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‘A glass half full’? The Harmonization of the EU Asylum System on LGBTI Asylum Claims and its Conformity with International Refugee Law and Human Rights Standards.

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Abstract:

Thousands of lesbian, gay, bisexual, transgender and intersex (LGBTI) individuals apply for international protection in the European Union (EU) each year due to fear of persecution on the basis of their sexual orientation and/or gender identity. Scholars and international organizations have identified many problems faced by LGBTIs during their asylum process in the EU. The level of protection of the fundamental rights of LGBTI asylum-seekers (including the right to asylum) depends to a large extent on the content of EU harmonization on LGBTI asylum claims. For this reason, the major objective of this thesis is to assess whether EU harmonization on LGBTI asylum claims is in full conformity with International Refugee Law and human rights standards. This critical assessment allows for the identification of substantive and procedural points of discord between EU's approach and International Refugee Law and human rights standards. In conclusion, this thesis highlights that EU harmonization on LGBTI asylum claims is not in full conformity with International Refugee Law and human rights standards.

Keywords: LGBTI asylum claims; International Refugee Law; LGBTI rights; European Union and LGBTI rights.

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Gabriel Almeida Ferreira

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Table of Contents

Glossary

AI	Amnesty International
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
HRC	United Nations Human Rights Council
HRW	Human Rights Watch
ICJ	International Commission of Jurists
ILGA	International Lesbian, Gay, Bisexual, Trans and Intersex Association
LGBTI	Lesbian, Gay, Bisexuals, Transgender and Intersex.
MS	Member States
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNHCR	Office of the United Nations High Commissioner for Refugees

Introduction

Each year, an estimated number of ten thousand lesbian, gay, bisexual, transgender and intersex (LGBTI)[1] individuals from around the world seek international protection in Europe.[2] They flee from a plurality of hostile actions towards sexual and gender minorities and from severe violations of their fundamental rights. Same-sex sexual acts are illegal in at least seventy-six (76) states in all continents except Europe,[3] and can be punished by the death penalty in at least eight (8) of them.[4] Moreover, violence and persecution by state and non-state actors due to one's sexual orientation and/or gender identity is a globally spread phenomenon. In 2014, the United Nations Human Rights Council (HRC) reiterated its concern about global violence and discrimination based on sexual orientation and/or gender identity.[5]

International Human Rights Law has increasingly recognized, albeit the reluctance of some states, that LGBTI people shall not be deprived of their fundamental rights, such as the right to private life and the right to equality and non-discrimination. Nowadays, the fundamental rights of LGBTI people are certainly protected by international human rights law. However, human rights law cannot offer immediate protection for many LGBTIs risking persecution. For this reason, they have resorted to apply for asylum invoking International Refugee Law. They flee their countries of origin in search of a place where they are protected (or at least *more* protected) from persecution due to their sexual

[1] In this thesis, the term LGBTI is preferred over other similar terms, since it comprises a wide range of individuals within the spectrum of sexual orientation and gender identity. The Office of the United Nations High Commissioner for Refugees (UNHCR) also uses this term. See on this note: UNHCR 'Guidelines on International Protection nº 9: claims to refugee status based on sexual orientation and/or gender identity within the content of article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees', 2012, HCR/GIP/12/09, (hereafter "UNHCR, *Guidelines on Sexual Orientation and Gender Identity*"), paras. 8-11.

[2] There is no exact data on the number of LGBTI people seeking asylum in Europe, but the estimation is that there are 10,000 asylum applications made by LGBTI people each year. See: Sabine Jansen and Thomas Spijkerboer, *Fleeing Homophobia: asylum claims related to sexual orientation and gender identity in Europe* (COC Netherlands, VU University Amsterdam, 2011) pp. 15-16 http://www.refworld.org/pdfid/4ebba7852.pdf accessed 13 June 2015.

[3] None of the European states criminalize same-sex sexual acts. However, in Russia and Lithuania there are legislation prohibiting 'homosexual propaganda', limiting fundamental rights of LGBs (e.g. the right to freedom of expression) and favoring an atmosphere of impunity from homophobic violence. See: International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA): Aengus Carrol and Lucas Paoli Itaborahy, 'State Sponsored Homophobia 2015: A world survey of laws: criminalization, protection and recognition of same-sex love' (*ILGA*, May 2015) pp. 116-118 http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2015.pdf accessed 14 June 2015

[4] ILGA, 'State Sponsored Homophobia 2015' (n 3) pp. 28-29.

