cuba 2017 Human Rights Report", pp. 1-29, esp. p. 5. Available at: <https://www.state.gov/wp-content/uploads/2019/01/Cuba.pdf>; last accessed 18 December 2020.

⁴⁶⁶ Saballe, C., Balzer, C. and LaGata, C. 2015. "The Social Experiences of Trans People in the Philippines" Transrespect versus Transphobia Worldwide Publication Series vol. 11, Transgender Europe, pp. 1-72, esp. figure 6 on p. 21. Available at: <https://transrespect.org/wp-content/uploads/2015/08/TVT-PS-Vol11-2015.pdf>; last accessed 18 December 2020.

cuffed me on my back. And then he said, “and now we walk to the police station”. But we were not going to the police station at all. He led me to another spot. And there, he raped me and said that it was my only rescue that I did this with him.

The serious violence expressed in the quotes are a lived reality that concurs with the background research information.

Seven out of eight participants experienced police violence. Five participants faced police repression and/or violence over long periods of a year, three years, four years, nine years, and ten years. These long periods were compounded by weekly to daily tension with police repression and/or violence. One trans Latina was chased nearly every evening/night as she tried to escape police interventions. She was arrested ten times in the course of four years. These ten arrests involved many counts of cruel, inhuman, and degrading treatment and possibly torture. Another was stopped and searched once or twice a week on public transport. Several were surveilled once a week or more and intimidated with warnings not to dress as women, threats of imprisonment, warning letters, warnings not to meet with friends, involving relatives, and entering participants’ living spaces. In addition, they faced police violence and repression in public spaces. Four of these five participants received between five and 100 fines, for “being dressed as women,” being in a city illegally, for prostitution (even if they were not involved in sex work), or disturbing public order.⁴⁶⁷ Four of them were arrested between five and 20 times. Three out of the five were sexually assaulted by police between one and ten times, including masturbation, fellatio, and rape amounting to cruel, inhuman, and degrading treatment. They were detained for up to 72 hours. Two of them had their long hair shaved off in police custody. In police detention, trans Latinas were insulted, slapped or punched, kicked, thrown on the floor, deprived of food, had water poured on them, robbed of belongings, extorted, and anally frisked. Two trans Latinas were displaced internally in the country because of police violence, intimidation, and threats of imprisonment and/or violence from non-government groups. One fled her country of origin to a neighbouring country. Two other participants experienced less frequent police violence. One was stopped and scrutinised for identity papers that did not fit her appearance. The incident turned into a humiliation and she was hit and kicked by four police officers, leaving her wounded. Several participants had negative experiences of filing complaints with police forces but most of them did not dare to try fearing further violence or deeming it useless. Four participants were imprisoned for periods of between two weeks and one year. The experiences of imprisonment are dealt with in Chapter 3.6.

3.4.2 Assessment of violence by state authorities in asylum procedures

The second part of 3.4 elaborates on the assessment of violence by state authorities in participants’ asylum procedures. The sections under the headers “Participant A, B and C” will discuss individual cases of severe state violence, i.e. participants who experienced long periods of police repression and/or violence on a daily or weekly basis. This is followed by a fourth section considering specifically the assessment of state violence towards Cuban participants.

Participant A

The discrimination and violence by the police towards this trans woman from Cuba were split into two “material facts” by the immigration service for the asylum assessment procedure. In one material fact, they considered the police discrimination and the violence experienced on a weekly and/or daily basis over a period of four years.⁴⁶⁸ This police discrimination and violence consisted of: surveillance; frequent fines and being taken to the police station for “being dressed as a woman,” for being in a city illegally, for prostitution (also when not doing sex work), and for disturbing public order. This trans woman was intimidated with threats of imprisonment under a “public order and vagrancy law,” received warning letters related to this law, and was arrested and imprisoned for two weeks followed by deportation back to her province. The police entered her living spaces on several occasions.

⁴⁶⁷ We prefer the term “sex work” but in citations we will repeat the term “prostitution” when it has been used.

⁴⁶⁸ A document showed entries in the police register recording over 50 warnings, fines, and transfers to the police station. She stated it to be only a snapshot of a larger file of entries.

The second material fact considered by the immigration service was that she was raped three times by a policeman.

In this case, a combination of two causes led to discrimination and violence by the police. Cause A was expressing a trans identity and cause B, was being involved in sex work.

Below are some quotes from this participant about the police violence experienced illustrating the links to causes A and B:

P: In [date] I graduated as a [profession]. On the day of the graduation, I wanted dearly to dress as a woman. I gathered all my nerve and courage. But to me this was a big event. It also meant great happiness to attend as a female. This was quite different for my fellow students and teachers. They were startled at seeing me. They gave me my diploma really quick and said I could not stay that way. I took a picture of myself for the occasion dressed as a woman. That is of great value to me. Together with a college with whom I graduated and who always loved and supported me. They said I had to leave but I did not want to. I wanted to enjoy the party. When they saw I would not leave and was taking pictures someone called the police. I don't know if it were fellow students or the teachers. The police came and arrested me and kept me in the police office for 24 hours. When they released me, they gave me a fine for 500 [currency] for disturbing public order.

P: I tried to get work in a whole lot of other places but I did not get work anywhere. I thought that maybe I should be less overtly feminine in my clothing. I mean, in my opinion it is not wrong for me to be dressed female but others are annoyed by it. Because I did not want to be in prostitution, I decided to dress and behave more manly. Then I got to work in [workplace].

Despite her (self-) restriction she was "being read as a trans person" and was fired after three months.

P: I earned money in prostitution. Because I could not get other work. This prostitution again led to a whole lot of problems with the police. Warning letters, I was taken to the police office 10 to 15 times a month.

P: the local police saw me one time dressed as a woman. He gave me a fine of thousand [currency] for disturbing public order.

P: I started prostitution then. [...] Who wants to do that is free to do so. If it is voluntary. For me it was no choice.

A separation of causes at odds with reality

A "material fact" is used in the asylum procedure to consider a participant's credibility and the severity of circumstances and adverse experiences. When deemed credible, and only then, will the immigration service consider the severity of these circumstances and adverse experiences. The "material fact" defined by the immigration service concerning police violence focuses on "what would cause the police violence against her?"

It is important in this case, that the immigration service decided to define the following material fact, which is only linked to cause A: "Person faced negative attention of authorities because of orientation and 'transgenderism'."⁴⁶⁹ This is followed by a credibility assessment of this material fact in their "intention" that attributes the violence to cause B, stating that "a lot of the 'negative attention from authorities' this trans Latina faced could be attributed to being involved in sex work and aspects of public order." As part of the consideration, the immigration service uses an entry recorded in the police register related to the issuing of a fine: "he was located on the public road dressed as a woman with signs of practice of male prostitution in the neighbourhood." Based on this state-

⁴⁶⁹ The immigration service stumbles when defining her identity, as "orientation" and "transgenderism." It is the literal translation from the immigration service's documents. It is a manner of speech we would not use. A more accurate term is "gender identity."

ment, the immigration service concluded “that person concerned is arrested because she practised prostitution, or a suspicion of such [...] Therefore, it is a matter of public order, not of being a woman or gay.” The immigration service argued that “a link between being a trans woman (or homosexual⁴⁷⁰) or being dressed as a woman and the police violence could not be established.” But the fact that it says “he” and “dressed as a woman” clearly points to, at least, police officers observing aspects of a trans identity and attention to gender non-conformance, “a male being dressed as a woman.”

Since the assessment attributes the police violence mainly to cause B, sex work, and the material fact attributes the police violence to cause A, her trans identity, the immigration service concludes that the attribution of the cause in the material fact is not credible. This leads to the immigration service “not testing this element as to the question if the asylum seeker can be seen as a refugee or recipient to article 3 of the ECHR.” The consequences of this negative credibility assessment are grave. None of the police violence “within the material fact,” as described above, was considered in the severity assessment for the asylum request.

The way in which this material fact is dealt with in the asylum procedure is rejected here; the way the material fact is constructed; how it is considered; how it leads to not considering the severity of the police violence and the separation of some of the police violence into a different material fact.

It is clear from the participant’s narrative, presented in her second hearing in an open way and without restraint, that both cause A and cause B (trans identity and sex work) provoked the discrimination and violence by the police. Evidence was also presented in the same hearing that she had been harassed and arrested arbitrarily for her trans identity by the police despite not having (yet) resorted to sex work. Given this information, it is astonishing that both the material fact as well as the assessment failed to acknowledge both causes. We do not think valid conclusions about credibility can be drawn from this approach by the immigration service. Finally, we highlight here three instances of rape that were assessed in a separate material fact in this case. In our opinion, such separate consideration hinders the understanding and assessment of the total picture of violence at the hands of the police that the participant experienced, also in terms of severity and pervasiveness.

Considering sex work and trans identity together

We think it is reasonable to consider the elements of sex work and a trans identity together when co-occurring. In our participants’ case, exclusion from family, work, and displacement⁴⁷¹ because of her identity left her with no other option than sex work, an experience widely replicated in the background research information.⁴⁷² Trans Latinas’ narratives and background information clearly point to a trans identity inherently producing a risk of police violence in itself. REDlactrans (2014) observes that arbitrary arrest, on charges that may appear to be based on reasons other than identity, can be a pretext for taking action against a person’s gender identity.⁴⁷³ Both the Human Dignity Trust and Human Rights Watch highlight a particular vulnerability to harassment, arrest, and prosecution under public order offences for both being a trans person and for engaging in sex work due to adverse circumstances.⁴⁷⁴ The independent expert⁴⁷⁵ observes that trans women are frequently targeted and prosecuted on the basis of “vagrancy” laws, regardless of whether they are in fact engaged in sex work.⁴⁷⁶ Fedorko and Berredo (2017)⁴⁷⁷ argue that prejudice and stereotyping of trans women can lead to them being associated with sex work and, consequently, being targeted as sex workers, even when this is not the case. Research also shows how trans sex workers face greater discrimination, violence, and more arbitrary arrests by police compared to non-trans sex workers. This clearly indicates that a trans identity is a cause that should be considered, also when a trans person is involved in sex work.⁴⁷⁸

Summarising the assessment of police violence concerning Participant One, we observe that the immigration

⁴⁷⁰ The immigration service does not define her identity, adhering both to sexual orientation and trans identity.

⁴⁷¹ When displaced in Cuba, without a legal address, one can be deported back to the own province, making a person virtually illegal in their own country.

⁴⁷² UNAIDS, 2014 B, p. 217; REDlactrans, 2014, p. 20; See also Chapter 3.5.1, under “Reasons for sex work”.

⁴⁷³ REDlactrans, 2012, p. 16.

⁴⁷⁴ Human Dignity Trust, 2019, p. 37; HRW, 2009, p. 10

⁴⁷⁵ Mr. Vitit Muntarhorn was the first independent expert on protection against violence and discrimination based on sexual orientation and gender identity, appointed by the United Nations Human Rights Council. He was succeeded by Victor Madrigal-Borloz.

⁴⁷⁶ Madrigal-Borloz, V. 2018, para. 56.

⁴⁷⁷ Fedorko, B. and Berredo, L., 2017, p 10.

⁴⁷⁸ Bianchi, F. et al. 2014, pp. 1638, 1639.

service attributes the violence to a single cause, sex work. Since the material fact links the police violence to the trans identity, the material fact is deemed not to be credible. The police violence is attributed to a single cause that has little to do with and disrupts the reasonable, realistic, and severe history the participant describes. Arguments are present in her narrative and in background research information that both her trans identity as well as her involvement in sex work contribute to the violence she experienced.

We reject this disconnection of identity and sex work. In this case, it led to the structural police violence the participant experienced being omitted from the severity assessment. By attributing her situation solely to sex work, the reality of the stigmatisation, exclusion, discrimination, and violence she faced as a trans woman, also as a trans sex worker, is erased from the assessment.

The reality of these elements is intertwined and an assessment that considers them as such will be closer to her real life experiences as a trans woman involved in sex work.

Participant B

This participant faced long periods of police repression and violence, and cruel, inhuman, and degrading treatment and possibly torture on a weekly or daily basis. She was deemed credible in all material facts identified by the immigration service. For participant B, the material fact concerning police violence is defined as: “claimant has stated that [he]⁴⁷⁹ had frequent problems with the police when [he] worked as a prostitute on the street.” The police violence participant B faced over a long period was very serious in terms of frequency and severity.

State violence against Participant B

The narrative the participant told in the asylum procedure concerning the “frequent problems with the police” included the following information: She was chased nearly every day and regularly hit with police bats and intimidated by officers on police motorbikes. She was arrested ten times and detained in a police cell over a period of four years, during which she was raped three times and sexually abused six times. She was frisked anally for money. She faced physical violence in the form of hitting and kicking, having water poured on her, being left without food in a cold cell, and being robbed and extorted. After one incident in which she met the police officer who had tried to extort her on the streets, she fled the city where she grew up.

Processing police violence in the asylum procedure

Below are some fragments of what this participant told during an asylum hearing:

P: I was arrested when I was at work. They started right away with offences; they then say: what kind of work do you do: you are a bloke. You will be brought to a cell.

immigrationservice: Were you abused time and again by the same persons from the police or by different persons?

P: The police officers always have shifts, certain shifts so to say. We were always chased. Those police officers received certain targets from their superiors. For instance: tonight, you have to arrest ten transsexuals. But there were also police officers for whom transsexuality was an issue. There was one dark officer of whom we knew he was extremely homophobic. And he always came at us.

Immigrationservice: You speak about ‘we’ were abused. Do you mean other transsexuals or also other persons?

P: I mean the transsexuals who I was with.

immigration service: If I understood this correctly, these problems we talked about just now were not aimed specifically at you and were other transsexuals also having these problems?

P: Indeed, this was the case for everyone.

We interpret these fragments as follows: the participant states that the discrepancy between presentation and physical status played a role (“you are a bloke”); that she is targeted both as a transsexual belonging to that group

⁴⁷⁹ Most trans women are depicted by the immigration service as men in this research. Chapter 2.4. elaborates on this misgendering.

and as a sex worker. There was a “set target” by superiors in the police force towards “transsexuals.”⁴⁸⁰ The police violence was structural and frequent, with signs of [homo]phobia and guided by targets.

Considering the above, the description of the material fact does not fully represent her situation: “claimant has stated that [he] had frequent problems with the police when [he] worked as a prostitute on the street.” The description “problems with the police” in itself is perceived here as an understatement of the severity of the police violence and the cruel, inhuman, degrading treatment and possible torture she faced, especially in police custody. Also, the “material fact”, attributed to “working as a prostitute on the street,” ignores the specific connection between trans identity and the police violence and cruel, inhuman, degrading treatment, and possibly torture. Thus, the moment the immigration service deems the stated material fact credible, it also emphasises the focus on “prostitution” and dismisses gender identity.

The immigration service argues in Participant B’s “intention” that the police violence she faced was not specifically aimed at her and can be seen as the random acts of a few police officers, not condoned by superiors. An examination of the fragments from the participant’s hearing, however, results in the opposite impression. It becomes clear that the police violence is specifically targeted at trans women doing sex work, that it was structural, repetitive, extensive and gives the impression that it is coordinated (by superiors?). But by assessing the police violence as random, the actions of a few, and not condoned by superiors, it is followed by the conclusion it is not a measure for the conduct of all police officers. The immigration assumes normalcy in the approach of state authorities towards trans individuals leading to the claim that participants are expected to file complaints about violence with the authorities in her country of origin.

The immigration service argues in the “intention” that she stopped sex work after several years suggesting that this had resulted in an end to her problems:

In as far as the claimant states fearing the police as a result of the problems [he] had before [year] with the police when working as a prostitute on the street, the following is considered. The statements of claimant, that [he] in the period before [year] was arrested ten times by the police because of working on the street and this was illegal, does not mean there is a well-founded fear of persecution within the meaning of the refugee convention. After all, from the statements of the claimant follows that [he] did not experience problems after [he] stopped with prostitution.

One part of a sentence in the above statement stands out: “*and this was illegal.*” The assumption that sex work was illegal was not justified.⁴⁸¹ The way the intermediate sentence is linked to “the ten times she was arrested,” seems to aim at justifying the arrests. This provides a distorted picture since the ten arrests in themselves were not the most urgent problem the participant was presenting; rather, it was the fact that, following her arrest and detention in police custody, she faced severe and repeated cruel, inhuman, degrading treatment and torture and this cannot be justified in any way, irrespective of whether sex work is legal or not.

Furthermore, what the immigration service describes as “stopping with prostitution” was, in reality, Participant B being displaced from one city to another and later from the country of origin to neighbouring countries to escape these four years of persecution. We are aware that the main focus of the immigration service is addressing an asylum seeker’s claim to having a well-founded fear of persecution in their country of origin and thus does not question periods outside the country of origin. However, a failure to do so meant that the immigration service was not in a position to judge whether she had stopped sex work or whether she had encountered problems with state authorities while she was displaced outside her country of origin.

In addition, the suggestion that she stopped doing sex work did not match the information presented in the first hearing, which stated that at least four years of the five to six years she spent outside her country of origin were spent as a sex worker. Below are Participant B’s own statements on this matter:

⁴⁸⁰ The word participant B used to depict herself and her colleagues, “transsexuals,” is replicated here. As is the word “homophobia.”

⁴⁸¹ This will be considered further in Chapter 3.5.2 in the section “Considerations of the (il)legality of sex work in Cuba and elsewhere.”

P: I experienced four years of these mistreatments. Until I decided that I wanted to escape the country.

Immigration service: What kind of work did you do in [country outside the country of origin]?

P: In [country outside country of origin, for three and a half years] and [other country outside country of origin, for half a year] I had to work as a prostitute.

Immigration service: Why did you stop?

P: I stopped with prostitution in that city and went to another city. I could not stop with working in prostitution because it was the only way for me to generate income.

The immigration service's final consideration of this material fact, with all its cruel, inhuman, degrading treatment and possibly torture by the police, is that it happened years ago and that the applicant left the country years later. Thus, the immigration service does not see any causality between these traumatic incidents and the reason for requesting asylum. This reconstruction by the immigration service does not represent the information available in the hearings and additions by the lawyer. Participant B fled the city shortly after bumping into a police officer who had robbed and extorted her. She then fled the next city also due to violence by a non-state group and was subsequently displaced out of her country of origin for years.

Summarising the way police violence is assessed, we see how both the material fact as well as the assessment of it seeks to attribute all discrimination, violence, and cruel, inhuman, degrading treatment and possible torture by police forces to a single cause, sex work. In doing so, the reality of how the targeting starts and is intertwined with being a trans woman and a trans sex worker is erased. As such, the approach to the assessment and our arguments are similar to those in the case of Participant A. We argue against the separation of causes and the focus on sex work as a criminal offence as it fails to fully consider the reasons for and the consequences of police violence in the asylum assessment.

The aforementioned phrase "and this was illegal" is incriminating and unjustified not least because sex work in Participant B's country of origin is permitted in "safety zones"; the immigration service did not establish whether she practised sex work there or elsewhere. Moreover, whether sex work was illegal or not should not have influenced the assessment of the cruel, inhuman, degrading treatment and torture that Participant B experienced while under arrest.

The conclusions about Participant B stopping sex work were unfounded and based on an interpretation of a period of displacement outside the country of origin that the immigration service had little knowledge about. The reality was that she relied on sex work to survive also outside her country of origin. The mistaken interpretation led to the argument that the risk of cruel, inhuman, degrading treatment and possible torture had subsided; that they were merely something in her past that had occurred more than six months ago.

Furthermore, even if serious adverse experiences have occurred a while ago, the probability of a recurrence remains high since the circumstances have not fundamentally changed. There is no reason to assume it will not happen again. As such, the experiences detailed here concur with the description in article 4.4 of the Qualification Directive (2011),⁴⁸² which argues that the circumstances of past persecution are an indication that a well-founded fear and risk of suffering and damage are real, unless there is good reason to assume it will not happen again.

Participant C

State violence against Participant C

Participant C originates from Cuba. A summary of the circumstances and violence by police forces shows that she fled the country because of the police, stating "I can't have a life, you know" [...] If you go out after midnight as a woman, you can be arrested and disappear in a cell for one to five years, whatever they want." Over a decade, she received over 100 fines, many for being dressed as a woman and thus not looking like the picture in her iden-

⁴⁸² European Council, 2011, art. 4.4.

tification documents. On one occasion, taking the bus home, she got off at her stop but the police detained her, accusing her of being on the street late and saying that she was a prostitute. She was arrested 15 to 20 times and sometimes spent up to 72 hours in a police cell. She was in prison for three months because her identity document did not match her appearance and it was presumed to be stolen. She said, “I lost part of my life there” [...] In the cell I was not only mistreated by the police, but also by other prisoners. I’d rather not talk. Because these are things from the past that are behind me.” After this remark, no further questions were asked about her experiences in prison, although she implies serious abuse in her reply. In fact, she was treated for psychological problems after this period of imprisonment in her country of origin. According to her story, the turning point came when Raoul Castro succeeded Fidel and repression of LGBTI people began, with a curfew being imposed. Tensions rose on the street and LGBTI people were targeted. In one incident, the police hit her and ripped her wig off. Another time, dressed as a woman, she was arrested but not her male partner who accompanied her. At the police station, a police officer in civilian clothes, from an intelligence agency, pressed her to work for him, but she refused: “Then I received a warning letter stating I was a dangerous person.” After this, she started complaining officially. Over six months she complained three times at a main police station and at CENESEX. They said she should dress as a man and refused to help her. During this period, she was arrested twice, once she was handcuffed and her hair was shaved off, and she was given a fine and a warning letter. The second time, she was pushed and received another warning letter.

Processing state violence in the asylum procedure

In the immigration service’s “intention,” the material facts about Participant C’s identity are deemed credible. However, despite her stating that “I would actually describe myself as a woman that is only attracted to men,” the immigration service deemed her experiences and problems with the Cuban police to be “due to the sexual orientation”⁴⁸³ and not sufficiently severe. The “intention” states that the:

[...] aforementioned research⁴⁸⁴ [does not show] that the negative treatment of persons belonging to the LGBTI community renders it impossible to function socially and societally [...] Neither is it proven that the discrimination is of such a severity that life would be untenable or the terms for being a refugee are met. Statements about problems with the police, however annoying, cannot be seen as systematic very invasive treatment of discriminative nature that are a severe constraint of the possibilities of existence that made life untenable in Cuba. Her hair is cut off and however tragic this can be, this is not severe enough to be seen as persecution. That she was never kicked and hit by the police is also weighted in the decision.

Indicators of tenability

The immigration service’s reaction in the “intention” deems Participant C’s experiences as lacking severity. Subsequently, the assessment then considers if those credible facts that are seen as discrimination might amount to persecution. Indicators of the tenability of life in the country of origin are used for this purpose, assessing: housing; education; medical assistance; legal assistance; legal process; and primary necessities. In other cases, “work” would also be in this list but it was not included in the case of Participant C. This assessment did not consider the fact that she had to quit school, partly because of bullying, did not have access to healthcare (breast augmentation) at CENESEX, and could not find work following her social transition. This suggests that indicators of tenability are being interpreted more positively in hearings without substantiation.

Assessment of state violence against Cuban participants

In order to consider the assessment of violence by state authorities to its fullest in the case of three Cuban participants, it is important to consider a public order law that is relevant for how the Cuban police force responds

⁴⁸³ Again, the contrast between self-identification and the immigration service using “sexual orientation” is worrying.

⁴⁸⁴ “Aforementioned research” refers to an “investigation” in Cuba on the situation regarding LGBTI persons conducted by the Dutch Foreign Ministry, which concluded, among other things that there was no systematic persecution of LGBTI persons in Cuba and that homosexuality, homosexual acts, and being transgender are not prohibited or criminalised. They estimated that the situation for homosexuals has improved in recent years. That the law on labour contains a prohibition on discrimination on the grounds on sexual orientation even extending to housing, education and health. (AbRvS 2018, par. 2.1). Furthermore, it was deemed possible to file complaints or seek protection from CENESEX, which functions as a interest group. “In principle, it is possible for LGBTI [persons] to turn to them and there is no proof of a threshold to filing a complaint.”

to trans Latinas.

Cuban context

The law that is relevant when considering violence by state authorities against the three trans women is the **Ley de Peligrosidad**⁴⁸⁵ the law “on dangerousness social and rehabilitation”.⁴⁸⁶ The role of this law relating to violence by state authorities will be analysed in this section and it will be examined with respect to sex work in the next section. Below is a reconstruction of the way the Ley de Peligrosidad is used:

A sector chief ⁴⁸⁷ is a rank in the Cuban Police and also answers to the Ministry of the Interior. The sector chief receives information from the Cuban police and from the Committees for the Defence of the Revolution.⁴⁸⁸ These are neighbourhood cells consisting of citizens from the Communist Party who, among other things, collect information on other citizens. The information compiled by a sector chief can be linked to vague descriptions in the Ley de Peligrosidad about the “proclivity to be dangerous,” and being “suspected of the possibility of committing crimes given that someone shows conduct contrary to socialist morality.” Indicators of “dangerousness” include being drunk, drug abuse, or anti-social conduct. Such conduct is covered by a wide range of vague descriptions such as provocative acts, behaviour harming rules of community life and order, living as a social parasite from the work of others, and engaging in sex work or socially reproachable vices.⁴⁸⁹ The sector chief can order surveillance on a citizen and their environment and call citizens to the police office to officially warn them under the Ley de Peligrosidad.⁴⁹⁰ After several letters, someone can be convicted in a summary process, without the guarantees defined in human rights declarations regarding minimal judicial standards and the freedom to life and liberty.⁴⁹¹ This can lead to imprisonment, euphemistically called “re-education,” for up to four years⁴⁹² without actually having committed a crime.

Chronic structural targeting related to the Ley de Peligrosidad

The three participants from Cuba were targeted under the Ley de Peligrosidad by state authorities. Two cases, discussed in this chapter, consisted of a reoccurring and structural pattern of frequent surveillance, intimidation, fines, and warning letters, with a risk of imprisonment for up to four years. All three participants’ narratives are consistent with background research information from three sources.⁴⁹³ The sector chief checked on the trans women, intimidated them, saying things like “you will end up in jail” and “don’t dress as a woman.” In all three cases, a file was opened regarding the Ley de Peligrosidad and warning letters issued. We perceive their narratives to be truthful depictions of being targeted by the sector chief under this law at least partly because of their trans identity and/or expression. Such targeting under public order and vagrancy laws was of significant consequence for the assessment of the severity and the well-founded fear of persecution. Contrary to the corroborated narratives, the Ley de Peligrosidad was not acknowledged as an instrument of structural oppression of Cuban trans women, resulting in an incomplete risk assessment in these cases.

Risk of cruel, inhuman, degrading treatment and torture on return to Cuba

In our participants’ cases, it is probable that negative police attention would recommence on return to Cuba given that warning letters have already been issued. This could lead to a final warning letter, followed by imprisonment of up to four years under the Ley de Peligrosidad. Central in this situation is the fact that trans woman without legal gender recognition must serve detention in a facility for male prisoners in overcrowded cells with a high risk of severe cruel, inhuman, and degrading treatment and torture from prisoners and guards. Seen in this manner, the application of the Ley de Peligrosidad can foreseeably lead to an increased risk of cruel inhuman de-

⁴⁸⁵ Ley de Peligrosidad is shorthand for “Ley de Peligrosidad y rehabilitación social”; translated here as the “law

of dangerousness and social rehabilitation,” which is a Cuban public order and vagrancy law. It is included in Cuba’s penal code, Código Penal, as “Estado peligroso y las medidas de seguridad” described in articles 72 to 84.

⁴⁸⁶ Tula, 2018. “Cuba: Ley de Peligrosidad”, Canarias 3 Punto Cero. Available at: <http://www.canarias3puntocero.info/2018/05/08/cuba-ley-de-peligrosidad/>; last accessed 18 December 2020.

⁴⁸⁷ Information by Figueroa, V. in LGBT Asylum support, 2018, pp. 74 and 75, para. 4.

⁴⁸⁸ USDOS, 2017 B, p. 11.

⁴⁸⁹ IACHR, 2017, para. 59.

⁴⁹⁰ Romero Moreno, L. 2018.

⁴⁹¹ IACHR, 2017, para. 60.

⁴⁹² ACCORD, 2017 A, p. 89.

⁴⁹³ LGBT Asylum support, 2018, p. 50; Wijker, A. 2018; Romero Moreno, L. 2018.

grading treatment and torture during imprisonment, which must be considered in any assessment of whether a trans Latina is likely to be imprisoned on returning to her country of origin.

Summary Chapter 3.4.1 and 3.4.2

Severe and frequent state violence directed against trans Latinas exists in many countries in the LAC region. The nature of the harassment and violence against trans Latinas at the hands of state authorities concurs with our background research information and corroborates the substance of our participants' stories. State violence ranges from surveillance, being stopped and searched, accused of carrying false documentation or "being dressed as a woman," being wrongly perceived as a sex worker, disturbing the peace or, when actually involved in sex work, being fined and/or arbitrarily arrested and incarcerated, being exposed to all kinds of violence including rape and cruel, inhuman, degrading treatment and torture. Being visible as a trans person, (being perceived as) a trans sex worker, a displaced person, or as someone from a lower socioeconomic class aggravates the risk of arbitrary arrest, discrimination, exploitation, and violation by state authorities. Internal instability or a repressive regime in several countries in the LAC region further aggravated the risk of police violence and "social cleansing" for trans people. In five cases, this discrimination and violence by state authorities was frequent and pervasive over long periods of time for up to ten years. This included rape and cruel, inhuman, or degrading treatment and possibly torture. Participants had negative experiences when filing complaints with police forces or did not dare to try for fear of further violence or deemed it useless.

Trans identity is sidelined in assessments

A striking observation in the assessment of the police violence of those participants that were involved in sex work is the way the immigration service separates the trans identity and/or expression and being involved in sex work as triggers for police violence. This separation is reflected in the assessment of state violence as being attributed to involvement in sex work. In doing so, the reality of the violence also being induced by participants' trans identity and being intertwined with sex work is ignored. Consequently, the immigration service's approach led to them not considering or considering less the severity of discrimination, violence, cruel, inhuman, and degrading treatment and possible torture related to police violence. We observed how the immigration service's description of material facts steers towards and is based on the preconceived notion that it is possible to separate the "causes" of violence by state authorities thus ignoring the intertwined reality of trans persons involved in sex work.

Diminishing the role that trans identity plays in the state violence fails to represent the real situation. Firstly, both the narratives and background research information clearly point to the trans identity inherently producing a risk of police violence. Secondly, trans women can be perceived as sex workers even when they are not, or are not active at the time the violence occurs. Prejudice and stereotyping of trans women by police forces can lead to them being associated with sex work and, in turn, being targeted with violence as such. Their particular vulnerability to harassment, arrest, and prosecution under public order offences is seen as being provoked by being a trans person and engaging in sex work. Furthermore, arbitrary arrest, on charges that appear to be based on reasons⁴⁹⁴ other than the identity form a pretext for police to act against a person's gender identity. Thirdly, even when involved in sex work, trans sex workers face greater discrimination, violence, and more arbitrary arrests by police compared to non-trans sex workers. This confirms that expressing a trans identity is a risk for actual violence by state authorities. The intertwined character of trans identity and sex work means that it is difficult to attribute exactly the causes of state violence. Fourthly, it is unlikely that any "reason" for abuse by state authorities can really be determined in the absence of documentation. In cases where the immigration service does so, it is an attribution from the outside. In the minority of cases where documentation from authorities exists, it is important to realise that this information comes from alleged predators. This increases the risk of them defending their position and their documentation misrepresenting the real motive for and the abuse itself. If anyone can reconstruct what induced the abuse, it is most probably the trans Latina herself. Finally, it is primarily the trans identity and not sex work that is a catalyst for problems, starting with the early hardships of trans teens that lead to homelessness, not finishing school, and finding no place to live and work.

⁴⁹⁴ Whatever induces abuse should not be defined as a "reason" or a "cause" for abuse, since abuse is not reasonable or justified, especially by state authorities.