[5] Human Rights Council, A/HRC/27/L.27/Rev.1, 'Human Rights, sexual orientation and gender identity', 2014. See also: Human Rights Council, A/HRC/19/41, 'Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity - Report of the United Nations High Commissioner for Human Rights', 2011.

orientation and/or gender identity. By virtue of its good record regarding the protection of LGBTI rights,[6] the European Union (EU) has been one of the main destinations of LGBTI refugees.

In the last decade, the EU has developed legislation establishing common standards on asylum and refugee status with the aim of creating a Common European Asylum System (CEAS). The CEAS is comprised of different directives which intend to *harmonise* diverse Member State (MS) practices on granting and assessing international protection. MS remain, nevertheless, under the obligation to comply with the 1951 Refugee Convention and its 1967 Protocol,[7] which is the cornerstone of international legal protection of refugees.[8]

The *Fleeing Homophobia Report*, published in 2011, identified considerable differences in the ways MS assess LGBTI-related asylum claims.[9] However, as far as legislation is concerned, the EU included references to sexual orientation and gender identity in its asylum directives. In fact, the directives and the recent case law of the Court of Justice of the European Union (CJEU) allow for the identification of the current **content of the EU harmonization in relation to LGBTI refugees**, which is the primary object of this thesis.

In the light of the fundamental rights of LGBTI people, particularly the *right to asylum*, it is important to ascertain whether the EU approach to LGBTI-related asylum claims is compatible with International Refugee Law and human rights standards. Despite the relevance of achieving harmonization *per se*, it is pertinent to examine the ***content*** of the harmonization. Otherwise, the success of European harmonization on asylum matters risks becoming a technical issue, rather than a substantive issue in the perspective of the rights of asylum-seekers.

Research Questions and Objectives

Considering the above, it is the aim of this thesis to answer the following research question: "**Is the content of EU harmonization on LGBTI asylum claims in**

[6] Cf.: ILGA, *State Sponsored Homophobia 2015* (n 3) pp. 114-118; and Phillip Ayoub & David Paternotte, *LGBT Activism and the Making of Europe: A Rainbow Europe?* (Palgrave Macmillan 2014)
[7] Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137, and: Protocol Relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (hereafter "1951 Refugee Convention and its 1967 Protocol").
[8] See, for instance: CJEU, Joined cases C-175/08, C-176/08, C-178/08 & C-179/08 *Aydin Salahadin Abdulla a.o v German Republic* [2010] ECR I-1493, paras. 51-53.
[9] Jansen and Spijkerboer, *Fleeing Homophobia* (n 2) p. 7.

conformity with International Refugee Law and Human Rights standards?". For that purpose, the following sub-questions need to be answered:

a) Do LGBTI individuals have a right to asylum in the European Union?
b) What is the content of EU harmonization on LGBTI asylum claims, as defined by the Common European Asylum System (CEAS) and the Court of Justice of the European Union (CJEU)?
c) What are the International Refugee Law and Human Rights standards on LGBTI asylum claims?

The answer to those questions serves the objective of critically assessing the content of the on-going harmonization of MS policies towards LGBTI asylum-seekers. Additionally, it intends to highlight the importance of reaching an EU approach which is in conformity with human rights standards and international refugee law. For that purpose, considerable weight is given to the perspective of asylum-seekers and their rights. Ultimately, this thesis hopes to contribute for a better understanding of the progress and drawbacks for the protection of LGBTI asylum-seekers in the EU.

It is important to note that this research by no means attempts to express a complete disapproval of the current state of protection of LGBTI asylum-seekers in the EU. It does, however, offer a picture of the current assessment of LGBTI asylum claims in the European Union as a **glass half full**. In other words, it explores an area in which much progress has been achieved, but which still faces important obstacles to be considered complete. The content of the harmonization herein investigated is a substantial portion of the half empty part of the glass.

Research Outline

To answer the research question, this thesis is divided into four chapters. The **first chapter** starts by briefly elucidating the general conditions that make LGBTIs leave their countries of origin. This is important as it helps understanding the nature of the persecution and discrimination LGBTIs seek to escape. After this clarification, the right to asylum in the European Union is explained in conjunction with the prohibition of discrimination. This reasoning assesses if the Charter of Fundamental Rights of the EU gives LGBTIs a right to asylum in Europe. To conclude, this introductory chapter

describes the main problems faced by LGBTI asylum-seekers in the EU. Therefore, by the end of the first chapter this thesis already points out why LGBTIs seek asylum, what is the nature of their right to asylum in the EU, and what are the main problems they face during the asylum process. This chapter answers this thesis' first sub-question.

Chapter two focuses on the European legal framework, in order to identify the content of EU harmonization on LGBTI-related asylum claims. The chapter is divided into two sections. The first one looks at the EU legislation on asylum. It describes the legal basis for the EU mandate in this area, the features of the CEAS and the two most important directives for the assessment of LGBTI-related asylum claims – the Qualification Directive and the Procedures Directive. The second section of the chapter is dedicated to pertinent case-law of the CJEU. Finally, by the end of the second chapter, it should be possible to identify the **content of the EU harmonization on LGBTI-related asylum claims**, thus answering the second research sub-question.

Chapter three answers the third sub-question of this research, by looking at International Refugee Law and Human Rights standards in relation to LGBTI asylum claims. As far as International Refugee Law is concerned, the chapter presents the 1951 Refugee Convention as the legal backbone of international refugee protection. Afterwards, it discusses the mandate of the Office of the United Nations High Commissioner for Refugees (UNHCR) and the legal character of its guidelines. Due regard is paid to UNHCR's Guideline on International Protection nº 9, which is dedicated exclusively to setting standards for the interpretation of the Refugee Convention in cases related to sexual orientation and/or gender identity. In its turn, as far as Human Rights standards are concerned, this chapter investigates the standards set by human rights courts (e.g. the European Court of Human Rights (ECtHR)) and human rights treaty bodies (e.g. the Human Rights Committee) on the fundamental rights of LGBTI people, to the extent that they are related to asylum. Due to the scope of this thesis, this chapter looks particularly at the case-law of the ECtHR on article 3 (prohibition of inhuman or degrading treatment or punishment) of the European Convention on Human Rights (ECHR) in relation to LGBTI asylum seekers. However, international standards provided by UN treaty-bodies have complimentary value. Ultimately, chapter three provides an answer to the third research sub-question.

Chapter four evaluates the conformity of the content of the EU harmonization on LGBTI asylum (identified in chapter 2) with International Refugee Law and Human Rights standards (described in chapter 3). This chapter has an argumentative character

and it maintains that the content of the EU harmonization on LGBTI asylum is not in full conformity with International Refugee Law and Human Rights standards. The concerns with the current *status quo* is divided into identifying substantive and procedural problems. The section on substantive problems focuses on the extent of the protection of the rights, while the section on procedural problems focuses on procedural guarantees. This chapter answers the main research question of this thesis.

The **conclusion** of this thesis gathers the main findings of this research and reiterates the *importance* of reaching an EU harmonization of LGBTI asylum which is in conformity with international refugee law and human rights standards. It discusses the feasibility of this objective in the light of recent initiatives at the policy level, such as the role of the European Asylum Support Office in coordinating the process of harmonization. To a certain extent, it inserts the topic into the broader discussion on the balance between fundamental rights and MS discretion on asylum matters. Finally, the conclusion evaluates the weight of the advances and drawbacks of the EU harmonization on LGBTI asylum in the past years, and seeks to identify avenues for a better protection of LGBTI asylum seekers.

Methodology

To follow this line of reasoning, this thesis mainly engages in **descriptive and analytical** legal research. First, a descriptive approach is necessary to conduct an inventory of relevant European legislation on asylum matters, so as to locate the EU legal sources for the assessment of asylum claims based on sexual orientation and/or gender identity. This approach is particularly evident in the second and third chapters. Not less importantly, this thesis makes use of a variety of legal sources, such as the guidelines of the UNHCR, as well as case law of the CJEU and the ECtHR.

The main contribution of this thesis lies in its analytical approach, which is clear in chapter four and in the conclusion. From the perspective of the fundamental rights of LGBTI asylum seekers, it is relevant to provide a critical assessment of the current state of protection provided to them by the EU. This thesis analyses the scope and content of EU legislation on asylum and refugee protection and the nature of the decisions of the CJEU. The research also adopts a future-oriented approach. The assessment of the feasibility and ways forward to a better system to protect LGBTI asylum seekers in the

EU benefits from this approach. It also helps to go a step further than the (undoubtedly important) examination of the problem.