Therefore, we dispute the assessment that singled out and attributed the violence mainly to sex work. We conclude that a realistic approach to an assessment is one that considers simultaneously and equally sex work and trans identity and that respects the intertwined nature of the two. It is detrimental to the asylum procedure that the central role of trans identity has been eliminated from the assessment of violence against trans Latinas by state authorities.

Pervasive police violence

The police violence that participants faced was actively explored by the immigration service in hearings. However, in several cases, the way that the immigration service responded to this issue was problematic, i.e. describing it as not being specifically aimed at the person, random, by a few, not ordained, and not a measure of the conduct of all police officers. Even more so since it is followed by the immigration service's position that participants could seek protection in their country of origin. But it also extends to representing police violence as not being structural and thus not to be expected if a trans woman returns to her country of origin. This view does not match the participants' narratives or the background research information. The immigration service's claim in participants' "intentions" that the violence was random and not representative was not substantiated by COI or specific references.

An analysis of background research information from many countries of origin in the LAC region shows that misconduct against persons with an LGBTI identity and, more specifically, trans Latinas by state authorities is at least recurrent and frequent and certainly more than "a few" incidents. When looking beyond one country, across countries of origin in the LAC region, it is evident that state violence is widespread and not an occasional hiccup. Prejudice, homo- and transphobia are reported in police forces in the LAC region. Knowing that trans Latinas are targeted more than the larger LGBTI group in the LAC region, further supports the idea that the police and others view them as individuals belonging to a social group that suffers prejudice and negative associations. Pervasive marginalisation, prejudice, and gender normativity can result in this violence by state authorities being structural. While prejudice and normativity may often not be "conscious or ordered" it can, nevertheless, be specific and structural. Moreover, whether violence by state authorities or others is directed "specifically at the person" is less relevant when someone being marginalised is not seen as an individual, but as a member of a group. Dutch asylum assessments currently fail to consider the wider context related to marginalised trans persons being targeted as a social group in the LAC region and ignore indications in trans-specific COI that should at least induce adjudicators' doubts about its "incidental" character.

Filing complaints

The question if it is of any use for trans Latinas to file complaints or rely on the protection of the police in their country of origin can only be answered on the basis of sufficient information. A proper foundation of such estimate was not present in participants' cases. COI relating to violence by state authorities was barely present in a knowable way, the absence of protection by law without legal gender recognition was not a point of attention at all to the immigration service and anti-discrimination laws were mistakenly interpreted to include trans persons. Without legal gender recognition and anti-discrimination laws there is no basis for trans Latinas in countries of origin to claim the right to protection. Despite these omissions, the immigration service judged it possible for the participants to file complaints/ seek protection concerning one's gender identity in the majority of cases.

Matters that affect the dependability of state authorities for filing complaints and providing protection negatively were not included sufficiently. This includes information on public order and vagrancy laws and instability and/or repression in countries that heighten the risk of police violence and diminish protection from non-state groups and state authorities, as will be discussed later in this research.



© Antonio Olmos, 2017. Image showing trans women sex workers on the street.

3.5 Involvement in sex work

Given the immigration service's view of sex work as a contributing factor to state violence, in isolation of trans identity, as detailed above, it is worth addressing the issue of sex work previously in more depth here. Moreover, trans sex work has significant consequences in terms of the experiences of and danger to trans women involved in it, as reflected in the background research information. This section, like the last, has been divided into two parts because of its length. The following subchapter provides access to the background research information and trans Latinas involvement in sex work, before looking at the way it is dealt with in their asylum procedures in the second subchapter. A combined summary is presented at the end of Chapter 3.5.2

3.5.1 Trans sex work in the LAC region and participants' involvement in it

Sex work is often, but not always, present in the lives of trans Latinas. Sex work both originates from and leads to more exclusion, discrimination, and violence by society. It results in major health risks, like violence, bodily harm, a diminished life expectancy, HIV and other sexually transmitted infections, stigma, marginalisation, depression, addiction and trauma. As mentioned in previous chapters, many adverse experiences increase the risk of trans Latinas becoming involved in sex work. When trans Latinas are (believed to be) involved in sex work there is reasonable indication that they face higher risks and additional challenges compared to non-trans sex work populations of arbitrary arrest, discrimination, and violence by state authorities.

The percentage of trans and gender diverse people involved in sex work worldwide is very high⁴⁹⁵ and, according to the IACHR (2015 C),⁴⁹⁶ it amounts to 90 per cent in the LAC region. Other sources put the total trans female population⁴⁹⁷ engaged in sex work at: 47 per cent in El Salvador; Peru 64 per cent; Venezuela 68 per cent; Chile 95 per cent; and Colombia 99 per cent. These figures lead to a somewhat lower average of 75 per cent for the LAC region as a whole⁴⁹⁸ than the IACHR's estimate. Trans Murder Monitor data (2018 B) show that trans murder victims whose occupations are known are mostly sex workers (62 per cent).⁴⁹⁹ Since 2008, 2,349 trans people were murdered (mostly trans women) in the LAC region, accounting for 79 per cent of registered murders worldwide.

Reasons for sex work

Research on the LAC region and elsewhere points to the way adverse circumstances for trans persons contribute to the high probability of them becoming involved in sex work. While the country or region, wording and emphasis might differ, the general narrative remains the same: circumstances such as a poor socio-economic background, exclusion, and transphobia⁵⁰⁰ from families and social surroundings from an early age drives trans Latinas towards sex work. A lack of family support and being thrown out of home leads to isolation, homelessness, instability⁵⁰¹ and the inability to finish school. Institutional violence in school and elsewhere, exclusion⁵⁰² from jobs due to widespread discrimination in the job market,⁵⁰³ not being able to earn a living,⁵⁰⁴ not having a place to

⁴⁹⁵ Fedorko, B. and Berredo, L., 2017, p. 4.

⁴⁹⁶ IACHR, 2015 C, par. 280.

⁴⁹⁷ For El Salvador, Venezuela and Colombia: Berredo, L. et al. 2018, p. 16.; For Peru: Silva-Santisteban, A. et al. 2012, pp. 873-874.; For Chile: REDlactrans, 2014, p. 20.

⁴⁹⁸ Combining these figures, $47 + 64 + 68 + 95 + 99 \div 5$, amounts to 74.6 per cent, on average. According to Vandepitte, J. et al., an estimate of the prevalence of female sex workers in the general non-trans female population in the LAC region points to a range of between 0.2 per cent and 7.4 per cent in urban areas. If we fix this estimate at 3.6 per cent for the sake of a rough comparison, the chances of trans Latinas becoming involved in sex work are 13 to 27 times higher than the chances of cis gender women being involved in sex work. Vandepitte, J. et al. 2006. "Estimates of the Number of Female Sex Workers in Different Regions of the World", *Sexually Transmitted Infections* 82 (Suppl. 3), pp.18-25, esp. p. 18. Available at: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2576726/>; last accessed 18 December 2020.

⁴⁹⁹ TvT, 2018 B.

⁵⁰⁰ Balzer, C., LaGata, C. and Hutta, J. 2015, p. 17.

⁵⁰¹ Myrntinen, H. and Daigle, M. 2017, pp. 8, 27.

⁵⁰² UNAIDS, 2014 B, p. 217.

⁵⁰³ Corporación Caribe Afirmativo et al. 2017, paras 10 and 14.; OutRight Action International, 2016, p. 19.

⁵⁰⁴ Bianchi, F. et al. 2014, pp. 1641, 1642.; Wijker, A. 2018, p. 84.; Silva-Santisteban, A. et al. 2012, p. 873.

stay⁵⁰⁵ results in poverty and food insecurity.⁵⁰⁶ Even those trans Latinas in poorly paid jobs as hairdressers or cosmeticians⁵⁰⁷ can end up involved in sex work due to the financial pressures and high costs associated with physical feminisation.⁵⁰⁸ Feeling ostracised and stigmatised for their trans identity⁵⁰⁹ and being “undocumented and illegal”⁵¹⁰ in their own country⁵¹¹ leaves them with limited options.⁵¹² Imprinted low expectations and internalised transphobia may also lead to a trans Latina settling for less favourable (sex) work;⁵¹³ on the other hand, even trans academics can struggle to find employment and resort to sex work.⁵¹⁴ Displacement is another circumstance leading to a heightened risk of involvement in sex work. Grattan (2018), Ritterbusch, Correa Salazar, and Correa (2018), and Bianchi et al. (2014) report on this issue with respect to Colombia, and the IACHR (2015) and Sananes (2016) report on displacement leading to sex work in Cuba.⁵¹⁵ Displacement can be caused by social cleansing, conflict, and social violence towards trans people. Not only from non-state groups and state authorities but also from family and their surroundings. Other contributing factors include racial, migration, and class-based disadvantages⁵¹⁶ that can exacerbate discrimination and create a pull towards sex work.⁵¹⁷

In addition to adverse circumstances leading to involvement in sex work, another point of view is that sex work can also be a choice, an opportunity, and a profession. Research points to the positive aspects of involvement in sex work, for instance peer support within the trans sex work community,⁵¹⁸ having an income, development, intimate power, encountering accepting attitudes and affirmation of the female identity, and being able to generate income for physical feminisation.⁵¹⁹ We acknowledge and honour this idea that positive aspects can be present and developed in sex work. That said, the guiding principle of this research remains that, regardless of individual motives, qualities, and desires, most sources point to the many corresponding negative conditions and intersecting aspects that result in 75 per cent or more of trans Latinas becoming involved in sex work.

It is worth noting here that an Austrian Asylum Court considered the circumstances of a trans woman from Pakistan where societal discrimination was such that it was only possible for her to earn a livelihood as a sex worker. These circumstances were not only considered to be inhuman or degrading treatment, prohibited by Article 3 of the ECHR, but also a form of discrimination amounting to persecution.⁵²⁰

Additional risks for trans sex workers

We reiterate here the indication that trans female sex workers often face additional challenges when involved in sex work compared to non-trans female or gay male sex workers.⁵²¹ Trans female sex workers are more stigmatised, have the lowest status among sex workers, work in the least desirable locations (usually on the streets), generate less money, are mistreated by other sex workers and parts of society, have a higher incidence of violence and discrimination related to sex work, face more arbitrary arrests, often have to limit themselves to tolerance zones, and are more likely to stay in sex work due to economic necessity. Average global HIV infection rates are very high for trans women (19 per cent) and for trans sex workers (27.3 per cent). In Peru, for instance, HIV infection rates for trans Latinas are three times higher than those for “men who have sex with men.”

⁵⁰⁵ Balzer, C., LaGata, C. and Hutta, J. 2015, p. 16, regarding Venezuela and Colombia.

⁵⁰⁶ Fedorko, B. and Berredo, L., 2017, p. 4.

⁵⁰⁷ López Castañeda, D. and Myrtilinen, H. 2014. “Re-examining Identities and Power: Gender in Peacebuilding in Colombia” (London: International Alert) pp. 1-36, esp. p. 19. Available at: <https://www.international-alert.org/publications/rethinking-gender-peacebuilding-colombia>; last accessed, 19 December 2020.

⁵⁰⁸ Bianchi, F. et al. 2014, pp. 1638, 1639; Berredo et al. 2018, p. 16.

⁵⁰⁹ Human Dignity Trust, 2019, p. 37.

⁵¹⁰ Transgender Law Center, 2016, p. 23.

⁵¹¹ REDlactrans, 2014, p. 11.

⁵¹² UNAIDS, 2018.

⁵¹³ Divan, V. et al. 2016, pp. 1-4.

⁵¹⁴ Nureña, C., et al. 2011. “Diversity of Commercial Sex Among Men and Male-born Trans People in Three Peruvian Cities”, *Culture, Health & Society* 13 (10), pp. 1207–1221, esp. p. 1214. Available at: https://www.tandfonline.com/doi/pdf/10.1080/13691058.2011.609908?casa_token=y7UQZqowR-NoAAAAA:8JDrVewAkF0gpKI2u2lxGFT6JSvMNL95q2S7BaEm7Csq_ESBRcSFyKcJqW6b6WFF612okaDa-w; last accessed 19 December 2020.

⁵¹⁵ Grattan, S. 2018, p. 9; Ritterbusch, A., Correa Salazar, C. and Correa, A. 2018, p. 1836; Bianchi, F. et al. 2014, p. 1641, 1642; IACHR, 2015, ch. IVB on Cuba, para. 76; Sananes, R. 2016.

⁵¹⁶ López Castañeda, D. and Myrtilinen, H. 2014, pp. 19, 20.

⁵¹⁷ Fedorko, B. and Berredo, L., 2017, p. 4.

⁵¹⁸ *Ibid.*, p. 7.

⁵¹⁹ Bianchi, F. et al. 2014, p. 1644, 1645.

⁵²⁰ Jansen, S. 2014, pp. 37-38.

⁵²¹ Bianchi, F. et al. 2014, p. 1638, 1639; Silva-Santisteban, A. et al. 2012, p. 875; UNAIDS, 2018; Madrigal-Borloz, V. 2018, para. 56; IACHR, 2015, para. 94.

Arbitrary arrest, discrimination, and violence

As shown in Chapter 3.4.1, there is reasonable indication that state authorities are a risk to trans Latinas (perceived to be) involved in sex work in terms of arbitrary arrest, discrimination, and violence. Here, we substantiate this indication by examining those sources that connect trans sex work to these higher risks of state violence and discrimination. Studies show that those who are more visible, like trans persons or sex workers, are: prone to violence, harassment, humiliation, and exploitation by security forces;⁵²² state authorities actively produce aggravated and compounded violence, police forces profile trans women in a prejudiced and negative way;⁵²³ police execute corrective violence and social cleansing;⁵²⁴ the police detain and extort trans sex workers based on public order and vagrancy laws;⁵²⁵ state authorities execute many more arrests of trans sex workers than of non-trans sex workers;⁵²⁶ police forces are the “primary predators” targeting trans people under the pretext of “wearing female clothing” or the accusation of doing sex work;⁵²⁷ trans women are constantly victims of police abuse;⁵²⁸ police officers are directly involved in a number of killings of trans activists and other trans women involved in sex work in Uruguay and Honduras;⁵²⁹ police abuse and violence includes excessive use of force, abuse of power, arbitrary arrest, sexual violence, physical and verbal abuse, and forced displacement;⁵³⁰ and law enforcement officers themselves are predators making instability and uncertainty the norm for sex workers.⁵³¹

Research regularly reveals that the reason that state authorities target trans sex workers is not only sex work, but also prejudice and stereotyping about trans women, which can also lead to the targeting of trans women not involved in sex work.⁵³²

Criminalisation of sex work

According to the global Network of Sex Work Projects (NSWP, 2019),⁵³³ selling sex is approached in very different ways in different countries and within large federal republics, like Argentina and Mexico, the approach can differ per state. In just under half of countries in the LAC region selling sex is not criminalised or restricted. In a little more than 50 per cent of the LAC region countries selling sex is restricted in different ways even if, formally, it is not criminalised. It can be restricted to tolerance zones, licenced brothels, indoors and involving mandatory, expensive, high frequency health checks, registration and/or licencing. It can be prohibited to live off the proceeds of sex work. Buying sex is criminalised almost nowhere. The organisation and/or management of consensual adult sex work, such as the promotion, inducing, facilitating, or recruitment of sex workers is criminalised in more than 60 per cent of LAC region states.

The rise of sex work and sex tourism in Cuba

Background research information shows that Cuba struggles with sex work and sex tourism. Sex work has been on the rise as a means of economic survival since the collapse of the former Soviet Union. According to Lecland (2013),⁵³⁴ the “rapid growth of prostitution and sex tourism industry has become indicative of a larger social problem.” As early as 2005, Pope⁵³⁵ referred to Cuba as the “Thailand of the Caribbean.” Fernandez (2017)⁵³⁶ cites Henken, a sociologist saying that sex work in Cuba is part of tourism and despite authorities trying to clear the streets

⁵²² Myrntinen, H. and Daigle, M. 2017, p. 21.

⁵²³ HRW, 2009, p. 13.

⁵²⁴ Grattan, S. 2018, p. 9.

⁵²⁵ ACCORD, 2017 B, p. 19.

⁵²⁶ IACHR, 2015 C, para. 94.

⁵²⁷ Transgender Law Center, 2016, p. 18.

⁵²⁸ IACHR, 2015 A, para. 73.

⁵²⁹ REDlactrans, 2012, p. 14.

⁵³⁰ Ritterbusch, A. 2016, p. 429.

⁵³¹ UNAIDS, 2014 B, p. 191.

⁵³² Fedorko, B. and Berredo, L. 2017, p. 10.

⁵³³ NSWP, Global Network of Sex Work Projects, 2019. “Global Mapping of Sex Work Laws”. Available at: <https://www.nswp.org/country/cuba>; last accessed 20 December 2020.

⁵³⁴ Lecland, I. 2013. “Prostitution: Cuba’s Real Tourist Attraction”, *the Political Bouillon*. Available at: <https://thepoliticalbouillon.com/en/prostitution-in-cuba/>; last accessed 20 December 2020.

⁵³⁵ Pope, C. 2005. “The Political Economy of Desire: Geographies of Female Sex Work in Havana, Cuba”, *Journal of International Women’s studies*, 6 (2), pp. 99-118, esp. p. 99. Available at: <https://vc.bridgew.edu/jiws/vol6/iss2/7/>; last accessed 20 December 2020.

⁵³⁶ Henken cited in Fernandez, A. 2017. “Castro’s Daughter Favours Bold Legislative Weapon to Combat Prostitution, Punish the Client”, *Miami Herald*. Available at: <https://www.miamiherald.com/news/nation-world/world/americas/cuba/article136024378.html>; last accessed 20 December 2020.

of the trade, it is still present, just more hidden. Hermsdorf (2017) confirms these efforts to “clear the streets.”⁵³⁷ Fernandez (2017) also cites Valle (2008), the author of “Habana Babilonia, la cara oculta de las jineteras”, that the Cuban government does not recognise the proliferation of sex work directed at tourism as including “masculine or transsexual prostitution.”

Policies and laws against trafficking of persons.

Sex workers can be affected by policies and laws against trafficking. As Grover (2010)⁵³⁸ explains, the definition included in the international protocol⁵³⁹ regarding the prevention, suppression, and punishment for trafficking persons also risks consensual sex work between adults being seen as trafficking. When this happens, it results in sex workers, who work as consenting adults, being included in state guidelines designed to prevent trafficking. In Guatemala, a law against trafficking lacks this differentiation⁵⁴⁰ and, consequently, trans women are vulnerable to abuse, unlawful detention, extortion, and criminalisation by state authorities. This conflation of trafficking and sex work is also observed in Cuba.⁵⁴¹

Public order and vagrancy laws

Besides direct criminalisation of sex work, other legislation, local/ provincial provisions, or police regulations in countries in the LAC region affect trans people and trans sex workers. These concern public order,⁵⁴² proper conduct, decency, vagrancy, lewd and/or provocative behaviour, affronts to public morals, and good manners. Here, we refer to these laws as “public order and vagrancy laws.” Although public order and vagrancy laws do not explicitly mention trans people, they are generally construed as applying to and criminalising LGB and trans persons.⁵⁴³ According to the IACHR, laws against soliciting, vagrancy, loitering, and cross-dressing are open to arbitrary interpretation and enforcement, particularly towards trans persons and more so towards trans sex workers. In combination with prejudice and discriminatory attitudes, this can exacerbate explicit targeting, abuse, extortion, violence by state authorities and gives judges discretionary power that may lead to abuse in various countries in the region.⁵⁴⁴

In eight countries in the LAC region, public order and vagrancy laws are explicitly mentioned in background research information. In **Honduras**, the Ley de Policia y de Convivencia Social gives rise to Human Rights violations, police abuse, and arbitrary detentions against trans persons⁵⁴⁵ (regardless of whether they are a sex worker or not). Sex work in itself is not illegal, but Honduran authorities can arrest people deemed “morally dubious.” Trans people and trans sex workers thus fear prosecution both for their identity and their sex work.⁵⁴⁶ Despite the offending article 99 in this legislation being removed, Honduran civil society has reported that the same practices continue under article 142.⁵⁴⁷ In **Mexico**, public order and vagrancy provisions can be found in national criminal legislation in states of the republic, but also in local and/or provincial laws or police regulations. Two examples in the city of Tecate⁵⁴⁸ and Baja California⁵⁴⁹ prohibit cross-dressing or “being disguised in public.” The prohibition of this “threat of gender non-conformity” was welcomed by supporters seeking to protect order, morality, and children, implying that trans women are paedophiles. In **Chile**, article 373 of the Criminal Code is used by police forces to target trans sex workers and justify arbitrary detentions in order to force them out of neighbourhoods where

⁵³⁷ Hermsdorf, V. 2017. “Cuba Wil Prostitutie Aanpakken”, *Solidair*. Available at: <https://www.solidair.org/artikels/cuba-wil-prostitutie-aanpakken>; last accessed 20 December 2020.

⁵³⁸ UN, 2010. “A/HRC/14/20, Report of the Special Rapporteur, Anand Grover, On the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health”, (Geneva: OHCHR) pp. 1-24, esp. paras 31, 32, 33. Available at: <https://undocs.org/en/A/HRC/14/20>; last accessed 20 December 2020.

⁵³⁹ UN, 2000. “Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime”(Geneva: OHCHR) pp. 1-10, esp. p. 2. Available at: <https://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolTraffickingInPersons.aspx>; last accessed 15 December 2020.

⁵⁴⁰ REDlactrans, 2012, p. 17.

⁵⁴¹ IACHR, 2017, para. 57.

⁵⁴² Public order or vagrancy measures can not only be present in National legislation, but can also be found in local/ provincial laws or police regulations according to IACHR.

⁵⁴³ Human Dignity Trust, 2019, p. 31.; UN, 2015, para. 15.; UNHCR, 2015 A, p. 13.; UN, 2016 A, p. 57.

⁵⁴⁴ IACHR, 2015 C, paras 86, 87, 88, 92, 93, and 94.; This is also confirmed by Madrigal-Borloz, V. 2018, paras 56 and 90.; Divan, V. et al. 2016, pp. 1, 2; UN, 2010, para. 29.; Myrntinen, H. and Daigle, M. 2017, p. 23.

⁵⁴⁵ IACHR, 2015 B, para. 133.; IACHR, 2015 C, paras 89, 90.

⁵⁴⁶ HRW, 2009, p. 10.; IACHR, 2015 C, paras 89, 90.

⁵⁴⁷ UPR Platform, 2016. “Shadow Report From Honduran Civil Society to the UN Committee Against Torture (CAT), Presented in 2016”, pp. 1-34, esp. para. 19. Available at: https://www.ecoi.net/en/file/local/1305113/1930_1472116787_int-cat-css-hnd-24591-e.pdf; last accessed 20 December 2020.

⁵⁴⁸ Transgender Law Center, 2016, pp. 12-13.

⁵⁴⁹ ACCORD, 2017 B, pp. 18, 19.

they work.⁵⁵⁰ In **Argentina**, the Código de Faltas and Código Contravencional are public order laws used in some provinces.⁵⁵¹ In **El Salvador**, the Ordenanza para la Convivencia Ciudadana del Municipio de San Salvador, Article 32 on “moral and good manners” is applied in the city of Guayaquil. The version of these laws used in **Ecuador** is article 4.4 on “public order” and “good manners.” **Guatemala** uses the Penal Code, Article 489 on “good manners.”

In **Cuba**, as described in the previous chapter, the narratives of the trans women indicate the use of the Ley de Peligrosidad. In an insightful article on trans Latinas and the police forces in Cuba, Romero-Moreno⁵⁵² (2018) writes:

Our laws and the actions of the PNR [national police] oppose the behaviour of transsexual people. They read them like homosexuals, male-prostitutes, crazy people who cross-dress to commit a crime, to cause public disorder, among other allegations. They are released from police custody under threat or with the commitment not to dress as a woman. Those that relapse are subject to an official warning made by the Sector Chief in the place of residence [...] Generally, the official warning leads to them being labelled as conducting antisocially.

The Ley de Peligrosidad reportedly targets different groups, among whom sex workers, trans persons, dissidents, and peaceful political opponents. The IACHR (2015 C, 2017), USDOS (2017 B), and Tula (2018)⁵⁵³ state concerns about its use and critique on different aspects of its content: The IACHR has criticised such vagrancy laws for being broad and poorly defined, with vague definitions of outlawed conduct open to arbitrary interpretation and enforcement and having a disproportionate effect on LGBT persons. Descriptions like “suspicion of behaviour contradictory to socialist morality” or “exploits or engages in socially reproachable vibes” are rejected. In addition, both USDOS and IACHR are alarmed by the fact that someone who has not actually committed a crime can be punished with up to four years imprisonment purely on suspicion of a “proclivity” to commit a crime. The use of summary proceedings has been criticised as a legal format that fails to offer even minimal judicial guarantees and may result in arbitrary detention.

Participants' involvement in sex work

Six out of eight participants were involved in sex work. This mirrors the estimates of 75 per cent or more in research of trans women in the LAC region being involved in sex work. The period of involvement ranged from half a year to over a decade. For the two participants who had been involved in sex work the longest, it was their main occupation. A third worked as a hairdresser/stylist in combination with sex work for five years. A fourth worked as a waitress in combination with sex work for three years, and a fifth participant worked for a short time in healthcare followed by doing nails and sex work for four years. A sixth participant resorted to sex work for half a year when she had no financial support from her partner. All six participants saw sex work as something unavoidable given their circumstances. In four cases, the participants' sex work was not discussed during their asylum hearings⁵⁵⁴ but three of them were also hesitant to discuss the issue in our research interviews. Four participants mentioned dangerous and violent experiences in research interviews, for example:

they tried to rape me in [country] once, when I was also practicing prostitution. They took out a knife so I had to give oral sex to a man, [...] I was scared, because I'm so afraid that they disfigure my face, men always try to [...] mark and disfigure you.

[...] there are many men who do not want to pay, they want to abuse you, they take out guns, they want to manipulate you. Many friends have had dates and then [they were] killed [...] they have raped me and everything [...] It happens to all of us, it's something normal in life [...] It's not fair but, and all the people know that happens [...] in tv reports, it has been showed and nobody does anything.

They do anything [...] take your money, the phone [...] or force you to have sex [...] They have robbed me

⁵⁵⁰ OTD, Asociación Organizando Trans Diversidades et al. 2019. “Violations of the Human Rights of Trans Persons in Chile”, pp. 1-8, esp. p. 6. Available at: https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/CHL/INT_CCPR_ICS_CHL_34621_E.pdf; last accessed 20 December 2020.

⁵⁵¹ IACHR, 2015 C, para. 91.

⁵⁵² Romero-Moreno, L. 2018.

⁵⁵³ IACHR, 2015 C, paras 93, 94; IACHR, 2017, paras 59, 60; USDOS, 2017 B, p. 6; Tula, 2018.

⁵⁵⁴ As discussed in chapter 3.1 in the section “Representation and assessment in the asylum procedure.”

[...] they took me by the neck and choke[d me] until [...] you fall right there, you suffocate.

These experiences of sex customer violence were not raised during immigration hearings and therefore were not considered in severity assessments.

3.5.2 Dealing with trans sex work in asylum procedures

The background research information shared in the previous chapter provides a foundation for examining the way the immigration service looks at trans sex work in asylum procedures. It reveals the significance of the theme of trans sex work based on the percentage of trans Latinas involved and how pervasive police violence is against both trans persons and trans sex workers across the LAC region. This information and participants' narratives are in sharp contrast to an approach to trans sex work in asylum procedures that omits or invalidates the impact that being a trans person has on their well-founded fear of persecution. Prejudice against and stereotyping of trans persons by state authorities is reported as is the predatory nature of authorities enforcing gender normativity. Unfortunately, the chance of differentiating whether the targeting by state authorities happens because of gender normative targeting, criminalisation by law, dubious public order laws, measures addressing trafficking, or instability or repression in a country is very unlikely. Available information linking police violence against trans persons and trans sex workers to gender normative targeting is often limited to observations and qualitative analysis by local organisations or NGOs.

This section will follow up on aspects of sex work discussed in relation to Participant one (from Cuba) and, to a lesser extent, on Participant two, as detailed in Chapter 3.4.2. Our analysis is based on the triangulation of background research information, research interviews, and immigration hearings.

The (il)legality of sex work in Cuba

In a response to a request from the Dutch House of Representatives (2018)⁵⁵⁵ and in the argumentation of an appeal to the Council of State (2018),⁵⁵⁶ the State Secretary firmly states that "prostitution is illegal in Cuba, also for others than LGBTI [persons] that prostitute themselves run the risk of being fined or arrested" and "in as far as LGBTI [persons] are arrested, this occurs mainly on the suspicion of prostitution and disturbance of public order." At appeal, the Council of State's judgement followed the State Secretary in his opinion that: "the underlying reason for arrest at these places [gay meeting spots] often is public order, because they are known for criminality, such as prostitution" and "The State Secretary pointed justifiably to the question if a complaint has a chance of success, correlates with the reason for the arrest. If someone is arrested for prostitution this is hard to combat with a complaint."

In Participant one's "intention," (where problems with state authorities are interpreted as being caused by prostitution, see Chapter 3.4.2) the immigration service also refers to the judgement from the Council of State:

Person concerned is therefore arrested because of public order, not because of being a woman or gay. Look at the consideration of the department:⁵⁵⁷ According to the pieces [information considered in the appeal] the police have attention for people present at gay meeting spots. The department follows the State Secretary in its position that the underlying reasons for arrest of people on such places often are reasons of public order, because they are known for criminality like prostitution.

⁵⁵⁵ State Secretary of the department of Justice and Security, 2018.

⁵⁵⁶ AbRvS, 2018, para. 2.1, "The arrest of LGBTI [persons] by the police seems to be related mostly to the preclusion of prostitution and other criminal activities," according to the State Secretary.

⁵⁵⁷ By "department" the immigration service means: AbRvS.

On Cuba: Gay meeting spots, suspicion, and underlying reasons

The assessment of state violence towards LGBTI persons focuses on and is attributed to police attention at “gay meeting spots” for “public order problems and crimes such as prostitution.” It may be true that the police focus on such meeting spots but this attribution does not represent the majority of places and circumstances in which Cuban research participants experienced violence and repression from police forces. Moreover, participants were not questioned in hearings in order to ascertain a link between the violence they experienced and gay meeting spots or their involvement in sex work. For this reason, the “general” judgement from the Council of State should not have been applied in the “particular” assessment of any of the three participants. This focus on “gay meeting spots” misdirected the tone and blurred the picture of police violence and repression.

Furthermore, the argument by the State Secretary that LGBTI persons are mainly arrested on “suspicion of prostitution” and the use of the phrase “underlying reason for arrest” by the Council of State are not perceived as valid reasons for arrest. We would expect the Dutch government to be cautious about embracing “suspicion of an offence” as a valid reason for arresting LGBTI persons. As we have seen, the Ley de Peligrosidad is criticised for its applicability in cases of “suspicion” and it is open to abuse by the Cuban government. The United States Department of State also criticises the Cuban police force’s wide discretion to stop and question citizens, request identification, and carry out search-and-seizure operations.⁵⁵⁸ Besides these arguments, which run counter to the position taken by the immigration service regarding trans Latinas’ police harassment and arrests, it must also be insisted that sex work is not a criminal offence in Cuba.

Considerations of the (il)legality of sex work in Cuba and elsewhere

Contrary to the State Secretary’s statements, seven background research sources state that sex work is not a criminal offence in Cuba. The global Network on Sex Work Projects (NSWP, 2019)⁵⁵⁹ states that, “prostitution is technically legal in Cuba and laws against ‘prostitution’ were removed in 1976”; only pimping and promoting are criminalised, not soliciting. Flores (2013)⁵⁶⁰ states that soliciting is not a criminal offence in Cuba and Hermsdorf (2017)⁵⁶¹ states that “in Cuba, those exploiting sex work are criminalised, not those that prostitute themselves.” This is also supported by information from Giammarinaro,⁵⁶² UN rights expert in 2017, and three other articles.⁵⁶³ The information contradicts the State Secretary’s statement on sex work that informed the House of Representatives and the Council of State.