Limitations

This thesis concurs with other scholars that a lack of national data on LGBTI-related asylum claims (such as their numbers, process of evaluation, nature, and outcome) is a main obstacle to understanding the problems faced by LGBTI individuals during their asylum process.[10] To some extent, the *Fleeing Homophobia* report, as the first comparative research undertaken in Europe on this topic, provides the much needed clarity. Nevertheless, only a few MS gather specific and consistent data on their assessment of such asylum claims. As a result of the lack of this information from most Member States, it is hard to keep track of any changes in their daily practices. Another limitation, one which also accentuates the relevance of this topic, is the recent character of the decisions by international courts on this matter. Because of this, it is difficult to assess the concrete impact of the rulings on MS' practices.

Theoretical Framework

The upmost value of previous studies by scholars such as Sabine Jansen, Jenni Milbank, Nicole LaViollete and Thomas Spijkerboer on different aspects surrounding the asylum process of LGBTI people need to be fully recognized. Without them, the production of this thesis and the elaboration of its reasoning would not be possible. This thesis builds on this relatively new area of research which is still in process of development and aims at contributing to this field of research by looking at the relation between EU harmonization and international refugee and human rights standards.

This thesis, to a large extent, makes use of the European and International legal frameworks for the protection of asylum seekers and refugees. It is located at the intersection of Human Rights Law and Refugee Law, which are progressively intertwined.[11]

[10] Jansen and Spijkerboer, *Fleeing Homophobia* (n 2) p. 13.
[11] Francesca Ippolito, 'Migration and Asylum Cases before the Court of Justice of the European Union: putting the EU Charter of Fundamental Rights to test?' (2015) 17 *European Journal of Migration and Law* pp. 1-38.

Chapter 1: LGBTI Asylum-seekers and the European Union

Before analyzing the object of this research (the content of the EU approach towards LGBTI-related asylum claims), this chapter builds on three elementary aspects surrounding LGBTI asylum-seekers in the European Union. First, it looks at the different situations which force LGBTI people to flee their home countries. This is an important step to this research, as it clarifies LGBTI's need for international protection and the consequences they face if states violate the principle of *non-refoulement*. Second, it discusses the nature of the right to asylum in the EU in connection with the principle of non-discrimination. With this, this research starts the construction of the legal basis for LGBTI's asylum claims in the EU. Thirdly, it highlights the main problems faced by LGBTIs during their asylum process in the EU.

Since this thesis' goal is to assess the conformity of the EU's approach on LGBTI asylum with International Refugee Law and human rights standards, it first needs to present the constitutive elements of this objective, that is, (a) the reasons LGBTI people flee their home countries, (b) the nature of their right to receive asylum in the EU, and (c) the problems they face during the asylum process. Therefore, this chapter provides the necessary elements to answer the first sub-question: *"Do LGBTI individuals have a right to asylum in the European Union?"*. Only then can this research proceed to identify the content of the EU harmonization on LGBTI asylum.

1.1. Why are LGBTI people seeking international protection?

LGBTI people are subject to severe violations of their fundamental rights in different corners of the world.[12] While differing degrees of homo and transphobia can be identified in virtually every country, it is relevant to discern different levels of violations of the fundamental rights of LGBTI individuals. In the light of refugee law, this is particularly important as not all measures of discrimination or every violation of one's fundamental right reaches the necessary threshold for refugee qualification.

[12] It is worth mentioning that the difficulties faced by transgender, transsexual and intersex people often differ substantially from those faced by lesbians, gays and bisexuals. In this thesis, they are referred in conjunction unless stated otherwise, with no intention to assume that their particularities do not deserve specific research. On this note, see: Laurie Berg and Jenni Millbank, *Developing a Jurisprudence of Transgender Particular Social Group* in Thomas Spijkerboer (ed.), *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum* (Routledge, 2013).

With no intention to diminish the complexity of the analysis of the fundamental rights of LGBTI people, three categories of countries of origin can be identified. Firstly, those countries where **same-sex sexual acts are criminalized and punished by the death penalty.** According to the 2015 State Sponsored Homophobia Report, at least five (5) states (Mauritania, Sudan, Iran, Saudi Arabia and Yemen) implement the death penalty to those involved in same-sex sexual acts, as well as some areas of Iraq, Nigeria and Somalia. Although not recognized as a state, the Daesh (Islamic State, ISIS) also implements the death penalty for homosexuals.[13]