Despite this, the assumption of sex work being a criminal offence is followed in the Council of State’s judgement and used by the immigration service in asylum procedures. Furthermore, the immigration service argues that police may stop and search people at gay meeting points on the grounds of “criminality like prostitution” to justify police interference.

The second case, from another country of origin, in which sex work was discussed⁵⁶⁴ shows a similar approach. In its decision, the immigration service argues that sex work is illegal. But sex work is not illegal in this country, rather it is restricted to “tolerance zones”. The immigration service did not represent this information correctly and did not question the participant during hearings about whether she worked in a tolerance zone. Thus, a judgement on whether the sex work she practiced was illegal could not have been made by the immigration service. Nevertheless, the supposed illegality is then used, stating that she would not be persecuted in her country of origin merely for her identity, but rather for “prostitution”.

⁵⁵⁸ USDOS 2017 B, p. 5.

⁵⁵⁹ NSWP, 2019.

⁵⁶⁰ Flores, Y. 2013. “UN Concern About Prostitution in Cuba”, Institute for War and Peace Reporting. Available at: <https://www.refworld.org/docid/52175b814.html>; last accessed 21 December 2020.

⁵⁶¹ Hermsdorf, V. 2017.

⁵⁶² UN News Service 2017. “Cuba Needs New Laws and Stronger Action Targeting Human Trafficking – UN Rights Expert, 2017”. Available at: <https://www.refworld.org/docid/5909d32b4.html>; last accessed 21 December 2020.; Cribb, R. et al. 2014. “How Cuba became the Newest Hotbed for Tourists Craving Sex with Minors”, *Miami Herald*, Available at: <https://www.miamiherald.com/latest-news/article1948284.html>; last accessed 21 December 2020.; Fernandez, A. 2017.

⁵⁶³ Romero Moreno, L. 2018.; Cribb, R. et al. 2014.; Fernandez, A. 2017.

⁵⁶⁴ See “Participant B”, Chapter 3.4.2.

The role of the Ley de Peligrosidad

If sex work is not a criminal offence and cannot be the formal reason for police to arrest persons with an LGBTI identity, as the State Secretary suggests, what, then, causes arrests and other problems with the state authorities for a trans sex worker in Cuba?

The NSWP (2019)⁵⁶⁵ states that other laws than sex work laws are used disproportionately in Cuba. Public order and vagrancy laws, specifically the previously discussed Ley de Peligrosidad, are used to target sex workers with fines, arrest, and jail time. The NSWP information is consistent with the concerns of the IACHR and USDOS on public order and vagrancy laws.⁵⁶⁶ The rise of sex work in Cuba is a point of concern for the Cuban government, which may explain why this group is being targeted. Flores (2013)⁵⁶⁷ describes the Cuban government as having a clear policy of not tolerating prostitution. Echoing the Ley de Peligrosidad, the government imposes security measures on sex workers deemed anti-social and deprives them of their liberty in “rehabilitation centres.” Fernandez. cites Valle (2017),⁵⁶⁸ saying that prostitution is labelled as “dangerous” and “anti-social” and, in 2017, the UN⁵⁶⁹ called for the removal of social stigma on sex work and to stop detention in “rehab centres” in Cuba. The IACHR (2015 C) explicitly links the use of public order and vagrancy laws with violence against sexual minorities, trans Latinas, and trans sex workers, while USDOS (2017 B) reports that public order and vagrancy laws are used to justify “arbitrary arrest or detention” and links their use to sex workers, but also political activists.⁵⁷⁰ The IACHR report (2017)⁵⁷¹ points to the conflation of trafficking and sex work themes in Cuba increasing the risk of being wrongfully detained. Based on the above information, there is a clear indication that the Ley de Peligrosidad is used as an instrument to target trans persons, trans persons perceived as sex workers, trans sex workers, and other groups.

Finally, the information presented by the State Secretary in the appeal to the Council of State,⁵⁷² describing arrests at meeting spots, is clearly a reference to the Ley de Peligrosidad, which permits such arbitrary arrests when apparently no crime has been committed.

All of the above supports the idea that the Ley de Peligrosidad, a law with a flawed reputation, implemented in a repressive country, should be considered a core element of police violence against trans women in Cuba.

Interpretation of Cuban COI

The State Secretary fails to consider the precarious human rights situation within the authoritarian Cuban state⁵⁷³ and the reasons why Cuba is “not a safe country” and how this might relate to trans asylum procedures. The background research that is proposed in this research generates a very different picture than that presented by the State Secretary. The State Secretary⁵⁷⁴ rejects the idea, posited by Wijker (2018)⁵⁷⁵ that “a lack of specific country of origin information on Cuban society leads wrongly to considering asylum narratives lacking severity.” The State Secretary stated that, in his opinion, “enough reliable and objective knowledge is available on LGBTI’s [persons] in Cuba from diverse public and a few confidential sources” and “the immigration service is able to thoughtfully decide on individual asylum cases.” Our research casts doubt on this positive evaluation by the State Secretary. Our study reveals a lack of differentiation and knowledge regarding relevant trans themes combined with a non-critical approach towards, among others, the Ley de Peligrosidad, CENESEX, Cuba as an authoritarian state, and COI. An ACCORD COI compilation of information on CENESEX and Mariela Castro, for instance, provides two pages of positive evaluation followed by five pages of criticism.⁵⁷⁶ Yet, this criticism did not really feature in the considerations of the State Secretary and the immigration service. In 2017, the IACHR⁵⁷⁷ highlighted a particular lack of data and statistical information about LGBTI persons in Cuba. It demanded the Cuban state provide information on, among other themes, the deprivation of liberty. This lack of information does not give the impression that “being

⁵⁶⁵ NSWP, 2019.

⁵⁶⁶ See Chapter 3.5.1., “Public order and vagrancy laws.”

⁵⁶⁷ Flores, Y. 2013.

⁵⁶⁸ Valle, cited in Fernandez, A. 2017.

⁵⁶⁹ UN News Service, 2017.

⁵⁷⁰ IACHR, 2015 C, paras 424, 425; USDOS, 2017 B, p. 6.

⁵⁷¹ IACHR, 2017, paras 56 and 57.

⁵⁷² AbRvS, 2018, para. 2.3.3.

⁵⁷³ USDOS, 2017 B, p. 1 ff.

⁵⁷⁴ State Secretary of the department of Justice and Security, 2018.

⁵⁷⁵ Wijker, A. 2018.

⁵⁷⁶ ACCORD, 2017 A, pp. 165-172.

⁵⁷⁷ IACHR, 2017, paras 85, 86.

informed in an objective and reliable way” is possible. Needless to say, “confidential information” that is claimed to be part of the State Secretary’s considerations obstructs transparent governance and cannot be considered in this research.

Finally, our background research leads us to assume that Cuban participants seeking protection based on their gender identity face a higher risk of being tackled and punished by police forces, specifically, under the Ley de Peligrosidad, whose application can lead to a significant risk of cruel, inhuman, or degrading treatment or punishment and torture if they are imprisoned.⁵⁷⁸

Critique on the approach to the Ley de Peligrosidad in procedures

As observed earlier, Cuban trans women’s narratives corroborate the way we believe that the Ley de Peligrosidad is used against them.⁵⁷⁹ Despite this, the Ley de Peligrosidad is not acknowledged in the Dutch asylum procedure or in the aforementioned judgement by the Council of State as an instrument for the structural oppression of Cuban trans women. This leads to an incomplete assessment of risk in these cases.

There is also a discrepancy between the way the Council of State, following the State Secretary, and the immigration service position the Ley de Peligrosidad and the fundamental criticism this law and the authoritarian Cuban state have received.⁵⁸⁰ This criticism, presented earlier, is not used or considered in trans Cubans’ asylum procedures. To the contrary, the Council of State⁵⁸¹ states that they:

do not infer [...] that [the Ley de Peligrosidad] or other criminal laws are used to tackle and punish LGBTI persons for the sole reason of their other sexual orientation or gender identity. It is applicable to every Cuban and not used in a discriminatory way towards LGBTI [persons].

Here, we note, in particular, the Council of State’s sentence “*for the sole reason of their other sexual orientation or gender identity.*” Is being tackled and punished by the Ley de Peligrosidad only relevant for consideration if it is only applied to the issue of their identity? The lived reality of these situations cannot be analysed in such a narrow manner. This problem mirrors that discussed previously with respect to separating the issues of sex work and trans identity.⁵⁸²

We cannot confirm that this law is “*applicable to every Cuban*” but, according to USDOS (2017 B), the application of the Ley de Peligrosidad violates rights and is also used to target civil society organisations and to silence peaceful political opponents.⁵⁸³ Many people, including trans persons, possibly suffer unjust persecution in Cuba, partly under this law. In that sense, one might say that LGBTI persons are treated “equally” unjustly. Is this the non-discrimination that the Council of State is referring to? Contrary to the Council of State’s judgement, we see specific targeting of three participants under the Ley de Peligrosidad and understand that it has been a recurring issue among the approximately 250 Cubans, mostly persons with an LGBTI identity, who have fled the country.⁵⁸⁴

Paragraph 59 of the UNHCR handbook and guidelines on procedures and criteria for determining refugee status considers that prosecution can amount to persecution if a law does not conform with human rights standards (i.e. vague descriptions in a criminal law, prosecution on “suspicions,” and summary proceedings) or if the law’s application is discriminatory (targeting “gay meeting sites,” trans persons, LGBTI groups). Both elements are relevant when considering the Ley de Peligrosidad in the Cuban participants’ cases.

The Council of State stated further that “the underlying reason for arrest at these places [gay meeting spots] is often public order, because they are known for criminality, such as prostitution” and “the question if a complaint has a chance of success, correlates with the reason for the arrest. If someone is arrested for prostitution this is hard to combat with a complaint.” It is stated that, “the police forces want to discourage homosexuals to visit such meeting spots because they might become victims of violence.” Taken at face value, this may sound very

⁵⁷⁸ See Chapter 3.4.2, “Risks of cruel, inhuman, degrading treatment and torture on return to Cuba.”

⁵⁷⁹ See Chapter 3.4.2, “Chronic, reoccurring and structural targeting related to the Ley de Peligrosidad.”

⁵⁸⁰ See Chapter 3.5.1, “Public order and vagrancy laws”; USDOS 2017 B.

⁵⁸¹ AbRvS 2018, para. 2.5.

⁵⁸² See Chapter 3.4.2, “Considering sex work and trans identity together.”

⁵⁸³ USDOS 2017 B, pp. 5-6: for instance, Damas de Blanco and UNPACU members.

⁵⁸⁴ Wijker, A. 2018.

caring, but we want to ask: Is it caring if the police are using arbitrary arrests, detentions, fines and the threat of imprisonment for four years to “prevent” something? We don’t think so; it rather sounds like a pretext for targeting a minority.⁵⁸⁵

Following the State Secretary, the Council of State implies that, “arrest for sex work is hard to combat with a complaint.” We agree that the arrests will be hard to combat with a complaint but for totally different reasons than suggested in this judgement. Trans Cubans can be arrested under the Ley de Peligrosidad based on vague reasons and suspicion, and for being (perceived) as sex workers. This is hard for participants to argue against. They are structurally monitored by the sector chief, who also acts on information from neighbourhood committees,⁵⁸⁶ possibly based on prejudices and incriminations against trans persons. Since the prosecution is executed by law this makes a successful complaint very improbable. Furthermore, the fact that our trans Cuban participants have no legal gender recognition makes them vulnerable to accusations of “providing the wrong documentation” and, in Cuba, there is no protection against discrimination on the base of gender identity and/or expression. Finally, CENESEX, which the State Secretary refers to as the organisation where complaints should be filed, is presided over by Mariela Castro, who, according to Fernandez (2017), is seeking ways to combat sex work in Cuba.⁵⁸⁷

The above suggests that there is not a balanced representation of circumstances in Cuba. In Chapter 3.5.1 and this chapter, we propose the use of sources for COI that would generate a different and more nuanced picture of Cuba than the State Secretary currently presents.

Summary Chapter 3.5.1 and 3.5.2

The research analysis in Chapters 3.4 and 3.5 diverges significantly from the way the immigration service approaches discrimination, violence, cruel, inhuman, and degrading treatment by state authorities towards trans Latinas. What started off with the immigration service attributing the police violence to involvement in sex work was followed by the classifying of sex work as a criminal offence. The immigration service apparently views the hardships resulting from police violence as the consequence of a criminal and/or public order offence in the country of origin. But background research information shows that it cannot be automatically assumed that sex work is a criminal offence in countries. Laws, rules, and regulations vary greatly in different countries of origin in the LAC region.

Contrary to the assessment by the immigration service, sex work is not a criminal offence according to Cuba’s penal code. In the case of Participant two, sex work was legal in “tolerance zones” in her country of origin. Since the immigration service did not pursue this matter in hearings it could not have made an informed decision about whether participants’ involvement in sex work was illegal.

The mistaken assessments about sex work in “intentions” are problematic in several ways. To frame police violence in relation to a “criminal offence” suggests an accountability for something that was not illegal. Also, the estimate that 75 per cent or more trans Latinas are involved in sex work indicates that it is linked to the marginalisation of trans persons in the LAC region.

Most sources attribute trans Latinas’ involvement in sex work to stigma, exclusion, discrimination, and structural violence in response to trans identity and/or expression. In turn, sex work increases the risk of arbitrary arrest, discrimination, and violence by state authorities. If consenting adults that are selling or buying sex are criminalised in the LAC region this leads to a negative impact on trans sex workers in terms of health, well-being, and exposure to state authorities who act as perpetrators, using violence and incarceration. Trans sex workers face more discrimination and violence in comparison to non-trans sex workers. Although trans sex work is often not criminalised, targeting by state authorities can still give the impression that it is. Laws against trafficking of persons often lack differentiation, which can lead to the conflation of consented adult sex work and trafficking.

The reconstruction of the circumstances and experiences of trans Latinas in Cuba in this research is different from the way these issues are assessed in asylum procedures by the immigration service. The general focus in the State Secretary’s argumentation regarding “public order violations such as prostitution on gay meeting spots” in Cuba misdirected the reality of trans Latinas’ situation. The matter was not pursued in hearings and such argumentation misses the point given the recurrent chronic surveillance of trans Cubans. Verbal warnings from the police not to

⁵⁸⁵ Given indications that Cuban authorities do not distinguish adequately between homosexuals and trans persons, we consider the use of “homosexuals” to also mean trans people.

⁵⁸⁶ USDOS, 2017 B, p. 11.

⁵⁸⁷ Fernandez, A. 2017.



dress as female, under the threat of future imprisonment, occurred close to their homes and had nothing to do with “gay meeting spots.” Such action is aimed directly against the expression of their gender identity. Likewise, two participants having their long hair shaved off in a police cell is a direct violation of their female expression and evidence that it was not about sex work but about identity. Despite sex work in Cuba not being a criminal offence, trans Latinas’ narratives point to them being targeted for their trans identity or being trans sex workers perceived as committing a criminal offence.

The background research information supports the view that state authorities discriminate and use violence against both trans women and trans sex workers but this was never included in the asylum procedures. The Ley de Peligrosidad exacerbated trans Cubans’ problems in a country where sex work is rising due to the country’s poor economic situation and the influx of tourists. The Cuban government perceives this as a cumulative problem and therefore seeks to repress sex work, despite soliciting being officially legal. The targeting of consenting adult sex work may also be the result of a conflation of trafficking and sex work in Cuba.

The way the Ley de Peligrosidad is presented by the State Secretary evades all the ways in which this law is problematic. It is mentioned in background research information as an instrument for targeting both trans persons and trans sex workers. Both participants’ information and background information report surveillance by a sector chief, fines, warnings and threats of imprisonment as being well-known patterns of implementing the Ley de Peligrosidad. There appears to be no consideration of fundamental criticism of this law in the asylum procedure, i.e. its vague descriptions and concepts that can be “stretched to fit suspects” who have not actually committed a crime, its disproportionate effect on LGBT persons, and the use of summary proceedings that do not guarantee legal rights. A failure to consider such criticism makes it look as if the targeting of trans persons and trans sex workers under this law is a rightful response by the Cuban government to criminal offences. Furthermore, there is no consideration of Cuba as an authoritarian state with a precarious human rights situation and how this might be related to this law.

Finally, the limitation set by the Council of State to only consider whether the law is used in a discriminatory way “for the sole reason of their identity” is not a workable way to look at the intertwined reality of most trans participants. Whether it is the sole reason or not, discrimination because of trans identity and/or expression exists. The UNHCR (2012) takes the position that belonging to the social group of trans persons only needs to be a “relevant contributing factor”, not the “sole, dominant, cause” of persecution.⁵⁸⁸

It is perhaps ironic that the immigration service’s approach to two trans Latinas being open about sex work mirrors the stigmatisation by society. They attribute the police violence the trans Latinas’ experience to sex work, which, in turn, is judged to be a criminal offence, which leads to including less or not at all the severity and nature of the experienced violence in assessments. It is also ironic that the fears of those who did not open up about sex work in the asylum procedure are thus confirmed by those participants who did.

⁵⁸⁸ UNHCR, 2012, para. 38.



© Obra mercenaria website, 2017. Image showing two hands between jail bars.

3.6 Imprisonment

We observed that trans women are particularly at risk of being targeted by state authorities when they are visible as a trans person,⁵⁸⁹ are associated with sex work⁵⁹⁰ and/or are a sex worker, and when they are a displaced person or coming from poverty. It follows that this increased risk of targeting by state authorities results in a higher risk of imprisonment. According to Johnson *et al.* (2019),⁵⁹¹ trans persons tend to be arrested in higher numbers. To analyse this situation further, we will first turn to the general prison conditions in the LAC region.

The general situation

According to Hathazy and Müller (2016), the entire prison system in the LAC region is in a crisis and some of their data are reproduced here.⁵⁹² A huge rise in the number of imprisoned people has led to over-population in prisons in the region, which lacks sufficient facilities to cope. Worldwide, there has been a 20 per cent increase in the number of people imprisoned, but this increase is much higher in Central America (80 per cent) and in South America (145 per cent). The number of people imprisoned per 100,000 in the LAC region increased from 161 to 288 in fifteen years on average (with a global median of 144). Extreme increases are recorded in Cuba (510 per 100,000) and El Salvador (492 per 100,000). Overpopulation in prisons, a deficient infrastructure, prison violence, and disastrous human rights conditions is widely reported. There is a shortage of prison staff and inmates are enlisted systematically to perform basic prison functions (including the use of force and the application of punishment). In particular, those inmates endowed with substantial access to political and economic power and influence gain a position of control within a prison. This replicates the situation outside prison in the world's most unequal socio-economical region. The neoliberal political climate and governance in the region result in an increase in sanctions and the diffusion of harsh law and order policies (known as the strong hand, "Mano Dura"). The problem is known to politicians and governments but is largely ignored.⁵⁹³

A look at Cuba confirms the general description. A USDOS (2017 B) report on Cuba⁵⁹⁴ states that the judicial conditions leading to imprisonment are below standard, with arbitrary, politically motivated, sometimes violent arrests and detention. The burden to prove innocence is often put on a defendant. State authorities intimidate and use violence against persons who are arrested and / or imprisoned. The above-mentioned report on Cuba also details the persistence of deplorable prison conditions with shortages of all primary human needs. Serious human rights violations occur while authorities are not able to prevent acts of violence. The climate in prisons is worrying, with violent episodes among prisoners and prison guards who have a propensity to use force in a disproportional way and apply punishments that cross the line into cruel, inhuman, or degrading treatment or torture.

Trans Latina imprisonment

We did not find any quantitative data or much qualitative data on the imprisonment of trans persons in the LAC region within the background research. Nevertheless, the crisis in prison conditions in the LAC region cannot be anything other than very bad news for trans Latinas. A report on Colombia⁵⁹⁵ mentions that trans inmates are affected by overcrowding, violence, a lack of governance and corruption in prisons. There is no doubt that the prison climate in many LAC countries is alarming. This affects the already vulnerable position of LGBTI people in general and trans inmates specifically. The United Nations Office on Drugs and Crime (UNODC, 2009)⁵⁹⁶ states that: "Where transgender prisoners are accommodated according to their birth gender, especially when male to female transgender prisoners are placed with men, this paves the way to sexual abuse and rape." Many sources report the particular risk for trans women of physical and sexual violence when placed within a general male prison population, also by prison staff and that these violations can often be seen as torture or amounting to cruel,

⁵⁸⁹ ACCORD, 2017 B, pp. 18, ; HRW, 2009, p. 10.

⁵⁹⁰ Baker, C. 2013, p. 4; Transgender Law Center, 2016, p. 18.

⁵⁹¹ Johnson, R., McCandless, S. and Renderos, H. 2019, p. 5.

⁵⁹² Hathazy, P. and Müller, M. 2016, pp. 889-902.

⁵⁹³ Ibid.

⁵⁹⁴ USDOS, 2017 B, pp. 1, 2.

⁵⁹⁵ Colombia Diversa and IGLHRC 2015 A, p. 4.

⁵⁹⁶ UNODC, United Nations Office on Drugs and Crime, 2009. "Handbook on Prisoners With Special Needs," (Vienna: UNODC), pp. 1-190, esp. p. 108. Available at: https://www.unodc.org/documents/hiv-aids/publications/Prisons_and_other_closed_settings/P01_HandbookSpecialNeeds_2009_EN.pdf; last accessed 21 December 2020.

inhuman, or degrading treatment.⁵⁹⁷ Though concerned with federal immigration detention in the US, Lieberman (2013) is very informative about the structural and pervasive risks for trans immigrants in detention,⁵⁹⁸ including gender-based violence, sexual harassment and abuse, by prisoners and/or prison staff, and invasive frisking that can escalate into cruel, inhuman, and degrading treatment and/or torture of trans prisoners. Solitary confinement, which may be imposed “to protect” trans Latinas, or as a punishment for their gender identity, can amount to such treatment.⁵⁹⁹

Human rights and Trans Latina imprisonment

Yogyakarta Principle number 9⁶⁰⁰ specifies LGBTI people’s right to treatment with humanity while in detention. It states that, “everyone deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Sexual orientation and gender identity are integral to each person’s dignity.” Part 9c of these principles’ states that “it has to be ensured, to the extent possible, that all prisoners participate in decisions regarding the place of detention appropriate to their sexual orientation and gender identity”. Two other trans-related aspects of the Yogyakarta Principles concerning imprisonment are: 1) to provide adequate access to medical care and counselling, and access to hormonal or other therapy as well as to gender-reassignment treatments where desired; and 2) that protective measures for prisoners vulnerable to violence on the basis of sexual orientation or gender identity will not restrict their rights any more than the rights of the general prison population.

In 2009, the UNODC highlighted LGBTI persons as a particularly vulnerable group of prisoners and argued in favour of comprehensive management policies and strategies.⁶⁰¹ The UNODC confirms the rights specified by the Yogyakarta Principles. The UNODC handbook interprets the decision and the execution to house trans people according to birth sex,⁶⁰² especially in male to female trans prisoners, as actively facilitating sexual abuse and rape. This was reaffirmed by the UN (2016 A), which noted that a “failure to address the human rights situation and needs of a transgender prisoner may constitute cruel, inhuman or degrading treatment.” Decisions on the housing of trans prisoners should be made on a case-by-case basis, taking into account the prisoner’s gender self-identification rather than their “genital status.” There should be no abusive requirements that exclude someone from protection in prison for being a trans person.⁶⁰³ The revised United Nations Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules, 2015)⁶⁰⁴ specify that the identity and self-perceived gender of prisoners should be respected.

There are other relevant themes when considering the protection and rights of trans prisoners, including the way they are frisked, the policy regarding protective solitary confinement of LGBTI prisoners, confidentiality of identity to be guarded by prison staff, and more. This indicates the need for a comprehensive policy to secure the rights of trans prisoners and LGBTI people in general.

There is no exact, substantial information on the implementation of the Yogyakarta Principles or UNODC guidance in the LAC region.⁶⁰⁵ Four countries in this region showed good will in a meeting of “Friends of the Mandela rules”⁶⁰⁶ in January 2019, but we have found no further evidence of action in this regard. The UN’s “Living Free and Equal” report⁶⁰⁷ (2016 A) provides some examples of partial improvements related to these rules in the United Kingdom, Canada, and in some states in the USA, but not in countries in the LAC region.

⁵⁹⁷ UNHCR, 2012, p. 7, para. 22.; UNDP, 2013, p. 10.; UN, 2016 B, paras 34-36.; USDOS, 2016, p. 46.

⁵⁹⁸ Lieberman, A. 2013. “Complaints by Transgender Detainees Quantify Abuse”, *Women’s e. news*. Available at: <https://womensenews.org/2013/09/complaints-transgender-detainees-quantify-abuse/>; last accessed 21 December 2020.

⁵⁹⁹ UN, 2016 B, paras 34-36.; Colombia Diversa and IGLHRC, 2015 A, pp. 6,7, 12.

⁶⁰⁰ Yogyakarta Principles, 2007, pp. 16, 17

⁶⁰¹ UNODC, 2009, Chapter five, on Lesbian, Gay, Bisexual and Transgender prisoners.

⁶⁰² *Ibid.*, p. 115; irrespective of whether someone has undergone sex reassignment surgery.

⁶⁰³ UN, 2016 A, pp. 40-44.

⁶⁰⁴ UNODC, 2015. “The United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)” (Vienna: UNODC), pp. 1-38, esp. p. 4. Available at: https://www.unodc.org/documents/justice-and-prison-reform/GA-RESOLUTION/E_ebook.pdf; last accessed 21 December 2020.

⁶⁰⁵ UNODC, 2017. “Promoting the Practical Application of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)” (Vienna: UNODC), pp. 1-5. Available at: https://www.unodc.org/documents/commissions/CCPCJ/CCPCJ_Sessions/CCPCJ_26/CCCJ_Res_Dec/GA_Draft_Res_Dec/GA_Draft_Res_II_-_2017.pdf; last accessed 21 December 2020.

⁶⁰⁶ UNODC, 2019. “Group of Friends of the Nelson Mandela Rules Enter 2019 With Commitment to Turn Rules into Action”. Available at: <https://www.unodc.org/unodc/en/frontpage/2019/January/group-of-friends-of-the-nelson-mandela-rules-enter-2019-with-commitment-to-turn-rules-into-action.html>; last accessed 21 December 2020.

⁶⁰⁷ UN, 2016 A, pp. 41, 42.

The impression is that of a disastrous prison situation in the LAC region where the Yogyakarta Principles, UNODC and UN guidance, which are meant to protect the human rights of trans prisoners, are simply not applied.

Participants' experiences

Four of the eight participants were imprisoned for varying periods: two weeks for being in a city without a residence permit; several shorter periods for sex work; three months for an identity document that did not match her appearance and was presumed to be stolen; and a year on false charges. At least three participants were imprisoned with men.⁶⁰⁸ All three faced violence from prison staff and prisoners and two of them were raped.

Participant one states in a research interview:

P: I was in jail several times, and I remember one of the times, they put me in this jail in [city] which was like a big warehouse with cages [...] I was in that um cage with uh, obviously, 31 men and [...] So, there were some uh men always wanted to-to fuck you, because well you were there and you were a faggot, so. And I remember one of the times, uh as cliché as it sounds, there was this big uh black guy. So, he told me, "either you do it with me and you don't have to do it with anyone else, or you do it with everybody."

Another participant was in a cell with more than 50 men in one room for twelve months. Her female clothes and make-up were confiscated. One of the men in the cell was enlisted to perform basic prison functions.⁶⁰⁹ This man sexually assaulted her several times, hit her, and tore her skin open with an object. When complaining to guards, she was hit and put in an isolation cell without light for fourteen days.

Assessment of imprisonment in the asylum procedure

The three trans Latinas who were incarcerated with men were clearly imprisoned in a way contrary to the human rights rules and guidance described above in the section "Legal framework concerning Trans Latina imprisonment." When governments fail to address human rights needs and guidance regarding trans prisoners, this may constitute cruel, inhuman, degrading treatment, and or torture and is likely to result in further violence or inhuman treatment.

The immigration service did not consider the absence of human rights provisions, prison procedures and risks for trans prisoners in the asylum procedures of two participants.⁶¹⁰ Signals of severe distress during and after detention in one participants' story did not lead to further questioning about what happened in detention. No questions were asked during hearings with respect to prison procedures and whether any specific precautions were taken to protect the trans Latinas' human rights while in detention. The asylum assessment demonstrates no awareness that trans Latinas face specific and severe human rights risks, including cruel, inhuman, degrading treatment and torture. Nor is there any evidence of awareness of what these circumstances mean with respect to judging well-founded fear of persecution on return to the country of origin. This is important since the risk of being imprisoned again in a system without trans-specific prison rules automatically involves a very high risk of being re-exposed to torture and cruel, inhuman, or degrading treatment. Indeed, the United Nations Office on Drugs and Crime clearly states that the imprisonment of trans Latinas with men paves the way for sexual abuse and rape. Moreover, in its practical guide to COI, the European Asylum Support Office (EASO, 2018) clearly states that the risk of prison conditions leading to torture, or inhuman or degrading treatment and/or punishment, in the country of origin should be considered when assessing an asylum application.⁶¹¹

Summary Chapter 3.6

Clear human rights standards with respect to the imprisonment of trans persons have been defined in the last decade. Unfortunately, these standards are not followed in any country in the LAC region, despite the awareness that imprisoning trans women with men results in a high risk of cruel, inhuman, degrading treatment and torture.

⁶⁰⁸ We do not know under what conditions the fourth participant was imprisoned.

⁶⁰⁹ Hathazy, P. and Müller, M. 2016, p. 895.

⁶¹⁰ We will not consider the other two participants: one of whom was imprisoned outside the country of origin; we do not know if the second participant was imprisoned with men.

⁶¹¹ EASO, 2018, p.19, see Table 9 "Situations arising under Article 15(b) QD (recast), such as prison conditions" and European Council, 2011, p. (L337)18, article 15b.



Besides that, the use of solitary confinement to circumvent imprisonment with men and invasive frisking, can both result in the cruel, inhuman, degrading treatment and torture of trans people.

Several of our participants had been imprisoned in conditions contravening the aforementioned human rights standards. They faced cruel, inhuman, degrading treatment and possible torture, by both guards and prisoners, while imprisoned with men. These circumstances were not considered in the asylum procedures. Furthermore, the high risk of cruel, inhuman, degrading treatment and torture upon return to the country of origin was not considered, even though several participants would face a risk to imprisonment if they went back. The absence of such considerations makes the cruel, inhuman, degrading treatment and torture look “random,” whereas the risk is predictable and structural. Finally, there is also no evidence that the serious crisis in the prison systems of the LAC region was considered by immigration service.

The laws and practices concerning imprisonment of trans people, their experiences, and risks upon return to countries of origin should be considered as part of an asylum procedure related to gender identity and/or expression for those who have been in prison or are at risk of imprisonment upon return.



© Rodrigo Abd, 2018. Image showing two trans women.

3.7 (Self-)restriction of identity in the asylum procedure

When a trans Latina explains in asylum hearings that she had to (self-) restrict⁶¹² the expression of her identity in the country of origin, how is the severity of this situation assessed?

Three of eight trans Latinas in this research restricted their preferred gender expression to various degrees, after having initiated a transition, during periods in their life. In addition, three other participants had delayed transition until adulthood. Yet another participant tried to hide her past for several years.

The three participants who (partially/temporarily) 'reverted' their gender expression and the one who hid her past felt that this (self-) restriction had been forced upon them. One trans Latina only ever left her home to go to work after receiving threats. Another trans Latina was forced to return to "male mode" during several periods in her life, including when she was homeless and her parents would only take her in if she did not "dress female." In another period, she presented as gender neutral in an attempt to maintain a job, but ultimately this failed. Another trans Latina, already traumatised by past imprisonment, was intimidated into not dressing as a woman by the police, who put her under surveillance several times a week. Consequently, she restricted her expression for years and did not live freely. The fourth person obtained documents in her preferred gender. She lived as a female hiding her past. The pressure that someone would find out about her past was detrimental to her mental health during this period and her safety if she would be outed. In addition, three other participants had delayed transition until adulthood.

Before examining the way (self-) restriction is dealt with in the asylum procedure, we will look at some general information. Sexual and gender minorities, in particular those who are more "visible",⁶¹³ such as trans persons (and sex workers), are more prone to violence, harassment, humiliation, and exploitation by, among others, state authorities.⁶¹⁴ Trying to be invisible is often a survival strategy for LGBTI persons.⁶¹⁵ It can be difficult for trans women not to be visible and to "hide" in order to escape persecution, thus they can become a focal point for hatred and discrimination e.g. when seeking employment.⁶¹⁶ Not having legal and identity documentation that matches their gender identity and appearance also makes it difficult for trans people to be invisible.⁶¹⁷ Hate against trans women (and feminine gay men) is driven by cultural gender norms. It can present in combination with misogyny⁶¹⁸ and particular vitriol against those expressing femininity despite being assigned male at birth.⁶¹⁹ It is clear that trans people have little access to this strategy⁶²⁰ of "invisibility" to deal with a hostile environment when in danger. Being able to blend in with the general non-transgender population depends on, among others, legal gender recognition and appearance, the latter being dependant on things like bodily conformity and having the financial means to access gender care.

The approach to (self-) restriction in the asylum procedure

First, we will consider two persons who clearly stated during their second asylum hearings that they had (self-) restricted. One trans Latina told of several periods of (self-) restriction when narrating how her life had unfolded, however, she did not receive any follow-up questions on this matter. This issue of (self-) restriction was not mentioned in the immigration service's "intention." The lawyer, however, highlighted (self-) restriction with respect to the "cumulative grounds" for assessing severity and a well-founded fear of persecution. We could not establish

⁶¹² (Self-) restriction: We define (self-) restriction as: being forced by (further) outside (fear of) repression to hide one's gender expression in accordance with one's identity to various degrees during periods in life, in general or in specific situations. Since the causes of restriction are located mostly in the outside world, arguably the prefix "self" is incorrect. On the other hand, it is the self that submits/adapts to repression.

⁶¹³ "Visible" as opposed to being able to "pass as cis gender and/or straight."

⁶¹⁴ Myrntinen, H. and Daigle, M. 2017, pp. 16, 21.

⁶¹⁵ *Ibid.*, pp. 10, 11.

⁶¹⁶ Transgender Law Center, 2016, p. 23.; Woodman, S. 2016. "Mexican Police Turn Blind Eye to Murders of Transgender Women, Say Activists", *Reuters*. Available at: <https://www.reuters.com/article/us-mexico-transgender-violence/mexican-police-turn-blind-eye-to-murders-of-transgender-women-say-activists-idUSKCN10X1TY>; last accessed 21 December 2020.

⁶¹⁷ UNHCR, 2012, p. 4.

⁶¹⁸ HRW, 2009, pp. 15-16.; IACHR, 2015, para. 27.; Immigration and Refugee Board of Canada, 2018.

⁶¹⁹ Transgender Law Center, 2016, p. 6.

⁶²⁰ Lavers, M. 2017. "Latin America Trans Rights Movement Sees Advances, Setback", *Washington Blade*. Available at: <https://www.washingtonblade.com/2017/09/14/latin-america-transgender-rights-movement-sees-advances-setbacks/>; last accessed 16 December 2020.

whether this issue was acknowledged or had influence on the course of participants' procedure as asylum was granted and the motivation for this decision is not given.

A second participant, under surveillance by police forces, received two follow-up questions on (self-) restriction in her second hearing. There was no consideration of this aspect in the immigration service's "intention." The lawyer responded that the assessment did not adequately examine her client's experiences. Many acts of persecution had occurred, despite her holding back as a trans person. She mostly dressed in a "gender neutral way" outside her home, only dressing female inside and usually only in the evening when she was felt protected by darkness. The few times she could not resist dressing female during daytime, she was stopped, fined, or arrested by the police. The lawyer asked that this should be considered when assessing the severity of her problems, stating that her "sexual orientation"⁶²¹ contributed to an untenable situation. The lawyer added that the immigration service had wrongly denied or did not recognise the pattern of events in its "intention." The immigration service, in turn, dismissed it in the decision, stating that "it is not clear what the person concerned wants to clarify with this." After this remark it was not discussed further in the decision.

A third participant tried to hide her trans history. This was possible because her identity papers reflected her gender identity and she returned to her country of origin to live in a large city, away from her family. Here she was able to work live as a woman and she wanted to avoid being discriminated against as a trans person, knowing that even highly educated trans women are forced into sex work. She did not go out and lived in fear that people at work, friends, colleagues, or the police would discover her past. Even though her identity papers veiled her trans history she lived under great stress. Keeping her history hidden became increasingly difficult. Colleagues' comments and questions about her big feet and jaw felt like she was "being almost outed as a trans woman." Being tense also resulted in questions by colleagues as to what was wrong. She did not pursue university education out of fear of detection and, for the same reason, she rarely visited a doctor. Though not considering herself a criminal, she felt like one. This unsustainable fear led to her asylum request.

The immigration service decision summarised her (self-) restriction, i.e. hiding her trans history, as:

Person concerned has completed a "full sex change"⁶²² and has documentation showing she is a female. She did not encounter any problem since the new start, is completely female and has never been discriminated because of her "sex change." Person concerned did not demonstrate that she has to fear discrimination or violence as a woman as a result of a previous "sex change." Person concerned obtained and functioned fully as a woman in a job without experiencing any kind of discrimination and could request a passport twice as a woman without any problem. The proposition that person concerned lived as a woman and not as a trans person in the country of origin supports this conclusion further. Furthermore, she was able to build a circle of friends and could take part in several courses in her country.

The trans Latina's appeal was granted. The judge stated that she could not be expected to uphold "discretion" in a way that would keep her trans history secret. Even though her transition was complete, she had lived in her country of origin and had functioned without being known as a trans person.⁶²³ The judge stated that the immigration service had not reacted sufficiently to the country of origin information presented in the case, thus it could not be excluded that a well-founded fear of persecution was present for her as a trans Latina based on that country of origin information. The immigration service was asked to reconsider the case.

In the new decision, the immigration service considered the country of origin information and argued that it was not plausible that there was a well-founded fear of persecution on return to her country of origin or that she would run a real risk of treatment contrary to Article 3 of the European Convention on Human Rights. The immigration service concluded from information and the hearings that it is possible she had a subjective fear, but it cannot be deduced that there is an "objective" well-founded fear in her country of origin. The appeal that fol-

⁶²¹ The wording used by the lawyer is inadequate, it was her trans identity that contributed to the untenable situation.

⁶²² This is an unfortunate, crude depiction by the immigration service, instead of using "sex reassignment surgery" or "gender-affirming surgery". Furthermore, to speak of a 'full' sex change implies that the immigration service only considers a trans persons' transition complete when certain criteria are met. It points to a limited understanding of what a transition may or may not include for different people.

⁶²³ This resonates with the conclusion in Jansen (2018, English edition, 2019), p. 167: "The idea of 'discretion' has not disappeared from Dutch asylum practice yet. It still occurs regularly that the State Secretary rejects applications if asylum seekers declare they will keep their sexual orientation or gender identity concealed after return in the country of origin. This study also shows, however, that such decisions, factually entailing that people return to the closet, do not hold up in appeal, as they are contrary to policy."

lowed this decision was turned down and the decision by the immigration service was upheld.

Summary Chapter 3.7

Most of our participants had experienced (self-) restriction, albeit in different ways. We see this as a consequence of repression and being the focal point of hatred, exclusion, discrimination, and/or violence.

(Self-) restriction because of repression is a tell-tale sign of the severity of circumstances and of an untenable life in the country of origin. As such it is relevant for assessment in the asylum procedure. In our research, with the exception of one participant, there was no consideration of (self-) restriction in the immigration service's "intentions" or decisions. In the case where (self-) restriction was considered, the participant had felt able to attempt to hide her past since she possessed adequate female legitimation. The immigration service only considered her case from the perspective of her ability to live discretely as a woman. This did not take into account that she could be outed as a trans woman at any point in her life and that discretion cannot be expected from her. The court did, however, acknowledge that "discretion" cannot be expected and that the risk of exclusion, discrimination, and violence as a trans person were part of her life. The immigration service was obliged to re-assess her case considering the potential risks if she returned to her country of origin as a known trans woman.



© Rodrigo Abd, 2018. Image showing a trans woman travelling with the Central American migrant caravan doing her makeup on board a truck.

3.8 Instability and/or repression in countries of origin

Most participants lived in unstable and repressed country of origin circumstances,⁶²⁴ adding additional risks to the lives of civilians in general and to LGB and trans people in particular. These circumstances had a negative impact on the tenability of their situation. We will analyse here what the circumstances of instability/repression are, in particular with respect to countries in Central America and Venezuela, according to COI and how these circumstances are dealt with in the asylum procedure.

Background research information

El Salvador, Guatemala, and Honduras, known as the **Northern Triangle of Central America** (hereafter, NTCA), is one of the most dangerous places on earth.⁶²⁵ Certain parts of Mexico face similar challenges.⁶²⁶ A surging tide of violence by criminal armed groups (gangs) is sweeping across the Northern Triangle. While 20,000 people fled the NTCA in 2012, this had increased to 100,000 people by 2015.⁶²⁷ The UNHCR (2015 B)⁶²⁸ and IACHR (2015 B)⁶²⁹ reports how the NTCA is increasingly under the control of so-called Mara gangs, MS 13 and M-18, who use gender-based violence, murders, and other serious harm and often have a transnational reach. The Mara's take control over large parts of the territory and people, surpassing governments' abilities to protect victims and provide redress. Authorities are said to be colluding with them in certain circumstances. Impunity for murder and violent crime is widespread, reflecting inadequate government capacity to provide safety, especially for women. Frequently, being a woman, and in particular a trans woman, compounds these threats.⁶³⁰ Paramilitaries, rebel groups, and so-called gangs specifically target LGBTI individuals. Where non-state entities inflict harm on LGBTI persons, either in collaboration with the state or the police, or where state protection is unavailable, the person qualifies for refugee protection.⁶³¹ The UNHCR interviewed 160 women,⁶³² among whom 15 trans women that fled from NTCA countries and parts of Mexico. Sixty per cent of these 160 women reported abuse, threats, or other harm to the police but received little, if any, help. Forty per cent of the women never even attempted to file complaints, "since friends or family did so to no avail, or simply believing that, given the pervasive presence of criminal armed groups, the police would have no effect." Ten per cent of these 160 women stated that state authorities were the direct source of their harm and five of the 15 trans women reported having suffered direct police abuse.

Venezuela's democratic system has come to a halt. According to Human Rights Watch, its courts are packed with "Maduro judges." Dissent is repressed and opponents are jailed, brutalised, and tortured. Daily life is disrupted by a severe shortage of food, medicine, and healthcare. Hundreds of thousands of Venezuelans are fleeing the country where human rights violations go unpunished. Protests are met with severe violence by state authorities and armed pro-government groups (Colectivos). In 2017, 2,000 people were injured and 5,400 people detained and seriously abused by state authorities during protests. Since 2015, there has been coordinated state authority action to raid low-income and immigrant communities resulting in abuse, extrajudicial killings, and mass arbitrary detention.⁶³³

⁶²⁴ We think of instability as situations where an elected government is in place but the country has been destabilised by non-government groups/gangs, in combination with possible cooperation by, corruption and/or impunity of state authorities, a state of emergency, and or economic problems. Repression refers to states where the democratic process is disturbed, like Venezuela, or absent, like Cuba, and the state actively limits and/or represses the liberties of citizens.

⁶²⁵ UNODC, 2014. "Global Study on Homicide 2013: Trends, Contexts, Data" (Vienna: UNODC), pp. 1-166, esp. p. 33. Available at: <https://publikationen.uni-tuebingen.de/xmlui/handle/10900/67185>; last accessed 21 December 2020.

⁶²⁶ UNHCR, 2015 B, p. 2.

⁶²⁷ Trouw Redactie buitenland, 2016. "UNHCR: Meer Dan 65 Miljoen Mensen Zijn op de Vlucht", *Trouw*. Available at: <https://www.trouw.nl/nieuws/unhcr-meer-dan-65-miljoen-mensen-zijn-op-de-vlucht~b475066e/?referer=https%3A%2F%2Fwww.google.com%2F>; last accessed 21 December 2020.

⁶²⁸ UNHCR, 2015 B, p. 2.

⁶²⁹ IACHR, 2015 B, para. 136.

⁶³⁰ *Ibid.*, p. 6.

⁶³¹ *Ibid.*, pp. 37, 48, 58.

⁶³² *Ibid.*, pp. 23-25.

⁶³³ HRW, 2018. "Venezuela: Events of 2017" in World Report 2018, HRW. Available at: <https://www.hrw.org/world-report/2018/country-chapters/venezuela>; last accessed 21 December 2020.

The Government of Venezuela denounced the American Convention on Human Rights in September 2012 and a year later it said it was no longer bound by the convention's provisions.⁶³⁴ The LGBTI Network in Venezuela observes the state to be homo- and transphobic, directly attacking them using laws, the police, insults or other means of verbal and physical aggression while the country is in arrears with legislation to protect the rights of the LGBTI community.⁶³⁵

The United States Department of State reports that the police are involved in abuse, illegal and arbitrary detentions, extrajudicial killings, kidnappings and excessive use of force. Impunity of state authorities remains a serious problem in these authorities. NGOs and police note that many victims do not report kidnappings to the authorities out of fear of retribution or lack of confidence in the police. Societal violence is high and continues to increase. Local police and private state authorities allegedly prevent LGBTI persons from entering malls, public parks, and recreational areas. Non-governmental organisations report that the government systematically denies legal recognition to trans and intersex persons, preventing them from obtaining identity documents necessary for accessing education, employment, housing, and health care. This vulnerability often led trans and intersex persons to become victims of human trafficking. A verdict issued by the Venezuelan Supreme Court prohibits discrimination based on sexual orientation, not gender identity, but it is rarely enforced. There are no LGBTI hate crime statistics or hate crime provisions. Incidents of violence are most prevalent against trans persons. Law enforcement authorities fail to properly investigate or determine motives for such crimes.⁶³⁶

In the concluding phase of this research, the Dutch government presented a general country report regarding Venezuela.⁶³⁷ This report and the COI report on Venezuela by the EASO⁶³⁸ provide extensive and up-to-date information on the situation in Venezuela. The situation in the country has deteriorated. Noting that, in 2020, the Venezuelan amounted to 28.4 million, a total of five million displaced persons are now known to host governments (this does not include those individuals without a regular status).⁶³⁹ The Dutch general country report on Venezuela led to a country-specific asylum policy in August 2020.⁶⁴⁰ Among the group of persons belonging to the LGBTI community, trans persons are classified as a risk group. The country policy states that "they can demonstrate their fear of persecution with a few indications."⁶⁴¹ The report confirms the severity of discrimination, violence, extortion, intimidation, verbal and physical assaults and/or rape, also by the authorities, which especially trans persons face in Venezuela. It points to the problems confronting trans persons with regard to accessing healthcare, government and/or food support, and finding employment, as a result of the absence of legal gender recognition. The report acknowledges that their precarious, marginalised existence makes trans persons vulnerable to trafficking and "prostitution."

The Dutch country-specific asylum policy confirms that adequate protection by authorities cannot be provided to the citizens of Venezuela. Consequently, failing to seek protection in their country of origin cannot be held against any individual with a well-founded fear of persecution or serious harm in asylum procedures. The alternative of internal relocation is also seen as improbable once trans people have experienced the negative attention of the government and affiliated groups, i.e. "colectivos" or non-governmental actors, also given the interconnectivity of these actors.

United Nations guidance

LGBTI persons are of special concern in the UNHCR eligibility guidelines for assessing the international protection needs of asylum seekers from El Salvador (2016 A), Honduras (2016 B), and Guatemala (2018).⁶⁴² Within the LGBTI

⁶³⁴ International Justice Resource Centre, 2012. "Venezuela Denounces American Convention on Human Rights as IACHR Faces Reform", International Justice Resource Centre. Available at: <https://ijrcenter.org/2012/09/19/venezuela-denounces-american-convention-on-human-rights-as-iachr-faces-reform/>.

⁶³⁵ LGBTI Network of Venezuela, 2015, para. 52c.

⁶³⁶ USDOS, 2018, p. 35.

⁶³⁷ Dutch Government, Ministry of Foreign Affairs, 2020 A. "Algemeen Ambtsbericht Venezuela 2020", pp. 1-121. Available at: <https://www.rijksoverheid.nl/documenten/ambtsberichten/2020/06/11/algemeen-ambtsbericht-venezuela-juni-2020>; last accessed 28 December 2020.

⁶³⁸ EASO, 2020. "Venezuela Country Focus, Country of Origin Information Report", pp. 1-158, esp. p. 42. Available at: https://coi.easo.europa.eu/ad-ministration/easo/PLib/2020_08_EASO_COI_Report_Venezuela.pdf; last accessed 27 December 2020.

⁶³⁹ Anon, 2020 B. "Venezuela Population", *Worldometer*. Available at: <https://www.worldometers.info/world-population/venezuela-population/>; last accessed 28 December 2020.

⁶⁴⁰ Dutch Government, Ministry of Justice and Security, 2020 B. "Landenbeleid Venezuela", pp. 1-5. Available at: <https://www.rijksoverheid.nl/documenten/kamerstukken/2020/08/25/tk-landenbeleid-venezuela>; last accessed 28 December 2020.

⁶⁴¹ *Ibid.* Original Dutch text: "Zij kunnen met geringe indicaties hun vrees voor vervolging aannemelijk maken."

⁶⁴² UNHCR, 2016 A, p. 38; UNHCR, 2016 B, pp. 56-57; UNHCR, 2018, p. 49.

group, trans individuals, and in particular trans women, are considered to be at an even higher risk of violence and they are frequently targeted for attack and murder by gangs and other sectors of society, including the police and other public authorities.

Participants' experiences

Three participants faced violence and/or threats from both non-government armed violent groups and police officers. These non-government groups were directly related to the instability/repression in their countries of origin, and these groups and state authorities specifically targeted trans persons, as documented in background research reports. In the case of two participants, the assessment by the immigration service was, despite COI to the contrary, that the risk was not sufficiently severe to flee or to be a risk of persecution on return. A third participant's claim of violence and threats from non-government groups was not deemed credible. All participants' claims of experiencing police violence were deemed credible.

Severity and filing complaints

Participants from El Salvador, Guatemala, Honduras, and/or Venezuela faced sexual abuse and/or violence by state authorities plus violence or threats by non-state actors. The information presented above points to structural problems with instability/repression, state authorities, non-state actors and issues when filing complaints. Despite this, it is simply assumed by the immigration service that police actions "do not point to an action being specifically aimed at the person concerned, but rather as a random act of [a number of] police officers that has not been ordained by superiors" and "person concerned apparently saw no benefit in advance to report to the police in response to mistreatment or threats." This leads to the judgement that he⁶⁴³ did not try hard enough before coming to the Netherlands as could reasonably be expected of him."

We cannot follow the immigration service's reasoning in participants cases that protection against discrimination and persecution by state authorities and non-governmental forces in El Salvador, Guatemala, Honduras, or Venezuela⁶⁴⁴ is to be expected and police violence is random. Instead, we point to background research information and COI that reports widespread impunity of state authorities and the likelihood of their collaboration with gangs or armed pro-government groups in Venezuela, who inflict harm on trans persons. These reports also posit the idea that filing complaints is useless or dangerous.

The UNHCR report "Women on the Run" was cited by the immigration service in one case from an NTCA country, but only to argue that "asylum seekers cannot be plainly regarded as a refugee following the general situation in [country]." We think, by contrast, that this report and the NTCA situation underpins the argument that trans women from these countries should be eligible for asylum. The report is one of a few to offer more detailed observations on the situation for trans women as part of the larger group of women from the NTCA countries. It deals with women fleeing these countries due to gang violence and absence of protection. A lack of state protection is reported for trans women, who are unable to report abuse or get protection from authorities. Harassment and serious physical and sexual violence existed wherever they tried to flee, leaving them without the possibility of relocating within their countries. Each of the UNHCR's trans interviewees had been repeatedly abused and assaulted, often both sexually and physically. The increasing reach of criminal armed groups, often amounting to de facto control over territory and people, has surpassed the capacity of governments in the region to respond.

There is no evidence that the 2016 and 2018 UNHCR's eligibility guidelines,⁶⁴⁵ which call for special attention to trans women in El Salvador, Guatemala, and Honduras, are being considered in Dutch asylum procedures. In the light of the information above, and its resonance with participants narratives, we do not understand why these risks are not being judged to be severe enough to amount to persecution.

Finally, the history of violence that participants faced at the hands of state authorities is a serious hindrance to trusting authorities and filing complaints, yet does not appear to be recognised by the immigration service in the asylum procedure. A more balanced approach to severity assessments would give weight to paragraph 35 of the

⁶⁴³ The citation literally translates the immigration services misgendering of trans women.

⁶⁴⁴ Venezuela is mentioned here since the research observations and analysis predate the general country report regarding Venezuela and the country-specific asylum policy of June and August 2020.

⁶⁴⁵ UNHCR, 2016 A, 2016 B and 2018.

Paragraph 35 of the UNHCR guidelines⁶⁴⁷: In situations where the threat of harm is from non-State actors, persecution is established where the State is unable or unwilling to provide protection against such harm.

Dutch regulations, Vc C2/3.4: That the foreign national does not have to state in a plausible way that he cannot be offered protection if general information from an objective source about the country of origin shows that a request for protection is meaningless or even dangerous in advance.

Summary Chapter 3.8

Participants talked about adverse experiences in hearings that clearly related to instability/repression in their countries of origin. The immigration service considered the experiences but not the circumstances related to instability/repression in their countries of origin. The pervasive problems with non-government groups and the police relating to instability/repression in countries of origin was not considered. Trans people are specifically targeted and murdered in NTCA countries by gangs and/or state authorities. Protection by the police is often not possible in these countries, who are suspected of colluding with gangs. Eligibility guidelines for all three NTCA countries clearly point to LGBTI persons as a group of special concern and trans women in particular being most at risk of violence. In Venezuela, the active obstruction of rights and targeting of trans persons by the police, general impunity for state associated forces, and a legal system dominated by Maduro's influence leaves trans Latinas at risk and possibly unprotected. The circumstances in these countries of origin are getting progressively worse.

The immigration service suggested that participants should have sought protection, even though background research information shows the absence of protection and the dangers of seeking protection in the mentioned countries. They assume that the police violence is random and incidental and expect trans Latinas to file complaints about violence by non-state actors with the police. According to the immigration service, not filing complaints shows an insufficient effort to find protection internally in the country of origin. But the immigration service's assumptions do not match the COI in the sources presented here and the experiences of trans Latinas that indicate that protection against discrimination and persecution by (non-) state actors is non-existent or improbable. Moreover, participants' history of violence at the hands of state authorities was a serious obstacle to trusting authorities. Again, this was not considered in the asylum procedure by the immigration service.

A more balanced approach would have been to measure the significance of this COI against the Dutch regulations (Vc, C2/3.4)⁶⁴⁸ and para. 35 of the 2012 UNHCR guidelines.⁶⁴⁹ According to the UNHCR, when the threat of harm comes from non-state actors, persecution is established where the state is unable or unwilling to provide protection against such harm. The Dutch regulations state that If general information from an objective source about the country of origin shows that requesting protection is meaningless or even dangerous in advance, trans Latinas should not be obliged to state in a plausible way that protection is absent.

We have highlighted the Dutch government's general country report on Venezuela and the subsequent country-specific asylum policy (August 2020).⁶⁵⁰ Though the report was published at the end of our research cycle, it has been included as a positive example of COI research and analysis. It incorporates not only the consequences of instability and/or repression in a country of origin in the LAC region, but also includes a more differentiated assessment of the higher risks and specific problems confronting trans persons. Thus, in terms of Venezuela, the country-specific asylum policy goes some way to acknowledge and address our criticisms regarding the adjudication of trans Latinas' asylum procedures.

Finally, there is no evidence of any consideration in participants' asylum procedures of the internal displacement they faced, related to instability/repression in countries of origin, even though it is a relevant aspect of severity assessments.

⁶⁴⁶ Dutch Government, 2000. "Aliens Circular", C2/3.4. Available at: <https://wetten.overheid.nl/BWBR0011823/2020-05-14>; last accessed 7 December 2020.

⁶⁴⁷ UNHCR, 2012, para 35.

⁶⁴⁸ Dutch Government, 2000.

⁶⁴⁹ UNHCR, 2012, para. 35.

⁶⁵⁰ Dutch Government, Ministry of Foreign Affairs, 2020 A; Dutch Government, Ministry of Justice and Security, 2020 B.



© Sergio Ortiz Borbolla/Amnesty International. Image showing a trans woman traveling with the Central American migrant caravan sleeping on the floor.

3.9 Individual disparities and/or circumstances intersecting with a trans identity and/or expression

In addition to direct prejudice, discrimination, or violence due to gender identity and/or expression, trans Latinas faced other individual disparities and circumstances in their country⁶⁵¹ that intersect with and exacerbated hardships experienced because of their identity. Examples of individual disparities include: being a woman; coming from a non-white racial and/or ethnic background; poverty; a rural background; being involved in sex work; or being HIV infected. Specific country circumstances can include: instability or repression; social cleansing; public order laws; displacement; or machismo.

Most participants experienced a series of such intersecting aspects that interacted with and aggravated the prejudice, discrimination, and violence because of their trans identity and/or expression. These aspects can, in turn, bring about other disparities, such as homelessness, poverty, or sex work. It may not always be possible to isolate or determine exactly what has caused the violence, discrimination, and/or exclusion experienced by a trans person, in this “combined package” of a person’s trans identity, individual disparities, circumstances, and the accumulation of new problems.

Background research

The concept of Intersectionality was introduced by Crenshaw⁶⁵² (1989) after encountering the tendency in legislation and advocacy to stand up for minorities from a one-sided point of view when considering race or sex. When black women’s cases were considered within the legal system the aspects of being black, being a woman, and their correlation were not considered together. This led to black women having less privilege within the law than white women or black and white men. According to Manuel (2006), intersectionality is an understanding: “that the [negative reactions to] distinguishing categories within a society, such as race/ethnicity, gender, religion, sexual orientation, class, and other markers of identity and difference, do not function independently but, rather, act in tandem as interlocking or intersectional phenomena.”⁶⁵³

The background research sources described in Chapter 3.1 under “Structural violence” deal with intersectionality and we refer to them here. The UNHCR guidelines on international protection point to intersectionality, the compounding effect of negative experiences, marginalisation, and isolation from the social environment, and warn against a superficial understanding of the experiences of LGBTI persons.⁶⁵⁴ It is important to look at the whole picture and the correlations in order to understand the dynamics and lived realities of trans Latinas, rather than looking at aspects of a person’s life separately.⁶⁵⁵ The IACHR notes⁶⁵⁶ that prejudices relating to race, sex, and gender identity have a disproportionate effect on trans women who are poor, of African [and indigenous] descent, migrants, or sex workers. The United Nations independent expert on sexual orientation and gender identity is explicitly mandated to address multiple, intersecting, and aggravated forms of violence and discrimination. The expert identified intersectionality as a framework for approaching these themes,⁶⁵⁷ indicating the importance of such an approach for analysing and understanding LGBTI persons problems. According to the European Asylum Support Office (EASO),⁶⁵⁸ COI data used in asylum requests tend to focus on the situation of LGB persons in gen-

⁶⁵¹ Together, the individual disparities and country circumstances are called “intersecting aspects.”

⁶⁵² Crenshaw, K. 1989. “Demarginalising the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics”, *University of Chicago Legal Forum*, vol. 1989,1 (8), pp 139-167. Available at: <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1052&context=ucif>; last accessed 21 December 2020; *Idem*, K. 2006. “Mapping the Margins, Intersectionality, Identity Politics and Violence Against Women of Color”, *Kvinder, k forskning*, no. 2-3 pp. 7-20. Available at: https://pdfs.semanticscholar.org/734f/8b582b7d7bb-375415d2975cb783c839e5e3c.pdf?_ga=2.144339893.1257581418.1608567500-277980268.1607450332; last accessed 21 December 2020.

⁶⁵³ Manuel, T. 2006. “Envisioning the Possibilities for a Good Life: Exploring the Public Policy Implications of Intersectionality Theory”, *Journal of Women, Politics & Policy*, 28: 3-4, pp. 173-203, esp. p. 176. Available at: https://www.tandfonline.com/doi/pdf/10.1300/J501v28n03_08; last accessed 21 December 2020.

⁶⁵⁴ UNHCR, 2012, paras 3, 4.

⁶⁵⁵ Watson, C., Wright, H. and Groenewald, H. 2016, section 1, p 3.

⁶⁵⁶ IACHR, 2018 B; IACHR, 2015 C, para. 17 of the executive summary and para. 366 of the report itself.

⁶⁵⁷ Madrigal-Borloz, V. 2018, paras 23, 24, 25, 40, 56, and 57.

⁶⁵⁸ EASO, 2015 A, p. 10.

eral and do not include intersections. Yet, the individual situation of LGB persons⁶⁵⁹ can be influenced greatly by intersections such as sex, gender, ethnicity/race, socioeconomic status, religion, geography, social network, attitude of the family, HIV status, and (non-) conformity to the prevailing norms. Racism against indigenous people and afro-descendants is clearly present in the LAC region. Being Afro-descendant or indigenous is a negative predictor for life expectancy and HIV in the USA and, predictably, in the LAC region.⁶⁶⁰ Seven participants are of mestiza or Afro-mestiza descent. The aforementioned sources clearly support intersectionality as a reality and as an approach to understanding the lived experiences of LGBTI persons both in a human right and an asylum context.

Participants

One of our participants illustrates the issue of intersectionality. She with most intersecting aspects in our research is a trans person, a woman, coming from poverty in a shanty town, from an unstable, single-parent home, whose education was limited to primary school due to bullying and the need to work. She was evicted from her family home, moved from one temporary housing solution to the next, in an unstable country. She became involved in sex work, went through improvised, unauthorised body alterations that resulted in health problems, faced severe cruel, inhuman, or degrading treatment or punishment and violence by state authorities and non-state actors, violence by customers and partners, is HIV positive, and was displaced more than once. Other participants demonstrate four to eight intersectional aspects. Six participants experienced “structural violence,” as described in Chapter 3.1. “Aspects of identity and being different” that have remained in the background in this research until now are: displacement; race; ethnicity; poverty; broken families; and the psychological and physical health consequences. We will make some remarks in this chapter about some of these themes but do not have the scope to consider all of them. Intersecting aspects are clearly present in the lives of trans Latinas; they play into and magnify the risk of an untenable life in combination with a trans identity in their country of origin.

Intersectionality in the asylum procedure

We have introduced the concept of intersectionality, its relevance from a human rights perspective, and its presence in participants’ lived experiences. But in what way are such intersecting aspects relevant in the asylum procedure? We will examine four issues in the asylum procedure that illustrate how intersectionality is relevant to the assessment of participants’ situations.

Singular positive examples

Exceptional examples of trans persons that are successful in their country are used by the immigration service in hearings and decisions to argue against the severity of circumstances for trans asylum seekers in their countries of origin. This ignores the realities and intersecting problems of most trans persons.

In two participants’ hearings, a singular positive example was presented by the immigration service or asked about further. In one case:

Immigration service: [trans person] is a politician in your country. She is “transgender.” We do not have that here. This looks pretty progressive to me.

P: I will explain to you how it is. The majority of us does not see her as a “transsexual” like us. Firstly, because she did not have to live through what we had to go through. She studied as a man. She is a graduated lawyer, as a male lawyer. She is appointed teaching at University and she was married as a man with a wife and children. When she had this position, she became “transgender” in a year. She has never had to go through the same like [sic] we had to go through.

⁶⁵⁹ *Ibid.* The practical guide researching the situation of lesbian, gay, and bisexual persons (LGB) in countries of origin does not focus on topics concerning trans people. Therefore, the T is not present in their acronym (chapter 2.1). Nevertheless, we deem their guidance very relevant for trans people.

⁶⁶⁰ Morrison, J. 2015. “Behind the Numbers; Race and Ethnicity in Latin America”, *Americas Quarterly*, Available at: <https://www.americasquarterly.org/content/behind-numbers-race-and-ethnicity-latin-america>; last accessed 9 December 2020; James, S. et al. 2016. “The Report of the 2015 U.S. Transgender Survey”, pp. 1-302, esp. p. 6 (Washington, DC: National Center for Transgender Equality). Available at: <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>; last accessed 9 December 2020.

The participant points to the huge difference between the privileged singular positive example provided by the immigration service and her own situation of intersecting disparities, i.e.: early transitioning; being rejected and evicted from her family home; being bullied and not finishing secondary education; getting involved in sex work; having no chance of legal gender recognition or gender care; and facing sexual assault from state authorities.

In three participants' "intentions" and/or decisions, singular positive examples were used by the immigration service as evidence against the severity of the general circumstances in the country of origin and the specific lives of those requesting protection.

1. Furthermore, a trans person and gay man in public functions do not point towards discrimination against LGBTI [persons] having such proportions that concerning every LGBTI [person] in [country of origin] being a refugee has to be concluded.
2. In practice, the LGBTI community is increasingly tolerated, this is, among others, showing in the intention in the already mentioned appointment of a 'transgender' as city council member in [City].
3. According to the immigration service, trans persons in [country] are not dependent on prostitution since one trans person is an academic at a university in that country. The position of this academic is presented as evidence "that the experienced discrimination [by participant] cannot have such grave limitations to the sustainability of life for person concerned leading to the impossibility to function socially and societally" and "person concerned cannot be seen as having to rely solely on prostitution."

An article by Lyons (2019) provides a good example of how the privilege of wealth and influence can result in a trans woman leading a fulfilled life, in this case Ms. Guzman, which is clearly described as not being representative of the group of trans persons. She is not representative of general acceptance or legal provisions in many countries in the LAC region.⁶⁶¹ Clearly, the success of individual examples is not indicative of the general situation in countries of origin. Two of the three countries where the privileged examples come from do not have legal gender recognition and do not have regulated gender care. The instability and/or repression in two countries of origin, moreover, illustrate serious problems related to state authorities and the enforcement of laws.⁶⁶² Furthermore, the singular examples are frequently from countries with very large populations of up to 100 million inhabitants. Finally, a closer look at the singular positive examples used by the immigration service to paint a positive picture of the situation for trans persons in their country of origin, makes clear that, despite being elected, they still face many problems because of their trans identity while engaged in politics or governance.⁶⁶³

In our opinion, by using such examples, the immigration service is presenting exceptions to the rule and ignoring the realities and intersecting problems confronting trans Latinas. It is not a sign of understanding and considering intersectionality.

Psychological impact in the asylum procedure

A trans person coping with multiple disparities will have more intersecting stressors resulting in greater psychological impact. This impact can influence behaviour and the way trans Latinas react and it can influence the ability of participants to represent their circumstances and lived experiences in hearings in the asylum procedure.

Background research

Rejection, marginalisation, violence, and the expectation thereof, affect trans persons' self-perception, sense of worth, and may contribute to depression, anxiety, drug and alcohol use, self-harm, and suicide.⁶⁶⁴ In extreme situations of adversity and stress, it inculcates pessimism and internalised transphobia in trans people, discouraging

⁶⁶¹ Lyons, K. 2017. "The Trans Experience in Colombia: "This is Where We Work – and This Is Where We are Killed", *The Guardian*. Available at: <https://www.theguardian.com/global-development/2017/oct/08/trans-women-in-colombia>; last accessed 21 December 2020.

⁶⁶² Freedom House, 2018, "Freedom in the World 2017, Colombia" under the header; F. Rule of Law. Available at: <https://freedomhouse.org/country/colombia/freedom-world/2018>; last accessed 21 December 2020.

⁶⁶³ OTRANS et al. 2018., p. 9.

⁶⁶⁴ UNAIDS, 2014 B, p. 219; Ritterbusch, A., Correa Salazar, C. and Correa, A. 2018, pp. 1836, 1838; Lanham, M. et al. 2019, p. 38.

them to apply for jobs.⁶⁶⁵ Expecting rejection is a frequent and salient internal minority stress for trans people resulting in behaviour like fear, anxiety, and situational avoidance.⁶⁶⁶ Myrntinen and Daigle (2017) refer to the “double move of homophobia,” that is to say, being targeted but simultaneously being inclined to be silent and invisible out of fear of targeting.⁶⁶⁷ Ritterbusch, Correa Salazar, and Correa (2018) observe how avoidance is a result of trans Latinas’ frustration, sadness, and despair about their maltreatment in healthcare, among others. UNAIDS (2014)⁶⁶⁸ points to a nearly universal discrimination, stigma and criminalisation of sex work in healthcare and by police forces resulting in concealment of sex work activity and avoidance of police forces and healthcare. Over 60 per cent of trans women with a history of sex work have attempted suicide⁶⁶⁹ and there is a high incidence of post-traumatic stress disorders in LGBTI asylum seekers.⁶⁷⁰ According to stigma theory, the way trans Latinas are marginalised shapes their self-perception and how they interpret “their world.” It generates a “bottom-up stigma” where the system that excluded them is rejected.⁶⁷¹ Both this bottom-up stigma and the real-life experience of violence from police forces can dissuade those who are violated from filing complaints at police stations, where their perpetrators work, or elsewhere.⁶⁷² A clear link can be observed in this research information between trans persons’ adverse experiences and psychological reactions.

Participants’ feelings and behaviour

The research questions in the semi-structured interviews with participants were not specifically aimed at psychological aspects. We have combined information from research interviews, hearings, and impressions from contacts in asylum accommodations in the descriptions of the behaviour and emotions told or demonstrated.

Some impressions of participants’ feelings:

When you live on the streets, you know so many things since you are little, that you learn how to live alone, practically living alone, you like to be alone [...] you distrust a lot of people and prefer not to be so open with people, even though they are your family. [...] I prefer always to be alone, I do not like to be so attached to them [...] it’s taboo for me, to open up my life.

If I am at work and someone taps me on the shoulder, I shrink all the time, I am always stressed. Even though I changed my identity [papers] to avoid problems, I always feel tense and stressed. I am not, but feel like a criminal.

I am sitting here with a gag in my throat for its very hard to relive all and think of all those difficult moments. Until now I was only busy surviving and to shut off of things. But when I had to tell my story here with the immigration service [...] all is lived through again and that is very hard.

Below we discuss behaviours observed in asylum accommodation, in interviews, and hearings that is probably connected to the psychological impacts of participants’ experiences.

Several participants were very positive about family or relationships, despite the fact that they had clearly had negative experiences, such as being judged harshly, repressed, (sexually) violated, evicted from home, and subjected to family members using their old name and gender. Adversities were downplayed, emphasising how good family ties were and several of them sent money from the little they had to support their family. Three participants told of long-term violence from partners in interviews but this is not reflected in the hearings. We observed that our participants perceived having a partner as “a form of success” and wonder if this might restrict them expressing any negative experiences with partners?

⁶⁶⁵ Divan, V., 2016, pp. 1, 2.

⁶⁶⁶ Rood, B. et al. 2016. “Expecting Rejection: Understanding the Minority Stress Experiences of Transgender and Gender-Nonconforming Individuals”, *Transgender Health* 1(1), pp. 151-164, esp. p. 151. Available at: <https://www.liebertpub.com/doi/full/10.1089/trgh.2016.0012>; last accessed 22 December 2020.

⁶⁶⁷ Myrntinen, H. and Daigle, M. 2017, p. 29.

⁶⁶⁸ UNAIDS, 2014 B, p. 194.

⁶⁶⁹ Poteat, T. et al. 2014, p. 276.

⁶⁷⁰ Piwowarczyk, L. et al. 2017, in Dutch Government, WODC, Wetenschappelijk Onderzoek en Documentatie Centrum, 2019, p. 14.

⁶⁷¹ Ritterbusch, A., Correa Salazar, C. and Correa, A. 2018, p. 1837.

⁶⁷² REDlactrans, 2012, p. 17.

Several participants tried to distance themselves from negative experiences by stating how they were their own psychologists, detaching themselves from harsh circumstances and experiences. Talking about adverse experiences among peers is often done in a detached way, giving the impression they are untouched and strong, laughing about the scariest moments. We perceived a downplaying of the seriousness of incidents and a boosting of one's self-control. That said, six participants had strong reactions after serious violence, such as depression, anxiety, generalised fear, agitation, disturbed sleep, and prolonged avoidance of the outside world. Sex work and HIV status was not something talked about easily and only discussed and admitted to in close circles. We observed fear and/or reluctance to discuss sex work and HIV because of their experience of being stigmatised for it. They feared these aspects would influence their asylum procedure negatively if mentioned in hearings.

Seven of our eight participants exhibited a lack of trust in persons and organisations, especially towards police forces, government authorities, healthcare professionals, LGBTI organisations, but also, in three cases, towards family and colleagues. Even our interviewer, a trans woman, was not always fully trusted. Some were afraid she could have connections to the Central Organ for the Reception of Asylum Seekers or the immigration service. In general, rumours of being spied on inside housing facilities were never far away. Six participants had engaged in avoidance behaviours in their country of origin, i.e. not leaving the house, even for groceries or running errands, avoiding the visibility of daylight, or avoiding healthcare. (Self-) restriction to varying degrees was present in seven participants' cases. Participants came across as still living in "the normality of chronic adversity" in their country of origin, driven by the uncertainty of the asylum procedure, maintaining inner preservation by downplaying, boosting oneself, and detaching from one's experiences. The majority of participants seemed to live day to day and do not plan ahead. Some do not have insight into the asylum procedure; they are not prepared or informed or try to pay little attention to the asylum procedure, even forgetting crucial appointments. Negative decisions in the asylum procedure regarding other trans persons in their social environment have a significant emotional impact and induced fear. Most participants had little hope that something good might come their way.

Presenting oneself in the asylum procedure

This section looks at the way the observed behaviour by participants described above can influence the asylum procedure. For most trans Latinas with a long history of structural violence and intersecting problems, and or cognitive challenges, it is a complex cognitive and emotional assignment to present themselves in hearings in a way that adequately represents all their circumstances and lived experiences.

Background research

We follow Doornbos (2004)⁶⁷³ and the UNHCR handbook (2011),⁶⁷⁴ both of which posit that decision makers cannot automatically assume that asylum seekers possess the same discursive methods and argumentation structures as the government for establishing "truth, credibility, coherence and consistency." Applicants may be impaired in their ability to state a coherent case considering all the relevant circumstances. As Doornbos says, "[m]aybe, it is exactly those people that are not capable of doing so that fulfil requirements of being a refugee." Berg and Millbank (2009) point to the effect physical and/or sexual violence and the threat of persecution have on the emotional state and memory of a person. An overly generic memory and difficulties retrieving memories can originate from depression and post-traumatic stress disorder. Moreover, the asylum procedure itself, an inherently stressful setting, can be a trigger for psychological protective mechanisms like dissociation, being unable to talk about or remember an experience.⁶⁷⁵

The UNHCR (2013) has stated that, as a result of their experiences, applicants for international protection may lack trust in state authorities, interpreters from their country of origin, or other individuals: "A person who, because of his experiences, was in fear of the authorities in his own country may still feel apprehensive vis-à-vis any authority. He may therefore be afraid to speak freely and give a full and accurate account of his case." Fear or lack of trust in state authorities may explain a lack of disclosure in a preliminary and/or personal interview. This has been acknowledged in international jurisprudence and judicial guidance. Applicants whose reasons for applying

⁶⁷³ Doornbos, N. 2004. "Gescheiden Werelden: De Beoordeling van Geloofwaardigheid van Vluchtverhalen", *Amsterdams Sociologisch Tijdschrift* 31(1), pp. 80-112, esp. pp. 81, 87. Available at: <https://ugp.rug.nl/ast/article/view/24206/21657>; last accessed 22 December 2020.

⁶⁷⁴ UNHCR 2011, para. 46.

⁶⁷⁵ Berg, L. and Millbank, J. 2009, p. 201.

for international protection relate to gender, sexual and gender-based violence, sexual orientation and/or gender identity, or trafficking, may fear reprisals by their family, community, and/or traffickers.⁶⁷⁶ Research information points to psychological impact from past experience as a possible hindering influence on the way trans persons can represent themselves in asylum procedures.

Examples and observed tendencies

The negative influence due to psychological impact that inhibits participants' ability to represent their circumstances and lived experiences in hearings in the asylum procedure is probable but the result of many complex factors. As such, it is difficult to present here, but the examples and observed tendencies below give an indication of such a negative influence.

Examples

One participant did not say much to the immigration service about the animosity she had encountered on the streets, except for "vegetable vendors on the market saying things." On the face of it, this does not seem to amount to much but looking a bit closer, when asked if trans persons can express themselves publicly in her country of origin she says, "if you are able to take the criticism it provides" and "the consequence is being offended and criticised." When asked if she had problems she says: "the normal things, being abused and discriminated against." The semi-structured interview reveals that she was a street vendor who had to go to the market every day for supplies. Research into this particular market revealed a narrow location in a crowded, dangerous area with high police presence and many arrests. In the interview, she took the time to talk about that market. She faced daily abuse and discrimination, fruit and insults being thrown, her wig pulled off. It was pervasive, chronic, and unavoidable if she was to earn her daily small income. Her coping strategy helped her to see it through, by incorporating it as an unavoidable fact of life to be downplayed and ignored. But in the immigration hearing, this coping strategy led to her presenting a downplayed version of the reality she faced. A majority of participants showed varying degrees of neglect for the context and severity of their own experiences.

Another participant had been mistreated by prison guards and prisoners in a male prison and said: "I'd rather die than having to go back there. I'd rather not talk. This are matters that happened in the past and are behind me." This gives the impression of a strong duality between a traumatic experience that makes her fear prison and the attempt not to look at it as a way of coping. The immigration service did not pose any follow-up questions on this issue. In the context of representing her experiences and circumstances, her coping strategy is counterproductive. It would have been more informative for the immigration service if she had been able to present exactly what happened.

Two participants' narratives in hearings included how they fought back with words or physically when dealing with discrimination and violence. In one case, this "fighting back" was cited as evidence that her situation did not seem untenable. We think her reaction to discrimination and violence can be seen differently when considering intersecting problems and their psychological effects. The fighting back might be seen as a sign of being in a psychological state of alarm and agitation as a result of all her experience and with the result that she is easily triggered and, in such situations, loses cognitive control.

Observed tendencies

We understood from participants that most felt pressurised in hearings and some had the feeling they were being submitted to police questioning. This was associated with trauma from previous police violence and caused distress.

In six cases, forensic medical examinations⁶⁷⁷ took place before the hearings to determine physical and psychological problems that should be taken into account by the immigration service in hearings and when making decisions. In it, five participants showed psychological restrictions, two of whom had trouble accessing their memories and had impaired detail and accuracy of data. Five participants experienced a heightened emotional response when discussing adverse experiences.

⁶⁷⁶ UNHCR, 2013. "Beyond Proof: Credibility Assessment in EU Asylum Systems", pp. 1-290, Chapter 2.3 "Fear and Lack of trust". Available at: <https://www.unhcr.org/51a8a08a9.pdf>; last accessed 21 December 2020.

⁶⁷⁷ Examinations by the Forensisch Medische Maatschappij Utrecht, FMMU.

A substantial number of participants' experiences that were revealed in our research interviews were never touched on in immigration service hearings. Moreover, trans Latinas downplayed or left out many experiences and circumstances in hearings which could have been relevant but did not raise attention due to the way they were presented. Of course, this is not only the result of psychological issues. Several factors can influence a failure to mention experiences and circumstances, including cognitive limitations, an asylum seeker underestimating the relevance of issues, or the line of questioning in hearings leading away from aspects of the own experience. But failure to mention something or downplaying issues can also be influenced by learned self-preservation behaviour, such as downplaying or acting detached, the non-accessibility of painful memories, or not expecting to be understood.

Some participants exhibited a negative expectation of being excluded from possibilities, avoidance behaviour, and mistrust during hearings and in their reactions. This can give the impression that some participants had not tried very hard to obtain a job or file a complaint with police forces. In several cases, trans Latinas had decided that a job search or filing complaints was useless. This was judged by the immigration service as evidence that filing complaints or seeking employment "was not pursued with enough effort." But background information indicates that the trans women's concerns were justified. What is interpreted as a lack of effort might, in fact, be a realistic lack of opportunity.

We suggest that some participants' behaviour can be interpreted by an observer as lacking effort, whereas, in reality, it is influenced by the psychological impact. Moreover, it is entirely possible that their expectation of not standing a chance is a realistic reflection based on lived experience. Proper interpretation of circumstances is only possible when observers are open to the effects of this impact.

Limited cognitive capacity

Two participants gave the impression of having limited cognitive capacity during the research interviews, hearings, and in their contacts inside the asylum seekers centre. Their education had stopped after primary school and they appeared to lack understanding to some degree of questions and the abstract level of what is expected and needed in hearings.

One participant had limited literacy and only communicated via video and audio messaging. The other participant had been working from the age of 12. They did not understand words such as "ethnicity," "population group," or "visa." The participants failed to explain to the immigration service sufficiently why they had not asked for asylum instantaneously. In both cases, the statements on the reason for asylum focused on separate "major incidents." They did not talk about the context and the structural sequences of discrimination and violence. This hindered a good representation of their lived experience. Their narratives were short and answers were not given. The answers to the questions on the credibility of their identities fell short of inner considerations and processes. Instead, their identities were felt and described as facts of life, not as an "internal struggle" but rather as a conflict with the outside world. The above observations resonate with those in Jansen (2018) about LGBTI asylum seekers possibly struggling with questions that refer to abstract concepts or ideas like "a process of awareness and self-acceptance." Jansen also refers to those LGBTI asylum seekers with a lower "level of education" possibly being less able to talk about their struggle in detail in their narratives.⁶⁷⁸

According to the Dutch working guidelines W2014/10⁶⁷⁹ and the UNHCR (2013),⁶⁸⁰ the integral assessment of credibility must be done against the background of an asylum seeker. Mitigating circumstances such as trauma, health problems, and level of education, can be relevant in this regard and should be taken into account. We would add "limited cognitive capacity" to this list.

The observed effects of cognitive limitation did affect the quality of how these two participants presented their negative experiences but there is no evidence that their limitations were considered during the asylum procedure.

⁶⁷⁸ Jansen, S., 2018, English edition, 2019, pp. 55, 58, 67.

⁶⁷⁹ Dutch Government, asylum policy guidance, 2014; "WI 2014/10, Working Guidelines, Substantive Asylum Assessment", pp. 1-16, esp. p. 10, 11, section 3.2.2 "De integrale weging". Available at: https://ind.nl/Documents/WI_2014-10.pdf; last accessed 22 December 2020.

⁶⁸⁰ UNHCR, 2013, Chapter 2, pp. 56-88. "The applicant's Individual and contextual circumstances,"

Intertwined experiences of trans sex workers

Sex work is another intersectional and important issue in trans asylum procedures. Frequently, the presence of intersecting aspects increases the likelihood of involvement in sex work. The hardships that result from involvement in trans sex work are a combination of the sex work itself, the criminalisation of sex work, and a trans identity.

Background research

In his report to the UN Human Rights Council, Grover (2010)⁶⁸¹ states that:

[I]n recent times, significant opposition has arisen to the imposition of criminal sanctions against sex workers [...]. Violence towards sex workers [trans and cis gender] often perpetrated by those in positions of authority, is a common aspect of sex work, and an unfortunate corollary of criminalisation. According to various studies, about 80% of sex workers have been assaulted in the course of their work.

According to Bell (2009), violence, police abuse, and the denial that this violence against sex workers is a real crime violates their basic human rights, including the right to security, and the right to being treated equally without discrimination and as a person before the law. The restriction on movement that is imposed on many sex workers (often in the name of combating human trafficking or preserving public health) is a further human rights violation. Finally, sex workers are clearly being subjected to torture, cruel and inhuman punishment and treatment.⁶⁸² The United Nations (2014) says that the criminalisation of sex work should be stopped because the deeply rooted stigma and discrimination through legal and policy environments that worsen sex workers' vulnerabilities including extreme structural poverty and vulnerability to brutal violence and sexual violence, without redress or protection. Sex workers have limited chances to improve their living and working conditions, financial security, health, and opportunities.⁶⁸³ According to UNAIDS (2014 B), states should decriminalise adult, voluntary sex work and recognise the right of sex workers to work without coercion, violence, or risk of arrest and they should provide social protection. Such measures enable the empowerment of sex workers and improves the chances of violence and abuse (also if committed by police or third parties) being reported.⁶⁸⁴ Fedorko and Berredo (2017) and Divan *et al.*(2016)⁶⁸⁵ clearly describe that laws prohibiting consenting adults from buying and/or selling sex negatively impact trans sex workers' well-being, health, and access to services and it entrenches their marginalisation, exposes them to violence and incarceration by police forces, and makes working conditions more dangerous. The criminalisation of sex work combined with a punitive legal and social environment are among the key determinants of increased HIV vulnerability.

The human rights and research background information above recognise the additional difficulties and violations for sex workers and the violations they face as a result of criminalisation.

Assessment of sex work as a criminal act

As seen in previous chapters, the immigration service's approach to two trans Latinas shows how state violence is primarily attributed to their involvement in sex work, and excludes trans identity and the criminalising attitude of authorities towards trans persons as a relevant cause. This is followed by framing sex work as a criminal activity, with the effect that there is minimal consideration for the experienced police violence in the severity assessment, or it is simply ignored. In addition, the inherent violations of human rights connected with a criminalising attitude and/or criminalisation by authorities that is reported in background research information and have occurred in trans participants' lives are not considered in the immigration service's assessments.

A very different approach to trans sex work is possible if a human rights perspective and an intersectional point

⁶⁸¹ UN, 2010, paras 27-50.

⁶⁸² Bell, F. 2009. "Violence Against Sex Workers in Latin America: Pervasiveness, Impunity, and Implications", Human Rights & Human Welfare, University of Denver, pp. 132-150, esp. p. 133. Available at: https://www.researchgate.net/publication/285599121_Violence_against_Sex_Workers_in_Latin_America_Pervasiveness_Impunity_and_Implications/link/5661e0e008ae15e7462ebc36/download; last accessed 22 December 2020.

⁶⁸³ UN, 2014. A/69/62, "Framework of Actions For the Follow-up to the Programme of Action of the International Conference on Population and Development Beyond 2014" (Geneva: Report of the Secretary General), pp. 1-288, esp. p. 66. Available at: https://www.unfpa.org/sites/default/files/pub-pdf/ICPD_beyond2014_EN.pdf; last accessed 16 December 2020.

⁶⁸⁴ UNAIDS, 2014 B, pp. 189, 193.

⁶⁸⁵ Fedorko, B. and Berredo, L. 2017, p. 10.; Divan, V. *et al.* 2016, pp. 1, 2.

of view are incorporated. This research approaches trans sex work as being the result of early structural violence and marginalisation of the social group of trans persons and other intersecting disadvantages. The intertwined reality of a trans identity and sex work leads to violence by state authorities and is aggravated by repressive laws, policies and/or attitudes against sex work that, in turn, lead to further violence by state authorities. Given the context, this is the more realistic representation and if applied to asylum procedures it can result in an assessment that integrates and represents trans Latina sex workers' circumstances.

Summary Chapter 3.9

Trans persons face other disadvantages besides a trans identity and/or expression, such as poverty, a lack of education, not being white, being female, being HIV positive, a sex worker, displaced, and coming from a repressive or unstable country of origin for instance where gang violence is rife. These and other aspects of difference or identity (hereafter, intersecting aspects) can lead to prejudice, disadvantage, discrimination, and violence. Being targeted for several intersecting aspects leads to accumulating and intertwined problems. Being an indigenous or black trans woman, for example, involves three intersecting aspects and clearly leads to a higher risk of adverse experiences. All cases in the research contain at least three and up to ten intersecting aspects. These aspects can play into and magnify the risk that a life is not sustainable in their country of origin. Guidance in a human rights context and regarding asylum seekers calls for individual consideration of such intersections like gender, ethnicity, and socioeconomic background, in asylum procedures. The way that such intersecting disparities are relevant in the asylum procedure is evident in the themes, as described below.

The immigration service presents singular positive examples of trans persons in public office in a country of origin several times in hearings and assessments. These are projected onto participants' situations to argue that their life is not untenable. The use of such singular positive examples ignores the individual situations of those trans Latinas who transition early, face intersecting aspects like poverty, HIV, displacement, repressive regimes, gang violence, and so on. The examples are in fact exceptions to the rule. They also ignore general and trans-specific COI revealing severe problems in countries of origin and marginalisation. This approach leaves out the intersectional realities of trans Latinas and misrepresents the situation in countries of origin.

The psychological impact of the experiences of trans Latinas in their countries of origin has likely shaped participants' behaviour. The severity of their experiences is best understood through the intersecting aspects of their lives. Such behaviour may affect their ability to represent their circumstances and lived experiences in hearings. Findings in the majority of medical examinations before hearings showed psychological restrictions in terms of memory, accuracy of data and detail, and heightened emotional responses.

The observed tendency in participants to downplay problems with family or partners or presenting grave incidents of violence in a detached "casual" way may be plausible survival strategies but can lead to a diminished representation of the severity of experiences in hearings. This downplaying is contradicted by signs of the high impact and strong reactions to serious violence like depression, agitation, disturbed sleep, and anxiety. Nearly all participants (self-) restricted the expression of their identity at certain times due to repression. Avoidance is a general theme, e.g. avoidance of government officials, police, going out, especially in daylight, or consulting healthcare professionals. Not trusting people and organisations, living day to day, and having no hope that anything good will come their way is also observed. The fear of judgement and stigma from sex work and HIV also contribute to participants' unwillingness to address such issues. Many participants do not focus on, have little insight into, and pay little attention to the asylum procedure for exactly these reasons.

The ingrained psychological effects described above can lead to not communicating their cases well during the asylum procedure. We find indications in hearings of downplaying and neglecting severity and the avoidance of themes. Many of the circumstances and experiences told in interviews were absent in hearings. Trans Latinas also diminished experiences that could have been relevant in hearings, which led to them being ignored. On several occasions' negativity expressed about the prospect of finding a job or the success of filing complaints was interpreted as a "lack of effort" by the immigration service while it is attributable differently, to being affected psychologically and the uselessness or danger of filing a complaint.

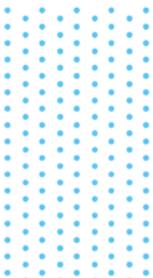
We are inclined to think the asylum procedure is a complex cognitive and emotional assignment for most participants. We see indications of impaired representation of some participants' life history in hearings due to cognitive challenges and lack of education. Cognitive limitations and lack of education can be seen as intersecting aspects



that in some cases were not considered in participants' procedures. Their narratives were brief and focused on separate incidents, while providing little context regarding their causes, circumstances, or structural nature. A failure to respond to questions was likely the result of impaired understanding or lack of knowledge. Inner considerations and processes were sparse in these two cases and the consequence of their identity was presented as facts of life they simply had to deal with.

Trans sex work comprises the intersection of identity and sex work. In the case of most participants, further intersecting disparities, such as not being white, being poor, or lacking education, heightened the risk of becoming involved in sex work. Trans sex workers' lives are complicated and aggravated by the effects of a repressive, violent atmosphere and actions against sex work by state authorities. There is growing recognition by human rights organisations of seeing repressive actions by governments not as "the enforcement of law" but as violations of rights against (trans) sex workers already facing intersecting disparities and being pushed further into illegality. Such recognition requires an understanding of intersectional dynamics. Unfortunately, the immigration service appears to do the reverse. It apparently sees trans persons' involvement in sex work as a choice. Violence by state authorities is attributed mostly to sex work which is judged to be illegal and any violence against them is inherent to this illegality.

This was the last of nine selected themes related to the trans Latinas' asylum procedures. Chapter 3 analysed how these themes are represented and assessed in the Dutch asylum process. In doing so, a multitude of data in the form observations, analysis, considerations, and critique has been generated in response to our research question. The following chapter will distil and reorganise the research results from Chapters 2 and 3 in order to provide an answer to the research question.



© Luc Forsyth, 2018. Image showing Roxsana Hernandez, standing between rails, while traveling with the Central American migrant caravan. Later, after arriving in the US she died in ICE custody.

4. Findings and conclusions

The accumulated results of the research, “Transcript from the margins” will be presented and considered in this chapter in response to the research question, followed by a discussion. The research and its central question were triggered by an exchange of thoughts and observations between a Dutch and a Latin American trans woman in the course of grass-roots support for trans asylum seekers. It was not clear whether all aspects of the harsh, marginalised reality of trans Latinas’ lives in their countries of origin were represented in their asylum procedures. This developed into research with the central question: **How, and to what degree, are the circumstances and experiences of trans persons in the Latin America and the Caribbean region that contribute to the danger and impossibility to live in countries of origin represented and considered in the current Dutch asylum procedure?** An exploratory case study was designed and executed that considered the asylum procedures of eight adult trans persons. This was done both for the purpose of answering the researcher’s questions and to generate new, relevant, and useful knowledge about current Dutch asylum practice regarding trans persons from the LAC region. The information that was coded and considered in this research included a semi-structured interview with each participant, available asylum procedure documents from the Dutch immigration service, lawyers, and courts, background research information, and country of origin information (COI). The research was conducted from a position of fundamental knowledge and insight about trans persons’ lives and circumstances. Candidates were eligible to participate in the research as trans identifying adults from countries in the Latin American Caribbean (LAC) region that do not explicitly criminalise LGBTI persons for their identity and who had requested international protection in the Netherlands. Though not a selection criterion, all participants had a female gender identity. The sample is not representative for the total trans population in the LAC region and does not include trans masculine, non-heterosexual, and non-binary experiences. The outcome of their procedures was not a criterion for participation, nor was it the focus of this research. Instead, the research looks at the process, content, and quality of Dutch asylum procedures when dealing with trans persons.

The research chapters and their results were different in focus. The observations and reflections in Chapter 2 deal with the conditions surrounding trans asylum procedures and general elements of participants’ asylum procedures, whereas Chapter 3 followed the central research question more directly. In the latter chapter those participants’ experiences and circumstances are central that contribute to their sense of danger, well-founded fear of persecution, and all that can accumulate to such persecution. In this research, these experiences and circumstances are the measure of assessment of the asylum procedure’s ability to represent and consider them. To that end, a selection was made of relevant life events and their context in countries of origin from semi-structured research interviews, participants’ asylum procedure documents, and background research information. This information was organised and divided into nine “central themes”: early problems in childhood and into an adult age; the absence of and restrictions to healthcare; legal gender recognition and its possible abusive preconditions; violence towards trans Latinas by state authorities; being involved in sex work; prison conditions; (self-)restriction; instability and/or repression in a country of origin; and disparities and circumstances that intersect with a trans identity in the asylum procedure. These themes were supported and substantiated by trans-specific knowledge, relevant background research information with explicit references, and country of origin information (COI), to the extent possible within this research effort. References to individual cases were only made when not compromising the required anonymity. Using the documentation relating to participants’ hearings and assessments, we analysed whether and how these nine themes were represented and assessed in the Dutch asylum procedure.

The large quantity of data, in the form of observations and reflections, generated in Chapters 2 and 3 have been reorganised and distilled into three main topics. The answer to the research question is based on these three key issues and overarching observations.

The first topic deals with the need for and the profound absence of trans-specificity in Dutch asylum procedures, i.e. the lack of a differentiated and specific approach to the lived experiences and circumstances of trans persons from the LAC region.

The second topic deals with the use and interpretation of country of origin information, which is observed to be problematic in many ways, including: inaccurate assumptions about legislation and its implementation; the use of generic COI that does not represent trans lives when more accurate information from smaller sources is available;

using and interpreting information in a one-sided, unbalanced way; and leaving out important information relating to circumstances in countries in a way that contradicted background research information.

Thirdly, we describe how the broad array of disparities that intersect with trans identity and expression is not represented and considered in asylum procedures. The aggravation of hardships caused by these intersecting disparities and the way they impaired the ability of trans Latinas to present their lived experiences is missing from the current asylum process. The whole picture and the interaction between various aspects of trans Latinas' lives is poorly represented and considered. This also leads to a neglect for the way that an accumulation of hardships can lead to a well-founded fear of persecution.

The fourth part of the findings and conclusions consists of observations about the wider context of trans asylum procedures and recommendations for necessary improvements in the national and international asylum context. The chapter concludes with a discussion of circumstances and choices that have defined the direction and scope of the study.

4.1 On trans-specificity

The first major group of observations deals with a profound lack of differentiation from the LGBTI group and specificity in the approach to participants' trans identity and/or expression⁶⁸⁶ throughout Dutch asylum procedures hearings and assessments.

Background research information clearly shows why an approach to trans asylum procedures should be trans-specific. The burden of exclusion, discrimination, and violence towards LGBTI persons in general is reported to be even higher for trans persons in the LAC region in most circumstances, e.g. in healthcare, being targeted by police forces and non-state groups, during imprisonment, displacement, or when involved in sex work as a trans woman. The visibility of trans women as gender non-conforming is also seen as a probable trigger for a higher burden of adverse experiences. At the same time, they are reportedly less protected by laws and regulations. Furthermore, it is widely recognised in background research information that persons with a trans identity and/or expression face specific and severe challenges in their countries of origin with respect to human rights. These uniquely "trans-related themes" are the absence of LGR and/or abusive preconditions to accessing it, imprisonment along the lines of sex assigned at birth, and the absence, restriction, or abusive preconditions to gender-affirming healthcare. Unfortunately, there is little evidence of the aforementioned information being incorporated into the fact-finding process and considered in the assessment of participants' asylum procedures.

Lack of differentiation

The conflation of LGB and trans-related information and the mistaken application of LGB information on trans persons' situations was observed on many occasions in participants' asylum procedures. This happened, for instance, in the **immigration service's working guidelines** and their execution and in the misinterpretation of anti-discrimination provisions. Both the 2015 and 2018 Dutch immigration service working guidelines are the starting point for trans asylum procedures but contain no specific approach to gender identity and/or expression. Indeed, trans persons are mentioned only once and subsequently incorporated within the larger group of LGBTI persons. This act of grouping them together in the guidelines, also under the header "sexual identities" is a recipe for confusing gender identity and/or expression with sexual orientation. Moreover, the guidelines propose that immigration officers ask questions aimed only at "whom you love" and not "how you identify", inviting misconceptions further.

The execution of these working guidelines in the assessment of the credibility of the trans identity and/or expression reveals how conflation of the LGBTI group leads to mistakes. The approach in credibility hearings of

⁶⁸⁶ Trans-specificity is seen here as an approach in trans asylum procedures that differentiates information, ideas, and their applicability from the larger LGBTI group and that is guided by specific knowledge, insight, and information about trans persons' experiences and circumstances in their countries of origin.

several trans women, who were questioned about whom they love, gives the impression that they are seen as gay men. This effect is exacerbated by the fact that most trans women were misgendered as men in asylum procedures. Moreover, the execution of the guidelines is also inconsistent, since another part of the participants did receive specific questions about trans topics to some degree, albeit in a way not defined in the guidelines.

For the majority of participants, anti-discrimination provisions for LGB persons in countries of origin did not include trans persons, but were mistakenly used by the immigration service to argue that trans Latinas are protected by these provisions. Furthermore, a country's decision to allow gay marriage was seen as progress and deemed relevant for the total LGBTI group. In fact, this step had negative instead of positive consequences for trans persons in this country, as opposition to this change resulted in a violent backlash that led to visibly gender-non-conforming persons becoming targets of attacks.

Differentiation is also crucial because **the severity of trans persons circumstances and negative experiences is higher** in the LAC region compared to LGB persons, while the **legal protections for trans Latinas lag behind** in the LAC region. They are at higher risk of exclusion, discrimination, physical and sexual violence, cruel, inhuman, degrading treatment and torture, face more violence from police forces, and are vulnerable in times of conflict and/or displacement or sex work. The targeting of trans Latinas is connected both to being feminine / female and to their higher visibility as gender non-conforming. Trans-related themes clearly contribute to a high incidence of adverse experiences among trans persons.

Misgendering

Most participants were misgendered using the wrong pronouns and first names in their procedures, especially in writing and in particular by the immigration service. Lawyers are somewhat inconsistent in gendering but to a much lesser degree than the immigration service. The courts, by contrast, consistently gender trans persons correctly, according to their identity. The misgendering of trans persons show disrespect for the gender identity and/or expression of trans asylum seekers. It emphasises the sex assigned at birth and maintains a gender normative position on trans identities. The possible gender normative bias behind the act of misgendering and the emphasis on sex assigned at birth increases the risk of the deficient execution of trans asylum procedures, both in the way the trans person is perceived, approached, and interpreted and in the appreciation of the dynamics of gender normative violence.

Ignoring trans-related themes

A near absence of conscious and informed inclusion of trans-related themes was observed in the fact-finding process and assessments of participants' asylum procedures. In that respect, the Dutch asylum procedures failed the critical test, i.e. inclusion of these themes is a measure of whether and how a specific approach towards trans identity and/or expression is a feature of the process.

The Yogyakarta Principles elaborate all three themes in a human rights context and it is clear that these trans-related rights depend upon explicit legislation and provisions by governments. But only a minority of LAC countries provided LGR and gender care and none of the countries follow human rights guidance concerning the imprisonment of trans persons.

Only one participant had achieved LGR, which was inaccessible in most participants' country of origin. Half of the trans women in our research had been imprisoned with men without any chance of protection or avoiding this well-known risk of cruel, inhuman, or degrading treatment. In the absence or restriction of competent, non-discriminatory gender care, almost all participants had resorted to using improvised, risky, and substandard medical interventions to achieve bodily gender affirmation.

Both the participants' narratives and background research information make clear how the absence of, abusive preconditions to, and/or restrictions of trans-related rights lead to hardships and a well-founded fear of persecution, and leaves trans Latinas unprotected and vulnerable. In this respect, the exclusion, discrimination, and violence that the majority of participants faced, including cruel, inhuman, or degrading treatment and possibly torture, both from state and non-state actors, is seen here as structural and pervasive. The narratives of those without LGR, for instance, reveal constant problems and hardships in many areas of life, i.e. in education, access

to work or accommodation, travelling on public transport, passing through checkpoints and borders or formal bureaucratic matters. In particular, participants were regularly stopped by the police for being visible as a trans women and were accused of carrying false identification or “dressing up,” leading to serious problems.

These themes are clearly important for trans persons trying to substantiate their well-founded fear of persecution in asylum procedures. Unfortunately, there is no evidence of a conscious intention to address or pursue these themes when they surfaced in hearings. This was in contrast to other, non-trans-related topics that did receive conscious and structured attention from the immigration service. Frequently, negative experiences, specifically about trans-related themes, which surfaced in hearings were not linked to an absence of rights despite being structural causes of persecution. Consequently, such experiences appeared to be incidental or random.

Assessments followed this trend by, among other things, not considering the legal situation, the implementation of provisions, or government responsibility concerning trans-related rights in countries of origin. There was no recognition that the absence of rights and provisions are a common, structural, and repetitive cause of many hardships. Instead, the resulting exclusion, discrimination, violence, cruel, inhuman, and degrading treatment and/or torture is presented as separate or random occurrences. Furthermore, the fact that the absence or restriction of rights leaves trans persons unprotected and without the legal grounds to ask for protection from state authorities, was ignored. Finally, there is no evidence of attention in participants’ procedures for abusive preconditions that must be met in some countries of origin in order to gain access to gender care or LGR. This, in turn, ignores the fact that preconditions such as mandatory sterilisation, sex reassignment, or other medical prerequisites are themselves serious human rights violations.

Gender non-conformance

The perception of gender non-conformance and visibility as a trans person is a serious and recurring trigger for many of the negative experiences that participants faced in heterogeneous circumstances. A number of experiences were not explicitly attributed to gender normative violence in trans asylum procedures and experiences were often taken as separate incidents and not as structural or recurring cause of persecution. The role that perceived gender non-conformance had in (co-) producing exclusion, discrimination, violence, cruel, inhuman, or degrading treatment and possibly torture was relegated to the background. This happened, for instance, in cases where instability and/or repression in the country of origin and police violence was an important element that dominated hearings leaving little attention for the specific role of gender non-conformance and the consequences of being visible as a trans person.

We conclude that there is a profound lack of differentiation of trans persons from the LGBTI group and an absence of specificity in the approach to participants’ trans identity and/or expression. The misgendering of participants illustrates a lack of respect and increases the risk of gender normativity and prejudice infiltrating their asylum procedure. The severity and seriousness of hardships for trans Latinas presented in background research information is not incorporated into asylum procedures. All these observed flaws invalidated the representation and assessment of trans-specificity in trans Latinas’ asylum procedures. Significant aspects of the severity, danger, risks, leading to a well-founded fear of persecution were unrepresented. Furthermore, and crucially, the lack of access to government protection for trans Latinas and the risk of, for instance, the imprisonment of trans women with men on returning to the country of origin, were neglected. Finally, the approach in asylum procedures gives an overall impression that Dutch immigration service officers lack knowledge, insight, and reflection on trans-related themes and their own gender normative position.

4.2 Interpretation of circumstances

The second major group of research results focuses on the interpretation of circumstances in countries of origin in the asylum procedures of trans participants. The proposed instrument for the interpretation of circumstances in a country of origin in asylum procedures is country of origin information (COI). But many problems, detailed below, were observed in this research relating to COI.

In this research, we concur with previous criticism of COI for the larger LGBTI group that it is scarce, insufficient, incomplete, and focusing on minority situations in general. Our findings indicate that such flaws may be more pronounced for the smaller trans group where less investment and attention is given to research and documentation. In addition, little COI was presented overall in the majority of assessments in the immigration service's "intentions" and decisions. When COI reports were mentioned, they were very general in nature, from larger sources, and often without references to relevant parts. These general reports featured limited sections on the total LGBTI group, and any content lacked a differentiated and specific assessment of trans persons' experiences and circumstances. The discussed profound lack of trans-specificity in participants' asylum procedures points, inevitably, to problems in the immigration service's gathering and collating of trans-specific COI. Furthermore, it is not clear what COI is used by the immigration service and how it is weighed in the general assessment of conditions in countries of origin. Finally, while it may be true that COI is sparse, this does not explain all the problems in the interpretation of circumstances. Indeed, our background research reveals that much more differentiation and specificity is necessary – and possible – than is currently observed in asylum procedures.

Given the limitations regarding COI in trans participants' asylum procedures, the COI mentioned in documentation cannot be a proper foundation for the assessment of circumstances in countries of origin. This research is therefore not limited to addressing the COI mentioned in "intentions" and decisions. Rather, it is a response to the immigration service's frequently unfounded comments and assessments in this regard. Moreover, the research highlights relevant circumstances present in the background research information but which were absent in the immigration service's interpretations.

The research observations and comments follow important themes such as the possibility of participants receiving protection in countries of origin, the pervasiveness of police violence, the risks for trans Latinas of returning to their country of origin and how this is influenced by the circumstances in such country.

Failure to consider an absence of protection

The assessment of protection possibilities is supposed to be an important topic in the assessment of a well-founded fear of persecution. The following observations show how this assessment was seriously compromised in several ways.

The presence of anti-discrimination provisions was often included and given significant weight in the few remarks on country of origin circumstances in immigration service "intentions". Unfortunately, in the majority of cases, anti-discrimination provisions in countries of origin regarding a person's sexual orientation did not apply to trans persons but were incorrectly projected upon them in their asylum procedures. This led to the mistaken assumption that trans persons could have received state protection and that they should have filed complaints with authorities in cases of police or other violence. A failure to seek protection or file complaints was deemed to be a neglect of a reasonable obligation that, in turn, had a detrimental effect on asylum procedures.

Moreover, a failure to highlight or consider an absence of trans-specific rights in legislation and provisions in the assessments in asylum procedures leaves a large gap when judging the protection possibilities for trans persons. How the absence of, abusive conditions of, or restrictions to legal gender recognition, protection from imprisonment with men, and gender care left participants outlawed and without rights was not considered.

In the case of Cuba, the possibility for transgender people to obtain protection from the organization CENESEX, is disputed here on several grounds. As previously mentioned, the proposed protection through anti-discrimination laws was undifferentiated and did not include trans persons. Since trans people were not legally protected, there was no reason to file complaints, regardless of whether CENESEX is effective in this regard or not.

In addition, background research information on CENESEX was ambiguous and inconclusive about the effectiveness of this organisation in general. It is a formal communist organization, led by Mariela Castro, embedded in the Cuban authoritarian regime whose agenda is disputed. Hesitation about the way filing complaints would be handled by this organisation seems reasonable.

Furthermore, CENESEX is also responsible for deciding who receives gender care in Cuba; however, the organisation restricts access to gender care in various and discriminatory ways, as was the case for our Cuban participants. Filing complaints with this state-run organisation is very difficult for trans persons when such a complaint could be received unfavourably and negatively impact their chances of getting the gender care they may desperately need. Effectively, this situation requires participants to file their complaints about police violence with a formal communist organisation that restricts their needs while lacking any rights under Cuban law. Seen in the most positive light, this would have been a useless exercise. Despite this, there was no hesitation on the part of the immigration service to include CENESEX as evidence of available protection for trans Cubans.

These omissions, mistakes, and unbalanced representations in the immigration service's assessment of protection possibilities have damaged the assessment of a well-founded fear of persecution in a majority of participants' cases.

Assessment of police violence

Violence by state authorities directed at trans Latinas was interpreted as incidental and random in asylum assessments. The recurring judgement that violence was "not specifically aimed at the person, random, carried out by a few, not condoned by superiors, or representative of the police force" was not underpinned by supporting COI and specific references. This judgement is disputed in the light of trans Latinas' narratives and background research information that portray police violence against trans persons as a major problem.

It must be acknowledged that both the background research information and COI are incomplete with regard to state violence and they are open to positive or negative interpretation or can be inconclusive. However, it does point to recurring and frequent misconduct and violence by state authorities against trans Latinas in many countries in the LAC region and certainly by more police officers than "a few." It is evident from participants' narratives and background research information from many sources and across countries of origin in the LAC region that violence is pervasive and accompanied by prejudice in particular towards trans persons. According to participants' narratives, the trigger for the repeated police violence is visible gender non-conformance. As such, it is not random and it is connected to being part of a marginalised gender non-conforming social group with an innate variance in gender identity. Yet, this element is not recognised in asylum assessments. Finally, even if the violence is not always consciously ordered by superiors – gender normativity is often a subconscious mechanism – it can, nevertheless, be specific and structural.

The Dutch state's general assessment of violence by police forces in Cuba is that it can be explained as "police attention at gay meeting spots" and linked to "public order problems and crimes such as prostitution." This generalised explanation of police violence against LGBTI persons in Cuba was projected on participants with a trans identity. This is an unreasonable projection since the immigration service did not inform themselves on the location and circumstances of incidents of police violence in our participants' cases. And the applicants' narratives in hearings did not match this explanation, not least because the places and causes of the violence were different. Moreover, sex work in Cuba was seen as a criminal offence in assessments in cases where, in fact, it was not. The emphasis on sex work and its illegality was not only mistaken, it also steered away, again, from the perceived gender non-conformance of a trans identity as an important trigger for violence by state authorities.

Neglecting the influence of instability and/or repression

According to the European Asylum Support office (EASO),⁶⁸⁷ COI should include, among others: the evaluation of the human rights and security situation; the political situation and the legal framework; cultural aspects and societal attitudes; the humanitarian and economic situation; and geographical issues. This idea about the function of COI is not visible in participants' asylum procedures; indeed, such issues relating to participants' countries of origin are largely absent. The problems relating to instability and/or repression in countries of origin were absent or underrepresented in assessments. Moreover, the immigration service's interpretation of circumstances in Cuba are disputable.

There are serious problems with respect to the functioning of the state in Guatemala, El Salvador, Honduras, the south of Mexico, Venezuela, Colombia, and Cuba. Increasingly large numbers of citizens are fleeing from the first three countries mentioned and Venezuela, among them trans women. Background research information and eligibility guidelines point to violence against and the targeting of trans persons and trans sex workers by both police and non-state groups/gangs. The police is reportedly vulnerable to corruption and is seen to cooperate with gangs that have substantial control in these countries. Protection from state authorities is largely non-existent. The lack of a functioning state increases the risks of being targeted for a trans identity with little chance of protection. This clearly contributed to participants' well-founded fear of persecution yet these circumstances were never considered in their asylum procedures.

Little weight was given to highly negative circumstances in Cuba, e.g. the impact of its authoritarian regime, the role played by CENESEX, the precarious human rights situation, and the use of the Ley de Peligrosidad. There is an impression that the severity of problems in Cuba are downplayed. Fundamental critique from major information sources on the Ley de Peligrosidad as an instrument known to violate human rights was missed in Dutch assessments. This information supported and corroborated the repression under this law experienced by participants, who told of frequent targeting under the Ley de Peligrosidad. This law and the absence of protection lead to a much higher risk of police violence among Cuban participants. The immigration services could also have considered the risk of possibly years of imprisonment confronting trans women as result of a conviction under this law, without having committed a crime. And it could have included the background research information that attests to the imprisonment of trans women with men as a violation of their human rights. There is a well-known and predictable risk of cruel, inhuman, or degrading treatment and/ or torture. This issue is not "a force of nature" but a government responsibility, but again, these circumstances were neglected by the immigration service, which also failed to address the fact that participants had no chance of protection against repression from state authorities under this law.

Relevant circumstances and information regarding instability and/or repression in the described countries of origin was not considered in trans participants' asylum procedures. This was detrimental to assessments of, firstly, limitations to or absence of state protection in these countries of origin, and, secondly, the higher risks of violence by state and non-state actors against individuals with a trans identity and/or expression. When combined with the aforementioned omissions relating to anti-discrimination, LGR, etc., the presence of state protection for the majority of participants should never have been assumed. Important elements regarding the well-founded fear of persecution were not considered.

We conclude that the interpretations of trans participants' circumstances in their countries of origin are highly inadequate. Relevant themes for the assessment of the severity of police violence or lack of protection in unstable or repressive countries do not receive appropriate attention and are underestimated, which is detrimental to trans asylum procedures. The interpretations are riddled with disputable elements, damaging mistakes, highly relevant circumstances and information are omitted, the total picture is represented in unbalanced ways resulting in a misdirecting of the situation and an underrepresentation of issues. The interpretations in asylum procedures were not trans-specific, remarks regularly lacked substantiation, and in cases where COI was presented, relevant parts were not referenced. In almost all cases, the additional COI and arguments by lawyers in response to "intentions" had no influence on the immigration service's position and were totally dismissed. The ambiguity or

⁶⁸⁷ EASO, 2018, p.8.

inconclusiveness of information was not reflected in immigration services decisions. We believe that both the interpretation of circumstances and the sparsely used COI inhibit objective and transparent assessments in asylum procedures.

This being said, here we insert an example of a better praxis by the Dutch government in its interpretation of circumstances in a country of origin, in this case Venezuela. At the end of this research (July/August 2020), the Dutch government published a general country report on Venezuela that, in turn, led to a country-specific asylum policy.⁶⁸⁸ The report and policy address several shortcomings observed in this research with regard to Venezuela, a country in the LAC region. They acknowledge how instability in a country of origin in the LAC region leads to an absence of state protection, laws that have no consequence in reality, and the impossibility of relocation as a realistic alternative. Moreover, the report and policy are more trans-specific, taking into account that trans persons face higher risks of exclusion, discrimination, and violence, also by state authorities, compared to LGB persons. They recognise the absence of legal gender recognition as a strong predictor of being outlawed in essential areas of life and they highlight how their marginalisation predisposes trans persons to being trafficked and/or becoming involved in sex work. All this culminates in the classification of trans persons in Venezuela as a risk group and, thus, the documents can be considered an example of a better practice.

4.3 The whole picture and intersecting issues

A third group of research results centres around all those elements omitted from or not considered in participants' asylum procedures and the way all these elements interact and accumulate, resulting in an increase in and greater severity of negative experiences. A substantial number of relevant experiences and circumstances relating to the trans identity and/or expression were not represented or considered in participants' hearings and the way individual disparities and circumstances intersect with a trans identity and/or expression was absent. Each research participant faced at least three intersecting disparities, e.g. being poor, from a rural background, a mixed racial background or contracting HIV, but most of them faced more intersecting disparities. They do not lead lives where the problems because of a trans identity and/or expression can be separated from the total context of their lived experience.

We will draw conclusions based on the following important elements that intersect with a trans identity: marginalisation and intersecting disparities in childhood and into adulthood; sex work; and participants' limited ability to communicate their lived experiences and circumstances in hearings.

Marginalisation at a young age and intersecting disparities

The majority of participants' early life experiences and circumstances were marked by harsh marginalisation. Coming out at the beginning of their teens or being perceived as different in the LAC region exacerbated the exclusion, discrimination, and violence they had to face from their family, in school and in their neighbourhood at a vulnerable and formative age.

Combined with other disparities like poverty, a rural origin, a mixed racial background, or instability and/or repression in their countries, these circumstances constitute a higher risk of being expelled from home and school, becoming homeless, interrupted education, and lack of employment. A wide range of background research information points to the ways these early hardships and intersecting disparities generate risks for new ones, such as becoming involved in sex work. Most participants became involved in sex work during such periods of mounting problems and several were displaced from their birth region/country and/or acquired HIV. As mentioned, all participants faced between three and up to ten disparities that intersected with their trans identity.

⁶⁸⁸ Dutch Government, 2020 A and B.

In general, an unprecedented 75 per cent or more of trans women are involved in sex work in the LAC region. Facing more problems than average, they have little chance of obtaining other work. This is seen here as an expression of the severity of their circumstances, the effect of intersecting disparities, and a consequence of belonging to a marginalised social group recognisable and targeted for their gender non-conformance and expressing an innate identity. These personal intersectional circumstances clearly influenced the harshness of their marginalisation. Knowing this, it was unjust for the immigration service to use singular positive examples of trans and LGBTI persons who had found employment in public office during participants' hearings and in their "intentions." These examples were used to argue that life is tenable for trans participants in their countries of origin. Such comparisons did not incorporate elements of intersectionality and privilege and the examples were singular exceptions to the rule of marginalisation plucked from countries with up to 100 million inhabitants. Moreover, consideration for general trans-specific conditions like an absence of LGR in such countries of origin were absent. To use such exceptions to the rule of marginalisation as examples is crude and demonstrates a lack of understanding and/or ignorance for the individual intersectional realities.

The chain of early experiences and intersecting disparities that emerged in research interviews with participants were not represented in hearings and rarely considered in asylum assessments. In only one case were early problems defined as a material fact and assessed as such. Not only were lived experiences of participants absent, but the scale, structural and repetitive character of social marginalisation was underrepresented. Disparities like being poor, from a rural background, or a mixed racial background, which intersect with being a young trans person to produce a much higher risk of losing one's family home and school were omitted.

Assessment of sex work

An intersectional approach was missing in assessments of trans sex work. The elements of the trans identity and sex work were separated in an unrealistic manner followed by an argument that sex work was the trigger for violence by state authorities. The obvious role that a trans identity and/or expression had in triggering this violence was set aside. In doing so, the role of trans identity as grounds for international protection was ignored in assessments.

This separation of a trans identity and sex work was artificial and misrepresented the real situation for several reasons. Firstly, narratives that their trans identity was a trigger for police violence were ignored, despite being supported by background research information. Secondly, it is primarily the trans identity, often combined with intersecting problems, and not sex work that is a catalyst for problems. Background research information showed how trans sex workers face more discrimination, violence, and arbitrary arrests than non-trans sex workers, which clearly points to the trans identity "co-producing" police violence. Targeting under public order laws is reportedly provoked by both the identity and sex work, not by sex work only. Charges based on "reasons" other than identity can be pretexts for acting against the trans identity. Reports on state violence originating from authorities may defend prejudice, misconceptions, and actions. The intertwined character of trans sex work does not easily allow for exact attribution of what triggered the violence. If an attribution is possible, it is most probably the trans Latina herself who may reconstruct what induced the violence. Furthermore, prejudice against trans women links them to involvement in sex work even when this is not the case. We conclude that the separation of the trans identity from sex work for the purpose of attributing police violence ignores narratives, information, and the intertwined reality of such situations.

In the case of Cuba, the immigration service not only separated the elements of trans identity and sex work but it also claimed that sex work in Cuba (and in another country) are a criminal offence, implying that the consequences of such offences, i.e. violence, were an individual responsibility. But sex work is not a criminal offence in these countries. As such, the immigration service's approach reflected the stigma and incrimination of society and state authorities. This contradicts the approach proposed by human rights organisations, who see violence by state authorities not as "law enforcement" but as a breach of (trans) sex workers' basic human rights. They also acknowledge that there is little chance of victims finding redress or protection from state authorities when the violence is sanctioned by the state. The latter supports participants' lived experience of state repression for sex work that is another intersecting problem.

The immigration service's approach ignores the chain of intersectional occurrences leading to the intertwined

reality of a trans identity and sex work. It isolates sex work in an artificial way and reflects the stigmatisation and repression by state authorities in countries of origin. We dispute such assessment, which led to considering the violence by state authorities in procedures less or at all.

Impact of experiences

Psychological impact of participants' experiences in their countries of origin was observed in most cases. Findings in the majority of medical examinations carried out prior to hearings revealed psychological impairments to memory, a lack of accuracy with respect to data and detail, and heightened emotional responses. This psychological impact probably shaped a mental attitude that may have impaired the presentation of trans Latinas' lived experiences in hearings. For instance, the way participants downplayed problems contrasted sharply with the strong reactions to such problems they exhibited including depression, agitation, disturbed sleep, and anxiety. They demonstrated a tendency to avoid situations, distrust authorities, and had little hope of anything good coming their way. When expressed in terms of a negative expectation of getting a job or the pointlessness of filing a complaint, for example, this was interpreted by immigration officers as a "lack of effort." This, in turn, had a very negative influence on their cases.

Being open to the intersectional reality of trans Latinas' circumstances may well produce a different understanding. The observed influence of psychological impact on participants' behaviour in hearings is likely to have impaired the communication of their experiences and circumstances effectively, which, in turn, influenced the outcome of asylum procedures.

One finding that stood out was that four out of six participants did not talk about their involvement in sex work during hearings, despite it being highly relevant and linked to an increased risk of stigma and violence. The above-described psychological impact could account for this failure to communicate this issue. It is hard to imagine that the immigration service missed signals of participants' involvement in sex work. Such "intersectional insight" is not difficult and is highly relevant, but its absence in asylum procedures was pervasive, and not only regarding sex work. Ironically, participants' fears that their involvement in sex work would influence their asylum procedures negatively were confirmed in asylum claim assessments where participants were open about their experiences as sex workers.

Cognitive limitations

Cognitive limitations and a lack of education intersecting with the trans identity and/or expression also impaired some participants' ability to communicate their lived experiences and circumstances in asylum procedures. Their narratives were short, focused on separate "serious incidents" and often neglected the context or structural aspects of circumstances. Inner considerations and processes were rare in these cases. Participants did not describe the formation of their identity as an internal dilemma, rather they presented it as being complicated by the effects of a hostile environment. There was no sign in the output of hearings and assessments that the immigration service was aware of or took into account participants' cognitive limitations and it was also not addressed by their legal representation.

The scope of an asylum procedure

We conclude that it is necessary and relevant to include the number, complexity, interaction and severity of negative experiences and intersecting disparities in their effects on trans Latinas' lives in asylum procedures. The intersecting disparities contribute to the structural and cumulative hardships that can make their lives dangerous and unsustainable and contribute to a well-founded fear of persecution. This issue demands a wide scope both in the fact-finding process as well as in the assessment of asylum applications. The UNHCR supports the position that belonging to the social group of trans persons does not have to be the "sole, dominant cause" of persecution, it

need only be a “relevant contributing factor.” Paragraph 201 of the UNCHR’s handbook⁶⁸⁹ illustrates this very well. It states that, “very frequently the fact-finding process will not be complete until a wide range of circumstances has been ascertained and taking isolated incidents out of context may be misleading.”

Unfortunately, this research concludes that there is an overall lack of attention to and consideration for participants’ total individual and intersectional context in Dutch asylum procedures, which tend to “narrow down” the focus to the primary goal (proving a well-founded fear of persecution) and divide the lived experiences into separate events. A limited number of isolated material facts were considered with little context and not representative of the whole picture and the interaction of various aspects. This is observed not only in relation to the intersecting disparities described here but also concerning the aforementioned trans-related themes. When the reasons for the things that happen are not considered, the elements of a narrative look more incidental and random, while they are, in fact, structural and pervasive. Also, a wide range of “smaller and larger” lived experiences were not considered in the course of the procedures. All this invalidated the chance to consider the whole picture.

Current Dutch asylum procedures fail to represent and take into consideration many of the circumstances and experiences confronting trans Latinas in their countries of origin in the LAC region that contribute to dangerous and unsustainable lives and a well-founded fear of persecution. While there is a partial consideration of larger, isolated elements, the absence of trans-specificity, the absence of, or incomplete, mistaken, unbalanced interpretation of circumstances and a failure to see the whole picture and relevant interactions did not do justice to trans Latinas’ experiences and circumstances.

4.4 Overarching observations

Describing the research findings and conclusions in Chapters 4.1 to 4.3 has inevitably dealt with the execution of trans asylum procedures by the immigration service. But many observations in the research indicate that the ability of Dutch asylum procedures to consider trans persons’ experiences and circumstances needs to be seen in a wider context. This part of Chapter 4 highlights some observations about the wider context of trans asylum procedures. These observations are not extensive but are a prelude to introducing our terms of reference⁶⁹⁰ aimed at national and international stakeholders, and to presenting recommendations in Chapter 5.

It is worth noting again just how recently it is that trans persons have become less marginalised and pathologised by communities, doctors, police, and governments, in a limited number of countries and regions in the world. Gradually, the door has opened to seeing them as persons with human rights, as specified in the Yogyakarta Principles. But moving from a situation of awareness to some extent to one of unambiguous legislation, rights, and equality for trans persons is a gradual process. We have highlighted the remark in the UNHCR’s 2012 guideline No. 9: “though persecution of LGBTI identities is not a new phenomenon, there is greater awareness in many countries of asylum.” While this is positive in itself, it also reveals how existing persecution may not come to light until the climate in receiving countries is such that trans persons are envisioned as worthy recipients of equality and human rights. There are many parts of the world where awareness and equality for trans persons remains a long way off. Even if European countries receive trans asylum seekers, the development of a human rights position for their own trans population is incomplete and varies greatly within Europe. This may influence stakeholders’ sensitivity to and perception of trans-related themes and the weight they have in asylum procedures. For example, how open can an asylum procedure taking place in the Netherlands be to considering issues of mandatory sterilisation and other abusive preconditions to LGR as human rights violations in countries in the LAC region when precisely these things were anchored in Dutch law until 2014? Some of the European countries even roll back or obstruct trans persons’ rights. How open will an immigration service in Hungary be in trans asylum procedures given the country’s current rolling back of LGR?

As early as 1981, a lesbian, gay, or bisexual orientation was recognised as grounds for asylum in the Netherlands by

⁶⁸⁹ UNHCR 2011, para. 201.

⁶⁹⁰ Terms of reference: “Descriptions of what must be dealt with and considered when something is being done or studied”. Merriam Webster dictionary, 2020 B. Available at: <https://www.merriam-webster.com/dictionary/terms%20of%20reference>; last accessed 26 December 2020.

the Council of State.⁶⁹¹ This was followed in 2004 by their inclusion in the European Qualification Directive.⁶⁹² Trans persons were only included in the revised Qualification Directive in 2011.⁶⁹³ Our finding, that, in the Dutch asylum context, the small, less familiar group of trans persons is incorporated into the larger LGB group is unfortunate. It hindered trans-specificity in Dutch asylum procedures and beyond, in the work of many stakeholders. Not only the Dutch immigration service, but for instance migration lawyers, generally did not include trans-specific themes when defending their trans clients.

The development of a differentiated and specific approach towards trans persons, which systematically and comprehensively encompasses all relevant themes, should be aimed for not only in the national asylum context, but also in the work of international stakeholders. The decision of the European Asylum Support Office (EASO)⁶⁹⁴ not to focus fully on trans persons “because their asylum procedures are not so common” in their 2015 practical guide to COI research is not helpful and regrettable.

Looking at the UNHCR’s 2012 guideline No. 9 regarding claims to refugee status based on sexual orientation and/or gender identity,⁶⁹⁵ it is observed as a first attempt to include trans persons in the asylum context. It hints at trans-specificity but falls short of what is necessary. We will consider some of the problems here.

The UNHCR guidelines are fragmentary and incomplete with respect to the importance of issues such as LGR, gender care, and imprisonment in trans asylum procedures. Notably, the fact that an absence of legislation and provisions leaves trans persons without essential rights and unprotected is not addressed. Legal Gender Recognition is mentioned only briefly (in para. 10 under the header “transgender” and as a footnote). It is not clear what is expected of LGR provisions in countries of origin and the guidelines fail to address the severe consequences of an absence of LGR, or the restrictions, or abusive preconditions that are often imposed on obtaining LGR. Moreover, the guidelines make no mention of the extent to which access to LGR impacts a well-founded fear of persecution. The significance of gender-affirming healthcare is not mentioned and there is no recognition that the way it is defined and implemented by governments impacts a trans person’s economic and social rights. It is essential that the consequences of the absence of and restrictions and abusive preconditions to gender care are considered. Crucially, improvised, substandard, illegal, self-administered measures for bodily affirmation should not be seen as access to healthcare. To the contrary, it must be acknowledged that they exacerbate existing hardships. The issue of trans persons being incarcerated in male prisons is only touched upon superficially in para. 22. There is no mention of what the standard should be for imprisonment of trans persons, what problems can occur, and how cruel, inhuman, degrading treatment, and torture contributes to a well-founded fear of persecution. In short, these guidelines, used in trans asylum procedures, also by the Dutch immigration service, must be improved urgently.

It is important to make some remarks here regarding the COI used to substantiate the circumstances and experiences of trans persons in their countries of origin in asylum procedures. Our findings reveal that the majority of COI is incomplete, undifferentiated, and is not trans-specific or is gathered with trans persons’ concerns at the periphery of the investigation. In particular, general country reports, for instance those from the United States, contain almost no trans-specific information. Where trans persons are mentioned, it is usually just a few remarks within a section on the wider LGBTI community. A few COI productions by ACCORD and a UNHCR report⁶⁹⁶ stood out for containing valuable information on some relevant trans themes, but by no means addressed the whole picture. In several participants’ cases, lawyers reported a sparseness of COI during hearings, leading to a request for a general country of origin report to be produced by the Dutch foreign ministry. Despite there being good reasons for such requests they were all refused.

At the same time, there is more and better information available in a human rights context and with smaller and larger NGOs than is currently present in the asylum context and used in Dutch asylum procedures. Agencies like the United Nations Development Program, the United Nations AIDS agency (UNAIDS), the World Health Organisation, the UNHCR, and the Committee Against Torture focus on certain trans themes that are important to consider when looking into the situation of trans persons, regarding LGR, gender care, healthcare diagnosis and treatment, or imprisonment. Themes important to trans persons intersect with issues of race, poverty, displace-

⁶⁹¹ Jansen, S. 2018, p.15.

⁶⁹² European Council, 2004. DIRECTIVE 2004/83/EC.

⁶⁹³ *Idem*, 2011. Directive 2011/95/EU.

⁶⁹⁴ EASO, 2015 A, p. 8.

⁶⁹⁵ *Ibid*.

⁶⁹⁶ ACCORD, 2017 A, pp. 165-188 concerning Cuba, contains a good section about LGBTI persons’ concerns in Cuba: ACCORD, 2017 B, pp. 11-14 on Mexico”, contained a useful part about the limits to LGR and anti-discrimination laws in Mexico. UNHCR, 2015 B, pp. 27-30.

ment, HIV, sex work, and gender-based violence. Most of the work of such organisations in this area tends to address aspects of the total situation for trans persons. A few thematic reports by two medium-sized and larger non-governmental organisations⁶⁹⁷ offer insights into the situation of trans persons in specific countries of origin. We hope the United Nations, the UN Independent Expert on sexual orientation and gender identity, the Inter-American Commission on Human Rights, international NGOs, and governments will integrate a holistic approach that addresses and considers all the themes concerning trans persons. An integrated analysis from a human rights perspective is a way to gain a true understanding of the extent, accumulation, and structural nature of the risks experienced by trans persons in the LAC region (and elsewhere) and the consequent well-founded fear of persecution. Such analysis should find its way into the asylum context for a better understanding of trans persons' experiences and circumstances in the LAC region.

An improvement in the way that COI is researched, gathered, and used is essential, and can only succeed with the investment of many stakeholders. We recommend following the method proposed by EASO for researching COI for the LGB population. We subscribe to EASO's arguments as to why a specific investment in COI is needed and value their suggested methodology, in particular that COI research must be executed by researchers who have prior knowledge of trans issues, an understanding of the relevant research questions and local contexts, and who are able to use specific search terminology, work with different types of sources, and obtain alternative sources of information. Of course, asylum authorities may have to open up to such "alternative" sources and reconsider the way they look at the reliability and acceptability in case of a smaller marginalised group about whom little information is available.

As we concluded the writing of this research, the Dutch Ministry of Foreign Affairs published a general country report on Venezuela.⁶⁹⁸ In it, and the subsequent country-related asylum policy⁶⁹⁹ of the Netherlands produced at the end of August 2020, trans persons are defined as an at-risk group in Venezuela. The section in the general country report on the LGBTI population was largely based on research by an exceptional trans activist, Tamara Adrian. In the most unstable countries in the LAC region, the provision of information or reports often comes down to local/regional trans persons and small non-governmental (LGB)T organisations, often at the risk of violence. Those persons and organisations deserve thorough protection, support, and funding in their countries of origin, also from international partners and non-governmental organisations. It is notable that the "terms of reference" questions⁷⁰⁰ that were prepared in the Venezuela general country report do ask for a trans-specific approach and do connect the situation of trans persons to an absence of LGR and the instability and repression in the country. We hope that such a trans-specific approach will develop further, also beyond general country reports, and feature when researching, collecting, and interpreting COI for use in trans asylum procedures.

Conclusion

These observations and many others inform our recommendations to stakeholders (outlined in Chapter 6) including: international parties like the UNHCR and their COI platform "Refworld"; the European Asylum Support Office; the UN Independent Expert on sexual orientation and gender identity; and Dutch stakeholders like the immigration service, asylum and refugee support organisation VWN, and migration lawyers.

To factually include trans persons in a differentiated and specific way in an asylum context requires the efforts of many stakeholders. It is clear, currently, national and international stakeholders only consider certain aspects of trans persons' experiences and circumstances and most of them miss crucial themes. We conclude that there is a need – in both a human rights and in an asylum context – to introduce **terms of reference** when considering the situation of trans persons in a certain region or country of origin. These terms of reference are implicit in this research but, for practical purposes, will be defined separately below. They describe the themes, circumstances, and experiences that we urge all stakeholders to observe, include, and consider in the form of questions to be answered. They can contribute to a focused effort to a comprehensive integration of all relevant themes, how they interact with each other, and how they accumulate to impact the situation of trans persons.

⁶⁹⁷ Transgender Law Center 2016; Redlactrans 2012 and 2014; HRW, 2009.

⁶⁹⁸ Dutch Government, 2020 A.

⁶⁹⁹ *Idem.*, 2020 B.

⁷⁰⁰ *Idem.*, 2020 C.

The terms of reference are organised into twelve sections. They deal with: Legal Gender Recognition; respecting trans identity; gender-affirming healthcare; the imprisonment of trans persons; laws and their implementation; gender-normative opposition to trans identity and/or expression; state violence; conflict, instability, repression and gang rule in countries of origin; displacement; country of origin information; sex work; and cumulative effects. The detailed list of terms of reference can be found in Appendix 5. We urge all stakeholders to use the terms of reference to guide their engagement with trans persons and to ensure that they are treated in a differentiated, trans-specific way that systematically and comprehensively encompasses all relevant themes.

4.5 Discussion

The reach of this research has been defined and limited by the circumstances and choices recorded here. The number of eight participants was rather small within an otherwise very extensive study. This is explained by the relatively small influx of trans asylum seekers in the Netherlands from the LAC region and a reluctance of trans asylum seekers to be found or to participate. The threshold for participation was lowered by the researchers' own trans background and by guarantees of anonymity. In the end all participants were trans females with a heterosexual orientation towards men, although these were not inclusion criteria. The research does not include trans masculine, non-binary persons, or trans persons with a non-heterosexual orientation. Our impression is that, currently, trans asylum seekers in the Netherlands are mostly trans female, but there are caveats to this statement, not least the lack of available data from asylum authorities and a recognition that trans masculine asylum seekers may choose to remain anonymous. Given the lack of COI and other information, it would have been nearly impossible to document and substantiate the situation for masculine, non-binary, or non-heterosexual trans persons in the LAC region. Further research to clarify their situation and the reasons for such gaps in information is required.

The background research on the conditions in countries of origin in the LAC region for trans people documented and clarified their situation. It provided a general reference for the individual experiences and circumstances of participants in the study. For each central theme within the research, a broader basis was sought by looking at a combination of information relating to several countries in the LAC region or a cross-section of all countries. Such information for the 21 countries of origin included in this research is inevitably incomplete. The extent of the background research was defined by the research effort possibilities and influenced by the following:

Attention was inevitably given to information concerning the circumstances that contribute to the risk of a well-founded fear of persecution. This results in an emphasis on negative circumstances. Discussing multiple countries provided a broader and more solid representation of the circumstances and also ensured that the individual countries of participants were not mentioned (except for Cuba⁷⁰¹) in order to guarantee anonymity. The information is therefore relevant to the circumstances of participants and countries of origin that were discussed but it is not representative or complete for all countries of origin in the LAC region and we acknowledge that differences between countries can be substantial.

Available information to clarify trans Latinas' circumstances and experiences was sparse, incomplete, or preliminary at times. This was compensated for by a large investment in and inclusion of heterogeneous and also smaller sources in the background research. This reflected the strategy described by the European Asylum Support Organisation but is apparently very different from the strategy adopted by the immigration service for including COI. A clear reconstruction of trans Latinas' situations emerged from this information and our observation is that it is more complete and trans-specific than the COI included by the immigration service in asylum procedures. The information replicates and corroborates the experiences and circumstances narrated by participants to a high degree. We do think that sufficient saturation of information was achieved and that this enabled us to discuss trans Latinas' lives and context broadly in this research. Moreover, the participation of eight participants was enough to cover the prevalent and important experiences and circumstances in the LAC region that can contribute to the risk to a well-founded fear of persecution and its consequences.

⁷⁰¹ Since dozens of trans Latinas from Cuba entered the Netherlands at the end of 2017, the combining of background information from Cuba with specific elements in three participants' asylum narratives from Cuba is less critical for anonymity.

In order to be informed about and consider what knowledge and information is used in trans Latinas' asylum procedures a formal information request was sent to the Dutch government but remains unanswered. Information about the immigration service's preparation and education for handling trans asylum cases, the use of COI, and quantitative data on the presence of trans persons in the asylum system remains obscure and could not be considered. Consequently, the research observations and considerations are primarily based on the immigration service's output in individual asylum procedures.

An element that was not pursued explicitly within this research that has relevance to the research question and was present to some extent in the available asylum procedure documents was the role of lawyers and other stakeholders. This has been done for the practical reason that it would have lengthened the research investment and text further. Adding extra boxes in every subchapter for the lawyer's contribution and others contribution would also have cluttered the research. It would be interesting, however, to examine this more closely in future research. Despite this limitation, we think that lawyers can inform themselves based on this research and use it to improve the quality of their representation of trans asylum seekers.

We hope this research is a motivation for others in this field to expand the knowledge and insight of asylum practice in Europe towards trans persons. Research would be welcomed, for instance, in a combination of European countries to compare the quality and differences of trans asylum procedures in these countries. We also suggest research including groups of trans persons from different regions and countries where trans persons are not directly criminalised. Such a study could focus on the way that social and government marginalisation of trans persons in different regions contribute to and can constitute a well-founded fear of persecution. The way trans sex work is approached in asylum procedures in this research calls for more information on the way (trans) sex work, its stigmatisation, repression (in the LAC region) and the resulting violence are interpreted and assessed in the European asylum context.



© Rodrigo Abd, 2018. Image showing a migrant trans women posing for the camera.

5. Recommendations

Based on our research findings and conclusions, we make the following recommendations to both national and international stakeholders in order to improve and promote the quality of trans asylum procedures nationally and internationally.

1. National and international stakeholders must develop a trans-specific approach when looking into experiences and circumstances of trans persons and adopt the **terms of reference** outlined in Chapter 8, Appendix 5 when conducting their work.

2. The Dutch immigration service must urgently consider a trans-specific approach in trans asylum procedures. This necessitates attention to important and specific themes relating to trans persons' identity and/or expression in their countries of origin. It also requires a differentiation of information and ideas from the larger LGBTI group and consideration of their applicability for trans persons. This **trans-specific approach** includes:

Specific consideration of themes such as legal gender recognition, imprisonment of trans persons based on sex assigned at birth, and gender-affirming healthcare.

Consistent use of the preferred name, gender marker, and pronouns that respect a trans person's gender identity and/or expression in all communications, regardless of what may be recorded in their ID.

Differentiating information and concepts relating to trans persons from the LGB or larger LGBTI group and also giving due attention to the fact that trans persons in the LAC region experience a higher severity and occurrence of hardships while being less protected by law.

Consistently considering and recording in asylum procedures how negative experiences are related to and provoked by gender non-conformity and visibility as a trans person.

Asylum procedures must include **more adequate and substantiated interpretations of the circumstances of trans persons in their countries of origin**. This includes:

Maximising the specific knowledge, insights, and country of origin information regarding trans persons' experiences and situations in their countries in asylum procedures.

Improving the quality, balance, and accuracy of interpretations in assessments of trans persons' experiences and circumstances, based on the improved information gathered as per the previous recommendation.

The immigration service must consider the whole picture and intersectional issues:

Consider the broad array of trans persons' lived experiences and circumstances in fact-finding and assessments, instead of narrowing down to a few isolated material facts.

This includes issues such as circumstances in childhood, instability and repression in countries of origin, displacement, or sex work.

Be attentive to and include the many **individual disparities** like poverty, a mixed racial background, or being HIV positive, which intersect with the trans identity and that accumulate and aggravate a well-founded fear of persecution.

Take a more nuanced approach to the involvement of trans persons in sex work, which is often the consequence of several circumstances and individual disparities that intersect with a trans identity.

Follow a human rights approach that recognises how criminalisation of sex work and its enforcement often exacerbates stigmatisation and unjustified violence against (trans) sex workers by police forces.

More and detailed recommendations with respect to the immigration service are available in Appendix 4.

3. Migration lawyers must improve the legal support and representation of trans persons in asylum procedures. This includes:

Consistent inclusion of important trans-specific themes and ensuring that trans persons and their experiences and circumstances are differentiated from the wider LGB group. Ensure that the immigration service has also adopted this approach when assessing asylum clients' claims.

Investing in obtaining and using COI that corroborates trans persons' hardships.

Highlighting and promoting the inclusion and consideration of trans persons' negative experiences, aggravating circumstances, individual disparities and the way they interact and accumulate to produce a well-founded fear of persecution.

4. We call on the **asylum and refugee support organisation (VWN)** to:

Assist trans asylum seekers in the preparation of their asylum procedures while keeping in mind all the relevant experiences and circumstances highlighted in this research.

Conduct trans-specific COI research and produce compilations that include all topics presented in this research that can inform VWN's work and asylum lawyers' COI documentation.

5. We call on **courts and judges** to take notice of and follow up on current inadequacies in trans persons' asylum procedures; in particular, to be aware of whether the relevant themes addressed in this research are included and considered.

6. The **State Secretary of the department of Justice and Security**, the **Directorate-General for Migration**,⁷⁰² the **Managing Board Migration Policy**,⁷⁰³ and the **immigration service's managing board** must command and enable fundamental improvements to the preparation and execution of trans asylum procedures. This includes:

Facilitating the roll-out of the aforementioned recommendations to the immigration service and ensuring that all staff understand and incorporate these recommendations into daily practice.

The education and training of all relevant immigration service personnel that includes teaching about a trans person's identity, experiences, and circumstances and also how they are shaped by regional and country conditions.

Enable training to heighten insight and reflection on gender normativity and to ensure trans asylum seekers are consistently and accurately interacted with in accordance with their identification. Recognising that a separate assessment of the situation of trans persons as a social group in a country of origin, based on the terms of reference (see Appendix 5), is necessary when determining country-specific asylum policy or when requesting the production of a general country report by the Foreign Ministry. Such policy cannot be inferred from a "safe country" status based on the general population.

⁷⁰² The Directorate-General for Migration: Directoraat-Generaal Migratie (DGM).

⁷⁰³ The Managing Board Migration Policy: Directie Migratiebeleid (DMB).

Coordinating and enabling a substantial improvement in COI research and collection both in the Dutch context and in cooperation with EASO and the UNHCR.

Producing a document that defines the immigration service's approach to the preparation and execution of trans asylum procedures. This document must be publicly available and shared with lawyers, courts, VWN, and asylum seekers.

Including the expertise and input of trans identifying experts in these improvements, including trans refugees, -migrants, -persons and trans organisations, like Transgender Network Netherlands and others.

7.

The UNHCR must contribute to improvements to trans asylum procedures. This includes:

Improvements to the Guidelines on International Protection no. 9 to better and specifically include topics pertaining trans persons.

Promoting the proposed **terms of reference** as a starting point for the questions that must be answered in an asylum context, for instance, when gathering COI documentation for trans persons in a country of origin or region, or composing country reports and guidance.

Promoting trans-specific COI research and collection by "Refworld" and other producers of COI in order to improve the scope, quality, and trans-specificity of such research.

Countering the current dynamics of asylum procedures. The use of only a few material facts and narrowing down attention to only a part of the total of the lived experiences and circumstances of trans persons does not give the full picture. Countering this dynamic will improve the analysis of the total of experiences and circumstances, their interaction and the accumulation of hardships.

8.

We call on the **United Nations Independent Expert on Violence and Discrimination based on SOGI**⁷⁰⁴ to invest in a comprehensive thematic inquiry, fact-finding mission, and report that investigates the experiences, circumstances, and individual disparities in the lives of trans persons in many countries in the LAC region. This inquiry must include the way that multiple problems intersect and accumulate, resulting in a well-founded fear of persecution or life becoming unsustainable. These findings must be translated and promoted in an asylum context and used to inform and guide the preparation and execution of trans persons' asylum procedures.

9.

We call on the **IACHR and the OAS**⁷⁰⁵ to adopt the approach described in recommendation no. 8 above. We also call on them to support and protect local and regional trans persons and organisations.

10.

We call on the **European Asylum Support Office** to contribute to the improvement of the quality and trans-specificity of trans asylum procedures. This includes:

Facilitating better use of COI by European national asylum authorities. This process should be guided by our **terms of reference**.

Revise the 2015 EASO practical guide and actions related to it in order to fully include trans persons as a group that requires specific COI research.

To develop practical guidance that assists national asylum authorities to conduct trans persons asylum procedures in a trans-specific way.

⁷⁰⁴ SOGI: Sexual Orientation and Gender Identity.

⁷⁰⁵ Inter-American Commission on Human Rights and the Organisation of American States.

11.

We call on **ACCORD**⁷⁰⁶ to use their expertise to provide for good quality COI that includes the **terms of reference** proposed in this research.

12.

We ask **ILGA**⁷⁰⁷ and **Transgender Europe** to develop a plan – together with all relevant stakeholders and in co-operation with **Transgender Network Netherland (TNN)** – guided by this research, that advocates for improvements in trans asylum procedures within the EU. We specifically call on **Trans United Europe and the Global Network of Sex Work Projects** to contribute to this advocacy with regard to the way sex work, HIV, racial or ethnical disparities, displacement, migration, and being undocumented intersect with a trans identity and lead to the accumulation and exacerbation of hardships for trans persons.

⁷⁰⁶ The Austrian Centre for Country of Origin and Asylum Research and Documentation.

⁷⁰⁷ ILGA: The International lesbian, gay, bisexual, trans and intersex association.



© Sonora Trans, 2021. Image showing two trans persons holding a sign that says “No Hay Dignidad Sin Identidad”, I have no Dignity Without Identity [without being legally recognised in their trans identity]

6. Glossary and abbreviations

A	
AbRvS	Administrative law division of the council of state (Afdeling Bestuursrecht-spraak van de Raad van State)
ACCORD	Austrian Centre for Country of Origin & Asylum Research and Documentation, including their COI documentation platform, ECOI.NET.
Agender	One of non-binary gender identities. Look at “non-binary” and “genderqueer.”
AZC	Housing facilities for asylum seekers (Asiel Zoekers Centrum)
C	
CDR	Cuban Committee for the Defence of the Revolution
CENESEX	Centro Nacional de Educación Sexual, the Cuban National Centre for Sex Educa-tion. It is led by Mariela Castro, daughter of Raoul Castro.
Cis-gender (person)	Someone whose gender identity matches the sex they were assigned at birth. A cis-gender identity is relative to a transgender identity, in the same way that a heterosexual orientation is related to a homosexual orientation.
Cis-normative	To assume that a person’s gender identity matches their biological sex.
COA	Central organ for the reception of asylum seekers that offers shelter, housing, and necessary resources and guidance to asylum seekers (Centraal Orgaan opvang asielzoekers).
COI	Country of Origin Information, which is used in procedures that assess claims to refugee status or other forms of international protection (EASO, 2018, p. 8).
D	
Decision	The decision in writing on an asylum procedure case by the immigration service.
Direct-criminalisation	The explicit mention and inclusion in laws of LGBTI persons’ behaviour and/ or identity as unlawful and punishable.
E	
EASO	European Asylum Support Office
ECOI.NET	COI documentation platform by ACCORD.
F	
FTM	Female to Male. See “Transgender man.”
G	
Gender	Gender traditionally refers to a social and cultural construct of being a man or a woman. However, some people do not identify within the gender binary of man/woman. Gender exists independently of sex, and an individual’s gender does not always correspond with the sex assigned at birth (TGEU, 2016 A).

Gender-affirmation	Synonymous to transition in this research. Definition to be found under “transition.”
Gender-affirming surgery	Bodily affirmation to the gender a trans person identifies by means of surgery. Sex-urgery reassignment surgery, is one aspect of gender-affirming surgery.
Gender-based violence	refers to harmful acts directed at an individual based on their gender. It is rooted in gender inequality, the abuse of power and harmful norms (UNHCR, https://www.unhcr.org/gender-based-violence.html).
Gender care	Is the abbreviation used in this research for “Gender-affirming healthcare” including all medical interventions, treatment and care related to affirming aspects of the body to the gender identity.
Gender expression	External manifestations of gender, expressed through a person’s name, pronouns, clothing, haircut, behaviour, voice, and/or body characteristics. Society identifies these cues as masculine and feminine, although what is considered masculine or feminine changes over time and varies by culture. Typically, transgender people seek to align their gender expression with their gender identity, rather than the sex they were assigned at birth (GLAAD, no date).
Gender Identity	Is a person’s inner sense of their gender. For trans people, their own internal gender identity does not match the sex they were assigned at birth. Most people have a gender identity of man or woman (or boy or girl), but for some people it does not fit neatly into one of those two choices. Unlike gender expression, gender identity is not visible to others (TGEU, 2016 A).
Gender norms	Is understood here as: social standards regarding how those assigned a physical sex at birth should behave, express, and develop including the standards on gender roles, gender identity and heterosexuality.
Gender normativity	The enforcement of gender norms.
Gender queer (person)	Transgender people that identify as neither a man nor a woman, or as a combination of male and female, and may use terms like non-binary or genderqueer to describe their gender identity. Those who are non-binary often prefer to be referred to as “they” and “them” (National Centre for Transgender Equality, 2016).
H	
HIV	Human Immunodeficiency Virus.
HR	Human Rights.
HRW	Human Rights Watch, an international non-governmental organisation.
I	
I	Interviewer in a semi structured interview.
IACHR	Inter-American Commission on Human Rights, part of the Organisation of American States (OAS).
ILGA	International lesbian, gay, bisexual, trans and intersex association, an International non-governmental organisation.
Immigration service	Within this research this represents the Dutch immigration service (Immigratie-en Naturalisatiedienst, IND).
Intention (to a decision)	Is the preliminary (negative) decision in writing on an asylum procedure by the immigration service on behalf of the secretary of state.

Intersectionality	According to Manuel (2006), an understanding of intersectionality is “that the [negative reactions to] distinguishing categories within a society, such as race/ethnicity, gender, religion, sexual orientation, class, and other markers of identity and difference, do not function independently but, rather, act in tandem as interlocking or intersectional phenomena.”
Intersex	The term intersex refers to the experiences of people born with a body that does not meet the normative definition of men or women as used by society (NNID, Nederlandse organisatie voor seksediversiteit, no date, translated from Dutch).
L	
Let de Peligrosidad	Shorthand for “Ley de Peligrosidad y rehabilitación social”; translated here as Peligrosidad the “law of dangerousness and social rehabilitation.” It is a Cuban public order and vagrancy law. It is included in Cuba’s penal code, Código Penal, as “Estado peligroso y las medidas de seguridad” described in articles 72 to 84.
LGBTI persons	Lesbian, Gay, Bisexual, Trans and Intersex persons. We follow the LGBTI acronym in this research, including trans and intersex persons since they are included in Dutch LGBTI policy. We are reluctant to do so in the context of our research. This research is a conscious effort to differentiate (not separate) the trans identity from the LGBTI group for the purpose of specific representation in an asylum context. It feels somewhat ironic adding intersex persons when they might be in need of such specific consideration instead of addition. That being said, we are also aware that the groups of bisexual and lesbian persons might deserve such an approach of specific consideration in an asylum context (and also gay men, though there is indication in research that information on the group of gay men in the asylum context is already dominant).
Legal gender recognition	LGR. The official procedure to change a trans person’s name and gender identifier in official registries and documents such as their birth certificate, ID card, passport or driving license (TGEU, 2016 A).
M	
Material Fact	“A circumstance or fact in the asylum procedure concerning at least one topic or narrative related to being a refugee or article 3 ECHR” (Translation). Separate material facts are a starting point for assessments in asylum procedures (ACVZ, 2016, p. 33). “Facts that are directly linked to the definition of refugee (Article 1(A)(2) of the 1951 Geneva Convention and Article 2(d) of person eligible for subsidiary protection and go to the core of the application” (EASO, 2015 B, p.2).
Mental attitude	A complex mental state involving beliefs and feelings and values and dispositions to act in certain ways (https://www.thefreedictionary.com/mental+attitude , accessed 1 July 2020).
Misgendering	The intentional or unintentional referral to, or interaction with, a trans person using language to describe that person which is not in accordance with the gender this person identifies with. For example, referring to a person identifying female as “he” or calling her a “guy” is an act of misgendering (Clements, KC. 2018).
MSM	Men who have Sex with Men.
MTF	Male to Female. See “transgender woman.”

N	
NGO	Non-Governmental Organisation.
NTCA	Northern Triangle of Central America: Guatemala, Honduras, El Salvador
Non-binary (person)	Person whose gender is not male or female use many different terms to describe themselves, with non-binary being one of the most common. Other terms include genderqueer, agender, bigender, and more. None of these terms mean exactly the same thing – but all speak to an experience of gender that is not simply male or female (National Centre for Transgender Equality, 2018).
O	
OAS	Organisation of American States
OHCHR	Office of the High Commissioner of Human Rights
OutRight	OutRight action international, Worldwide LGBTIQ human rights organisation.
OSF	Open Society Foundation
Otrans	Leading and pioneering organisation by and for trans women in Guatemala.
P	
P	Participant in the research
PAHO	Pan American Health Organisation
Pathologise	To view or characterize as medically or psychologically abnormal. (Merriam-Webster.com).
PNR	Policía Nacional Revolucionaria, the “National Revolutionary Police” of Cuba.
R	
R	Researcher
REDlactrans	Red Latino Americana y del Caribe de Personas Trans; a LAC region transgender network organisation of 25 organisations (REDlactrans, no date). ⁷⁰⁸
Refworld	A UNHCR country of origin information site.
Refugee Status Determination	is synonymous with “asylum procedure.”
RvS	Raad van State: Council of state
S	
(Self-) restriction	Being forced by outside (fear of) (further) repression to hide one’s preferred gender expression to various degrees during periods in life, in general or in specific situations. Since the causes of restriction are located mostly in the outside world it can be argued that adding the “self” to the restriction is not correct. On the other hand it is the self that submits/adapts to repression.
Sex	The physical classification of people as male or female.

⁷⁰⁸ REDlactrans, no date. “Red Latinoamericana y del Caribe de Personas Trans (RedLacTrans)”. Available at: <https://robertcarrfund.org/networks/2016-2018/red-latinoamericana-y-del-caribe-de-personas-trans>; last accessed 20 December 2020.

Sex assigned at birth	At birth, infants are assigned a sex that is usually based on the appearance of their external anatomy and the binary expectation of the sex to be one or the other. In English, it would be called “gender assigned at birth” but since it is the physical property, the birth sex, that is determined at birth, we will stick to “sex assigned at birth”. Gender identity is usually expected to be in conformance with the sex assigned. This expectation is cis-normative, it ignores the realistic possibility of a gender identification not in accordance with the sex assigned at birth.
Sexual orientation	Describes an individual’s enduring physical, romantic and/or emotional attraction to another person. Gender identity and sexual orientation are not the same. For example transgender people may be straight, lesbian, gay, or bisexual.
Sex work	Sex worker organisations globally, and locally, understand sex work as a contractual arrangement where sexual services are negotiated between consenting adults, with the terms of engagement having been agreed upon between the seller and the buyer of sexual services. By definition, sex work means that adult female, male and transgender sex workers who are engaging in commercial sex have consented to do so (that is, are choosing voluntarily to do so), making it distinct from trafficking (UNAIDS, 2009, p. 15).
SRS	Sex Reassignment Surgery. Refers to doctor-supervised surgical interventions, and is only one small part of transition. Avoid the phrase “sex change operation.” Do not refer to someone as being “pre-op” or “post-op.” Not all transgender people choose to, or can afford to, undergo medical surgeries (GLAAD, no date).
State authorities	Used here to describe, police officers, prison guards and possibly military (military, are regularly seen in LAC countries to engage in civilian tasks, having the authority and means to enforce laws and regulations).
Social cleansing	Armed groups draw on homophobic [and transphobic] sentiment to consolidate their power and reinforce a particular understanding of the nation and normative gender roles, often using the language of ‘social cleansing’ to police heteronormative gender ideals both within their own ranks and among the civilian population (Myrntinen, H. and Daigle, M. 2017).
SOGI	Sexual Orientation and Gender Identity
SRS	Sex reassignment surgery
State Secretary	Within this research, this abbreviation indicates the State secretary of the Dutch ministry of Justice and Security, responsible for the immigration service.
T	
Terms of reference	“Descriptions of what must be dealt with and considered when something is being done or studied” (Merriam Webster dictionary, 2020 B).
TDOR	Transgender Day of Remembrance, a day to remember and honour those lost to violence against trans persons.
Trans person	See transgender person. Trans person is seen as identical to transgender person within this research. “Trans” (person) is an adjective connected to a noun (person), the adjective is not meant to be used separately. When we use the adjective “trans” person this is meant to say that it concerns a person, of whom only one of the characteristics of that individual is to belong to the trans umbrella. Trans can be combined with another characteristic that is important in a particular discussion, like “trans youth”, “trans refugee”, or trans Latina.

Trans(gender) man	Term that may be used by people who were assigned female at birth but identify and live as men. Some may prefer to simply be called men, without any modifier. Female to Male (FTM) has also been used. It is best to ask which term an individual prefers (TGEU/Glossary, 2016 A).
Transgender (person)	is an umbrella term which includes those people who have a gender identity which is different to the gender assigned at birth, and those people who wish to portray their gender identity in a different way to the gender assigned at birth. Transgender includes those people who feel they have to, or prefer to, or choose to, whether by language, clothing, accessories, cosmetics or bodily affirmation, present themselves differently to the expectations of the gender role assigned to them at birth. This includes, among many others, transsexual and transgender people, transvestites, cross dressers, no gender, multi gender, genderqueer people, intersex, and gender variant people who relate to or identify as any of the above (TGEU, 2016 A). Trans person is seen as identical and preferred to transgender person within this research.
Trans(gender) woman	Term that may be used by people who were assigned male at birth but identify and live as women. Some may prefer to simply be called women, without any modifier or “woman with a trans history”. Male to Female (MTF) has also been used. It is best to ask which term an individual prefers (TGEU, 2016 A).
Transition	Synonymous to gender affirmation in this research. All that a trans person does to affirm their gender identity and/or expression. A process of involving in one, several or all legal, personal, social or medical steps by a trans person to bring the presentation/expression and/or the bodily characteristics closer to one’s gender identity and/or gender expression. It is not limited in time or restricted to medical aspects. It can involve a multitude or selection of different kind of changes. Not all trans persons want access to surgery or to involve in transition.
Trans Latina	Within this research it describes a trans woman/feminine person originating from the Latin America and the Caribbean region. Spanish is a very gendered language that ascribes to most nouns an A for everything feminine. In the absence of non-binary and trans masculine participants we chose the A. Please keep in mind that the abbreviation is only used for practical reasons and is not intended to limit trans Latinas’ lives to their trans identity or geographical roots.
Trans Panic Defence	A legal strategy that asks a jury to find that a victim’s sexual orientation or gender identity/expression is to blame for a defendant’s violent reaction, including murder. (The LGBT Bar, no date. “LGBTQ+ “Panic” Defense”).
Transphobia	A matrix of cultural and personal beliefs, opinions, attitudes and aggressive behaviours based on prejudice, disgust, fear and/or hatred directed against individuals or groups who do not conform to, or who transgress societal gender expectations and norms. Transphobia particularly affects individuals who’s lived gender identity or gender expression differs from the gender role assigned to them at birth, and it manifests itself in various ways, e.g. as direct physical violence, transphobic speech and insulting, discriminatory media coverage, and social exclusion. Transphobia also includes institutionalized forms of discrimination such as identities and gender expressions (TvT, no date. “Terminology”).
Trans-related themes	Three themes that are exclusively relevant for trans persons, consisting of legal gender recognition, gender specific health care and imprisonment along the lines of the sex assigned at birth.

Transsexual person	An older term that originated in the medical and psychological communities. The term is still preferred by some people who have permanently altered – or seek to alter – their bodies through medical interventions (including but not limited to hormones and/or surgeries). Unlike transgender or trans, transsexual is not an umbrella term. It is best to ask which term an individual prefers. If preferred, use as an adjective: transsexual woman or transsexual man (TGEU, 2016 A).
Trans-specificity	An approach to trans asylum procedures that differentiates information and ideas from the larger LGBTI group with respect to its applicability for persons with a trans identity and/or expression. Besides that, it is specific in attending to important themes relating to participants trans identity and/or expression and its context in countries in the LAC region in Dutch asylum procedures and is founded in relevant knowledge and insight.
TVT	Transrespect vs Transphobia, an ongoing global research project.
U	
UNAIDS	The Joint United Nations Programme on HIV/AIDS
UNDP	United Nations Development Program
UNHCR	United Nations High Commissioner for Refugees, “The UN refugee agency”
UNHRC	United Nations Human Rights Council
UNODC	United Nations Office on Drugs and Crime
USDOS	United States Department Of State: produces reports on many countries in the world, for instance concerning human rights or religious freedom.
V	
VWN	Vluchtelingen Werk Nederland, an independent organisation advocating for and supporting asylum seekers and refugees.
W	
WI	Working guidelines, guiding document for the work of immigration service.



© Claudia Hernandez/Borderless magazine, 2021. Image showing trans women celebrating together.

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© Transketeers, 2017. Image shows a person holding up a trans flag and a sign saying "Trans Lives Matter" on the Transgender Day of Remembrance in Amsterdam.

8. Appendices

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Appendix 1

Available asylum procedure documents

Participant	First hearing	Correction, addition lawyer	Second hearing	Correction, addition lawyer	Third hearing	Intention to decide on the asylum procedure	Opinion lawyer	Decision on the asylum procedure
A	Yes	No	Yes	No	No	Yes	No	Yes
B	Yes	No	No	No	Yes	Yes	Yes	Yes
C	Yes	No	Yes	No	No	Yes	No	Yes
D	Yes	No	Yes	No	No	Yes	No	No
E	Yes	Yes	Yes	Yes	No	No	Yes	Yes
F	Yes	No	Yes	No	No	Yes	No	Yes
G	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes
H	Yes	No	Yes	No	Yes	Yes	No	Yes
Participant	Notice of objection by lawyer	Court case	Notice of objection by lawyer	Council of state appeal				
A	Yes	Yes	No	Yes				
B	No	Yes	No	No				
C	Yes	No	No	No				
D	No	Yes	No	No				
E	No	Yes	No	No				
F	No	No	No	No				
G	No	Yes	Yes	Yes				
H	No	No	No	No				

Appendix 2

Words used in the WI 2015/9 and WI 2018/9

Words used in WI 2015/9

Sexual orientation	29 times
LGBTI orientation	4 times
Sexual activities	3 times
Homo(sexu(ality)(al)scene	11 times
Lesbian	2 times
Bisexual	1 time
Transgender	1 time
LGBTI	15 times
Gender identity	2 times (in a reference)

Words used in WI 2018/9

It has a similar tone with marginal differences. Gender identity is named once actively by the immigration service and twice in a quote and reference. It is still all about sexual orientation.

Sexual orientation	20 times
LGBTI orientation	7 times
"Being LGBTI"	6 times
LGBTI	21 times
Transgender	1 time
Sexual activities	3 times
Homo(sexu(ality)(al)scene	5 times
Sexual images	2 times
Gender identity	1 time inside main text
Gender identity	2 times (in a reference)

WI 2019/17 replaced WI 2018/9 in December 2019, but uses identical phrases and words. It only adds a very short fifth chapter, without consequence to the observations here.

Appendix 3

Questions asked to the Dutch Immigration service in an official information request⁷⁰⁹

The request concerns the administrative matter of asylum procedures of transgender persons, in particular from the region of Latin America, including the Caribbean.

How many asylum requests are concerned with a trans identity and from what countries do the persons requesting international protection originate? In what cases does the immigration service see the trans identity and/or expression as credible and in what cases is the trans identity not considered credible? (Per year from 2000 till now).

What COI does the immigration service use concerning trans persons from these countries? In what regard does this COI differ from information pertaining LGB persons?

What differences does the immigration service recognise in the position of trans persons compared to LGB persons in those countries? (Please specify if there are differences between countries).

Who takes care of acquiring COI and weighing this? How is the weighing of information organised?

To what extent can an immigration service adjudicator use information obtained by themselves through using for instance Google in the assessment of asylum cases?

Signals are, that immigration service officials use examples of LGBTI persons (for example trans women) in the country of origin of a trans asylum seeker as an example that generalises to an estimate of a positive development and position of trans persons in their country. For which countries does the Dutch immigration service use examples of well-known LGBTI persons in those countries?

What specific examples does the immigration service use? To what extent is this admissible?

What education about LGBTI topics is given to immigration service officials involved in hearing trans persons? What are the learning objectives, how much time is available to achieve these, how are they achieved, which immigration service officials receive such education, are the objectives attuned to LGBTI refugees? We request to be provided with the learning materials.

What happens if an immigration service official that has not received LGBT specific education is involved in an LGBTI asylum procedure when such an identity is brought forward in a hearing?

What vulnerabilities can the immigration service official involved in hearing a trans asylum seeker distinguish and what differences compared to LGB persons? How does the immigration service assess such skills?

What working guidelines are in use in hearing refugees? We request to be provided with the working guideline(s).

What questions does the immigration service ask specifically of LGBTI persons (including trans persons) and what specific questions in hearings only of trans persons? We request to be provided with these list(s) of questions.

⁷⁰⁹ This information request is called a "WOB request", made by Transgender Netwerk Nederland, Apeldoorn, 28 February 2019, reference number D100010/JCHP. No answer was received. The deadline passed in June 2019.

What means of evidence cannot be demanded by an immigration service official of an LGBTI asylum seeker, also respecting art. 4 Guideline 2004/83 and jurisprudence like the ABC judgement by the European court of justice? What questions are not allowed, which proof may or may not be submitted by the LGBT asylum seeker despite limitations for the immigration service?

What measures and guarantees does the immigration service hold to prevent the participation of immigration service officers in asylum cases with an unfavourable attitude towards LGBTI persons (for instance because of religious beliefs)?

Appendix 4

Recommendations to the immigration service

More detailed recommendations are given here to the immigration service. The recommendations are organised following the central themes in the findings and conclusions Chapter 4, sections 4.1 to 4.3 in general and subsequently examine the different issues within each theme. The recommendations deal with trans-specificity first. Secondly, advice is given to improve the interpretation of circumstances and the role that COI has in it. Thirdly, we recommend looking at the whole picture, including intersectionalities in trans persons' experiences and circumstances.

A.

Trans-specificity

Trans asylum procedures must be based in specific knowledge, insight, and information in their approach to trans persons' experiences and circumstances in their countries of origin that differentiates adequately from the larger LGBTI group.

Legal Gender Recognition

Include knowledge and insight on the absence of, restrictions, or abusive preconditions to LGR both in legislation and its implementation in trans asylum procedures. The consequences thereof must be investigated in COI, hearings, and considered in assessments.

Preparation must include the conditions and consequences regarding LGR in a country of origin. The fact-finding process must evaluate the exclusion, discrimination, and violence that is caused by limitations to or an absence of LGR. Group and consider all negative experiences connected to it in terms of severity. Consider how restrictions to LGR leave trans persons unprotected, excludes them from access to many human rights, and compounds the well-founded fear of persecution.

Include consideration for possible abusive preconditions to accessing LGR, for instance sterilisation and/or sex reassignment surgery, forced divorce, or submitting to medical examinations. Consider how access to LGR can depend on or be obstructed by gender care and its conditions.

Do not interpret LGR to be present in assessments in trans asylum procedures if there are serious restrictions or abusive preconditions to accessing LGR in the country of origin.

Consider that governments not providing LGR are withholding essential human rights from trans persons.

Do not assume that government protection is possible for trans persons if LGR is absent.

Gender-affirming healthcare (gender care)

Include knowledge and insight concerning the absence of, restrictions, and abusive preconditions to gender care in legislation and the execution of trans asylum procedures. The consequences thereof must be investigated in COI, in hearings, and considered in assessments.

Preparation must include relevant information about the legal and practical reality of gender care and general healthcare in a country of origin in trans asylum procedures.

Uncover in the fact-finding process, the experiences of exclusion, discrimination, and violence related to the absence, restrictions and/or abusive preconditions to gender care.

Consider that a lack of access to gender care leads to improvised, dangerous, and substandard bodily gender affirmation.

Look at the restrictions and abusive preconditions that trans persons have to submit to, such as compulsory treatments like sex reassignment surgery, sterilisation, or pathologisation.

Incorporate all aspects from the fact-finding process into the assessment of a well-founded fear of persecution. Consider healthcare as being not available if gender care is absent or there are restrictions and abusive preconditions to obtaining it.

Weigh up trans persons' hardships with respect to engaging in improvised, dangerous, or substandard treatment aimed at gender affirmation of the body when there is an absence of competent, non-discriminatory treatment.

The imprisonment of trans persons

Include the way that imprisonment of trans persons according to their sex assigned at birth presents a clear and specific risk of cruel, inhuman, degrading treatment and torture. Consider the absence of human rights guidance,⁷¹⁰ legislation, and precautions in prisons in the LAC region to prevent such risks.

Gather COI data and ask targeted questions in hearings about the way the imprisonment of a trans person occurs in their country of origin, what hardships occur, and whether protection from cruel, inhuman, or degrading treatment and/or torture is possible.

Consider how **the act of imprisonment** according to the sex assigned at birth can itself amount to an act of cruel, inhuman, degrading treatment and/or torture by state authorities who do not provide the necessary protections.

Consider how the **actual violence** towards trans persons is related to the absence of such state protection and amounts to cruel, inhuman, degrading treatment and/or torture.

Consider the **risk of imprisonment upon return** to the country of origin.

Respecting trans identity

Respect the self-identification of a trans person's gender identity consistently by using the preferred name, gender marker, and pronouns in spoken language, writing, and otherwise.⁷¹¹ This includes: registrations; hearings; internal notes; the assessments leading to "intentions" and decisions; and all other communications, regardless of the identity indicated on their ID.

Do not disrespect a person's trans identity and/or expression.

Be aware that a failure to respect identity raises doubts about an immigration officer's ability to execute an unbiased and respectful adjudication of a trans person's asylum procedure.

Limit the adjudication of trans asylum procedures to only those immigration officers who are comfortable with and able to address and consider trans persons according to their gender identity and/or expression.

Gender non-conformance

Register and consider explicitly in the fact-finding process and assessment how trans persons' experiences of exclusion, discrimination, and violence are shaped by perceived gender non-conformance and visibility.

⁷¹⁰ Yogyakarta Principles, 2007, p. 16; UNODC, 2009, Chapter five; UNODC, 2015.

⁷¹¹ The sex assigned at birth to a person is the anchor of existing gender norms. Such norms are contrary to and do not include variations in gender identity and/or expression. Misgendering trans persons holds on to the sex assigned at birth; it disrespects trans Latinas' identity and may be an expression of holding onto a biased gender-normative position.

Be more attentive to, include, and consider the way the high visibility of trans persons being perceived as gender non-conforming is a serious and repetitive trigger for many negative experiences. Investigation and assessment of police violence in asylum procedures must pay particular attention to the way such violence is connected to gender non-conformance.

Be alert to all the ways that imputations by predators towards a trans person's gender role, sexual orientation, and their gender identity/expression are connected to the violence they experience.

Consider all of the many negative experiences trans persons face due to gender-normativity as a whole. They may seem heterogenic or incidental but are, in fact, connected by the common trigger of gender non-conformance. Consider them as structural and pervasive.

Differentiation

Search for and use trans-specific **COI, concepts, and knowledge** that differentiates trans persons from those with an LGB identity and the larger LGBTI group and that does not assume uniformity.

Include the observed higher severity, the higher number of negative experiences and circumstances, and the structural nature of these hardships for trans Latinas in the LAC region in all future COI, fact-finding and severity assessments and wider trans asylum procedures.

Be precise when looking at anti-discrimination legislation and provisions in countries of origin. Laws and provisions for LGB persons, "sexual identity," or "the conflated LGBTI group," do not automatically apply to those with a trans identity and/or expression.

B.

Interpretation of circumstances and COI

Improve the quality, scope, and substantiation of interpretations on country of origin circumstances in asylum procedures where gender identity and/or expression is the central motive in the request for international protection.

Trans-specific approach

A trans-specific approach must be practiced, also with respect to COI, in order to vastly improve and enable fact-finding and the adjudication of experiences and circumstances of persons with a trans identity and/or expression in countries of origin in the LAC region.

COI research must be guided by prior knowledge and insights concerning trans identity and/or expression, also in its regional and country context and adequate terms of reference, adapted search strategies, and terminology must be used.

COI must inform about the circumstances related to LGR, imprisonment, and gender care.

COI must include information about the severity of transphobia and gender-normative violence towards trans persons. This includes violence from state authorities and social cleansing by state and non-state actors.

The observed higher risk and severity of trans Latinas' negative experiences and circumstances in the LAC region must be incorporated in future COI research and assessments.

Countering the sparsity of COI

The sparsity of trans-specific COI must be countered. An investment in trans-specific research is urgently needed to maximise and improve the quality of information available for severity assessments. The recommendations here point to current possibilities to counter this sparsity.

COI research for the preparation of trans asylum procedures must be conducted by researchers that hold sufficient knowledge on, and are open to, trans persons' concerns and the regional situation in the LAC region for them.

These researchers must consistently use specific terms of reference, adapted search strategies, and include a wide scope of sources.

COI information must be open to, look into, and accept smaller sources and a broader scope of information sources to document and corroborate trans Latinas' experiences and context.

Much more effort and investment are needed to uncover information on the situation of trans persons.

Other improvements relating to COI

Necessary other improvements regarding assessments and their substantiation with COI.

Be transparent about what information, arguments, and COI inform interpretations of circumstances in asylum assessments and include clear references to all relevant COI.

Include COI about the way conflicts, repression, instability, or public order laws in countries of origin in the LAC region aggravate a trans person's negative experiences. Such information must be incorporated in severity assessments. This includes the consequences of the absence of protection and the increased risk of violence from police and non-state forces. This information must be analysed and assessed with respect to their contribution to a well-founded fear of persecution. Refrain from concluding that police violence towards trans Latinas is incidental and random when differentiated data on discrimination, violence, and cruel, inhuman, or degrading treatment and/or torture by police forces is sparse or absent.

Do not demand that trans Latinas seek protection from transphobic state authorities in their countries, which have caused traumatic experiences. Particularly in cases where information sources point to an absence of, diminished capacity of, and/or danger to invoking state protection. Assessments in trans asylum procedures should not hinge on the presence of legislation in countries of origin when COI suggests that there is a significant gap between its application in practice and the harsh social reality and instability in particular states in the LAC region. By contrast, COI that informs about the social and governmental marginalisation of trans people, gang rule, suppressive authoritarian governments, conflict, and social inequality should be given weight in assessments.

C.

Looking at the whole picture and intersectionalities

Consider more experiences, individual disparities, intersectionalities, and their cumulative effect

Attend to and consider **more elements** of the total of trans Latinas' relevant experiences and circumstances in trans asylum procedures, including their complexity, **the way they interact**, and **their cumulative effect**. Consider, include, and validate what other disparities interact (intersect) with the trans identity and/or expression and how they aggravate and multiply negative experiences.

Increase the number of relevant experiences and circumstances that are represented and considered in trans Latinas' asylum hearings and/or assessments.

Include and consider the disparities that interact with a trans identity and/or expression in COI, hearings, and assessments. Look at the interaction, aggravation, and accumulation of hardships caused by intersectional issues, such as poverty, lack of education, race and/or ethnicity, HIV status, sex work, disability, and displace-

ment.

Avoid the pitfall of working with a limited number of material facts that consider only a few isolated larger events, ignoring the complexities of a transgender identity. Avoid narrowing down the focus of inquiry and consideration to violence by state authorities and non-governmental actors.

Adhere to paragraph 201 of the UNHCR handbook, which states that “very frequently the fact-finding process will not be complete until a wide range of circumstances has been ascertained. Taking isolated incidents out of context may be misleading. The cumulative effect of the applicant’s experience must be taken into account.”

Pay attention in COI research, fact-finding, and assessments to the exclusion, discrimination, and violence experienced by trans Latinas who have been targeted in their early teens by family, social surroundings, and in school, and consider aspects of this.⁷¹²

Paragraphs 52 to 55 and 201 of UNHCR’s handbook must be considered if a broader perspective on trans Latinas’ experiences and circumstances, as proposed above, is to be achieved.

Incorporate human rights guidance about the way intersectionalities may influence an individual’s well-founded fear of persecution.

Change the approach to sex work

Fundamentally change the approach to the assessment of trans persons’ involvement in sex work. Serious marginalisation, especially of those coming out early and facing intersecting disadvantages, leads to trans persons’ involvement in sex work. Once involved, the aggravated hardships become intertwined. The immigration service’s separation of sex work and the trans identity, the attribution of all problems to sex work in severity assessments, and refusing to acknowledge the contribution that a trans identity makes to the severity of a person’s situation does not reflect the lived reality.

Include important data on the fact that 75 per cent or more of trans Latinas are involved in sex work and that this has an impact on their very low life expectancy.

Consider how the marginalisation of trans persons is strongly connected to their involvement in sex work and what this means for trans persons as a social group.

Include information on intersectional disparities like poverty, not being white, lack of education, displacement, and coming out early in their teens as predictors of additional, cumulative hardships and sex work.

Acknowledge how the combined presence of sex work or other disparities that interact with the trans identity can result in a higher severity and exacerbate the well-founded fear of persecution. Include paragraph 38 of the UNHCR 2012 guidelines no. 9 in the severity assessment, i.e. that “the convention ground should be a contributing factor to the well-founded fear of persecution, though it need not be the sole, or even dominant, cause.”

Do not focus solely on the severity of adverse experiences attributed to a trans identity. Accept the inevitable reality that the trans identity and sex work both contribute to the higher severity and number of negative experiences.

Acknowledge how both the incrimination and criminalisation of trans sex workers results in additional violence by police forces and contributes to a well-founded fear of persecution. Do not interpret involvement in sex work as a criminal offence.

Follow a human rights approach that recognises how criminalisation and its enforcement often exacerbates stigmatisation and unjustified violence against (trans) sex workers by police forces.

⁷¹² Firstly, how a multitude of negative experiences leads to a person becoming vulnerable to further adversities, such as not finding housing or work and becoming involved in sex work. Secondly, to consider in the severity assessment how negative experiences in different environments are predominantly caused by gender non-conformance add up to structural and frequent exclusion, discrimination, and violence.

Take into account and act upon the possibility that a trans person may have a reduced ability to represent themselves. This may manifest in trans asylum procedures due to the mental and behavioural effects of everything they have experienced and/or limited cognitive capacity or education.

Trans persons requesting international protection in the Netherlands must be seen as a vulnerable group. Appropriate time to prepare for hearings is necessary and there must be access to assistance from a lawyer and VWN.

During hearings, adapt to signs of tension, defensive reactions, discomfort, distrust, or fragmentary reconstruction of situations from trans Latinas. Investigate how they are related to structural marginalisation and structural violence and experiences. Register such signs and include them in assessments of an asylum procedure as an indicator of severity.

Adapt to and register signs of cognitive or educational limitations.

Provide a written account of the way impairments detailed in medical examination reports prior to an asylum hearing have influenced hearings and were considered in assessments.

Appendix 5

Terms of reference

This is a description of themes to be addressed by all stakeholders when considering trans persons in an asylum or human rights context. It must guide their tasks when considering trans persons in a differentiated and specific way that includes all themes systematically and comprehensively. The themes are described in the forms of questions to answer. The list of themes is not extensive and it may be necessary to adapt or add themes depending on the task, function of the inquiry, region of interest, or the population.

1. Legal Gender Recognition (LGR)

- a. Does LGR that is provided in countries of origin conform to the Yogyakarta Principles, or is it absent, restricted, and/or does it contain abusive preconditions?
- b. What are the negative consequences in various situations for a trans person when the legal identity does not match the gender identity and/or expression? Think, for instance, of: access to healthcare; registering for and taking part in education; applying for a job; voting; travelling by plane or in public transport; crossing borders; being stopped at checkpoints, particularly in situations of conflict, instability, repression, or gang rule in a country of origin; when filing a complaint with state authorities or entering into litigation; opening a bank account; obtaining a mortgage; obtaining a public transport pass; picking up a package or medication; claiming heritage; proving kinship to family in hospital; claiming and exercising parental authority over ones children; renting a space or a hotel room; entering into a phone contract; or representation in news reports.
- c. What abusive preconditions and restrictions to gaining access to LGR exist? Have you considered mandatory sterilisation, sex reassignment surgery, (the costs of) a legal procedure, medical proof, delay, dependence on the discretion of a judge, lack of access to gender care, divorce, or authorities not implementing legislation?
- d. How do these abusive preconditions and restrictions affect a trans person?

2. Respecting the trans identity

- a. Is the self-identification of a trans person's gender identity respected consistently by using the preferred name, gender marker, and pronouns?
- b. Is the self-identification followed irrespective of a person's legal documents?
- c. Is it respected in conversation with, writing, and talking about a trans person by you, your organisation, others, and in countries of origin?
- d. If not, what does this mean for you as a stakeholder and your gender normative assumptions?

3. Gender-affirming healthcare (gender care)

- a. Is gender care absent, restricted, and/or does it involve abusive preconditions? Does it conform to the Yogyakarta Principles?
- b. What are the negative consequences for a trans person if gender care is restricted or absent?

- c. What are the consequences if the absence of gender care leads to improvised, dangerous, and sub-standard bodily affirmation to their identity?
- d. What abusive preconditions are connected to gender care, e.g. mandatory sterilisation, pathologising diagnosis, sex reassignment?
- e. How do these abusive preconditions influence and violate the rights of trans persons?
- f. Are medical procedures, diagnosis, reports, or certification a prerequisite to obtaining LGR?

4. The imprisonment of trans persons

- a. How great is the risk of a trans person being imprisoned compared to other groups?
- b. Does legislation and policy cover and prevent the known high risk for trans persons who are imprisoned (according to their sex assigned at birth) in terms of discrimination, violence, cruel, inhuman, degrading treatment and torture?
- c. Is the guidance in the Yogyakarta Principles and by the UNODC⁷¹³ followed?
- d. How are acts of discrimination and violence against trans persons in prison dealt with?
- e. Is protection possible after such acts?
- f. Is there a (trans-specific) risk of imprisonment upon return to a country of origin and does it amount to cruel, inhuman, degrading treatment and torture?

5. Laws and practice

- a. What other legislation and implementation is important besides that concerning LGR, gender care, and imprisonment?
- b. Is the possible presence of anti-discrimination legislation and provisions in a country applicable to trans persons or only to the LGB group?
- c. How does the absence of LGR, gender care, and rules regarding the imprisonment of trans persons diminish or nullify the relevance of general anti-discrimination provisions?
- d. How big is the gap between a constitution or anti-discrimination legislation on the one hand and its application and lived reality on the other. Have you considered the presence of harsh social and/or governmental marginalisation of trans people, gang rule, suppressive authoritarian governments, conflict, instability, and social inequality in countries of origin in the LAC region?
- e. What public order and vagrancy laws are present in a country of origin?
- f. Are such laws used by state authorities to target trans persons and trans sex workers?
- g. What are the consequences of such targeting?
- h. Are trans sex workers being incriminated and/or criminalised by law or in practise in their country of origin?
- i. What additional exclusion, discrimination, and violence do trans sex workers suffer from state author-

⁷¹³ Yogyakarta Principles, 2007, p. 16; UNODC, 2009, Chapter five; UNODC, 2015.

ities due to being incriminated or criminalised by them?

- j. How does this exacerbate a well-founded fear of persecution?
- k. How do public order laws, incrimination, and criminalisation of trans sex work diminish protection by state authorities?

6. Gender-normative violence, exclusion, discrimination, cruel, inhuman, degrading treatment and/or torture (gender normative opposition).

- a. In which situations and how frequently do trans persons face gender-normative opposition because of the perceived gender non-conformance and visibility as a trans person? Have you considered, e.g.: being in the public domain; access to housing, work, education, health care in general, doing groceries? Or the opposition to the trans identity and/or expression of minors (4-18 years) by family, in schools, and neighbourhoods in a country of origin? What is reported about gender-based violence against trans persons by sex work customers or partners? Is anything known about “corrective rape” or forced marriage? How do gender-normative restrictions limit travel in the country of origin?
- b. How often does gender-normative opposition against minors lead to them not finishing school, ending up homeless, and becoming involved in sex work?
- c. Are minors protected against such violence, exclusion, discrimination, cruel, inhuman, degrading treatment and/or torture?
- d. What societal forces are present in countries of origin that oppose the gender non-conformance of trans persons? Have you considered, e.g. the influence of machismo, religious and/or conservative groups claiming diversity is “gender ideology,” or social cleansing by state or non-state actors?
- e. Are trans persons depicted in the media and society as cheats or deceivers and are courts open to a trans-panic defence?⁷¹⁴

7. Violence by state authorities

- a. What is known about prejudice, transphobia, and gender-normative violence by state authorities against trans persons?
- b. How does this interact with other circumstances in a country of origin, e.g.: the absence or restriction of LGR? Conflict, instability, and/or repression, gang dominance? Public order and vagrancy laws? Legal suppression and/or criminalisation of sex work?
- c. How do these circumstances aggravate gender-normative violence by state authorities?
- d. How does this prejudice, transphobia, and gender-normative violence diminish the chances of receiving effective police protection?
- e. Is it realistic to expect trans persons that have faced, or are known to be at risk of, such violence in a country of origin, to file complaints with or receive protection from these or similar state authorities?

⁷¹⁴ “A legal strategy which asks a jury to find that a victim’s gender identity is to blame for the defendant’s violent reaction, including murder.” Available at: <https://www.americanbar.org/groups/crsj/publications/member-features/gay-trans-panic-defense/>; last accessed 27 December 2020.

8. Conflict, instability, repression, and gang rule

- a. How and to what degree do conflicts, instability, repression and/or gang rule in countries of origin (CIRG) aggravate a trans person's negative experiences both due to their gender identity and in general?
- b. How do CIRG diminish the chances of protection against violence by state and non-state actors?
- c. How and to what degree do CIRG lead to an increased risk of violence from police, non-state forces, or the general public?
- d. To what degree do CIRG diminish access to information about such violence?

9. Displacement

- a. What is known about the causes and prevalence of displacement (and homelessness) of trans persons due to gender normative opposition in social surroundings and from family, gangs, other non-state groups, and state authorities?
- b. How does displacement contribute to a well-founded fear of persecution?
- c. What is known about social cleansing in countries of origin?

10. Country of Origin Information

- a. Is COI adequate, sufficient, up to date, specific, trans-specific, and does it cover/provide answers to the terms of reference here?
- b. Do the COI researchers possess prior knowledge and insight in trans identity and/or expression, its regional context, and the terms of reference for COI research?
- c. Are supplementary and alternative sources sought, accepted, and included to provide such information where it is probable that general information will not be sufficient?
- d. Is the greater frequency, severity, and structural nature of negative experiences and circumstances for trans Latinas in the LAC region compared to the LGB group known, differentiated, and documented?
- e. Does COI include themes like murder rates, life expectancy, HIV infection rates, HIV treatment possibilities, and health disparities of trans persons?
- f. Does COI include information about the way different **circumstances**⁷¹⁵ intersect with and aggravate hardships of a trans identity and/or expression?
- g. Does COI include information about the way **individual disparities** like race, ethnicity, poverty, a rural background, unfinished education, an impaired cognitive capacity and/or sex work intersect with and aggravate hardships of a trans identity and/or expression?

11. Sex work

- a. How high is the percentage of trans persons involved in sex work?

⁷¹⁵ For instance: the absence or restriction to obtain LGR; conflict, instability and/or repression; public order and vagrancy laws in a country of origin; or the suppression and/or criminalisation by law of sex work.

- b. What circumstances and individual disparities interact with the trans identity to increase the probability of becoming involved in sex work?
- c. Are trans sex workers incriminated and/or criminalised by law or in practice in their country of origin?
- d. What additional hardships exist for trans sex workers when they are incriminated and/or criminalised, e.g. further marginalisation, being forced into illegality, and violence by state authorities?
- e. Do state actors use violence as a result of incrimination or criminalisation of sex work?
- f. How does such violence contribute to a well-founded fear of persecution or the inability to sustain life in their country of origin?

12. Cumulative effects

- a. How do all the negative experiences related to the trans identity and/or expression, all regional circumstances, and the negative effect of individual disparities of a trans identity and/or expression interact and accumulate?
- b. What is known about the intersectionality and accumulation of such disparities and circumstances?
- c. How do these cumulative effects and intersectionalities contribute to a well-founded fear of persecution and/or life being untenable in a country of origin?
- d. How do these cumulative effects and intersectionalities limit or preclude access to protection by state authorities?