Secondly, there are countries where **same-sex sexual acts are somehow criminalized,** which reaches the number of seventy-six (76) states.[14] In those countries, the penalties for engaging in homosexual activity can vary from a fine to life imprisonment. While some countries consistently persecute LGB people, others never apply their discriminatory provisions or only occasionally. Regardless of the frequency with which they are enforced,[15] laws criminalizing homosexual acts are, in themselves, discriminatory and generate a state of impunity, triggering homo and transphobic violence.[16]

Finally, it is possible to identify a broader third category, comprised of countries where **LGBTI people are not criminalized, but homo and transphobic violence is widespread and neglected by the State.** The number of countries in this category varies according to the different criteria used to define the gravity of homo and transphobia. Identifying this category highlights that violations of the fundamental rights of LGBTI individuals are not necessarily the result of laws but can also be attributed to the inaction of States *to stop* de facto violations of fundamental rights.

With this global panorama in mind, it should not come as a surprise that LGBTI people flee their countries due to a deep fear of suffering persecution due to their sexual orientation and/or gender identity, be it at the hands of the State or due to hostilities in their home-country which are not counteracted by the State. The European Union is, together with the United States, Canada and Australia, a frequent destination for LGBTI

[13] ILGA, *State Sponsored Homophobia 2015* (n 3) p. 76.
[14] See: *Annex I (Countries that Criminalize Same-Sex Sexual Acts).*
[15] The term *enforcement* can be understood as the existence of judicial, administrative or police actions envisaging the application of such norms.
[16] See on this note: Amnesty International (AI) and International Commission of Jurists (ICJ), 'Observations by Amnesty International and the International Commission of Jurists on the case X, Y and Z v Minister voor Immigratie, Integratie en Asiel (C‑199/12, C‑200/12 and C‑201/12) following the Opinion of Advocate General Sharpston of 11 July 2013' (October 2013) http://goo.gl/fWqs9F accessed 08 June 2015.

refugees. EU Member States in general have a good track record when it comes to LGBTI rights, and they have recognized (albeit rather inconsistently) a right to asylum for people seeking protection due to their sexual orientation and/or gender identity.

1.2. A right to asylum for LGBTI people in the European Union

Before describing the relevant EU legislation on asylum and refugee protection, it is important to investigate the concept of a ***right to asylum*** in the European Union. For that, it is necessary to make a brief inventory of asylum provisions under International Law, in order to compare it with the nature of the right to asylum in the EU. The goal of this section is to ascertain whether or not LGBTIs have an *individual* and *enforceable* right to be *granted* asylum in the EU.

Under international law, it is possible to identify three aspects of rights surrounding asylum. Asylum was first understood as "the right of States to grant asylum *if they so wish* in the exercise of their sovereignty"[17]. This is a right of ***states*** and is recognized as a general principle of International Law.[18]

A second international legal understanding concerns the ***right of an individual to seek asylum***. It concerns the "individual right that an asylum-seeker has vis-à-vis his state of origin"[19]. The right to leave your own country is recognized by Article 13(2) of the Universal Declaration of Human Rights (UDHR)[20] and Article 12(2) of the International Covenant on Civil and Political Rights (ICCPR)[21]. The UDHR also establishes that "everyone has the right to ***seek*** and to ***enjoy*** in other countries asylum from persecution"[22]. Nevertheless, from the wording of this article it is not possible to identify an obligation of states to grant asylum, but rather an individual right to seek and, if granted, enjoy asylum. This aspect of asylum is recognized as part of customary international law[23], thus generally binding on all states.

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[17] Maria Tereza Gil-Bazo,'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law' (2008) 27(3) *Refugee Survey Quarterly* p. 38 [emphasis in original].
[18] Roman Boed, 'The State of the Right of Asylum in International Law' (1994) 5 *Duke Journal of Comparative & International Law* p. 4.
[19] ibid p. 6.
[20] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) Article 13(2) reads: "Everyone has the right to leave any country, including his own, and to return to his country".
[21] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 Article 12(2) reads: "Everyone shall be free to leave any country, including his own".
[22] Universal Declaration of Human Rights (n 20) Art. 14 [emphasis added].
[23] Boed (n 18) p. 6.

The third aspect is the **individual right to be granted asylum.** Under International Law, individuals have no right vis-à-vis receiving States to be granted asylum.[24] The 1951 Refugee Convention and its 1967 Protocol provides the cornerstone *definition* of a refugee and a set of *rights* they are entitled to after refugee status is granted, but do not give individuals a right to be granted asylum. The Refugee Convention does entail the obligation for States to refrain from *refoulement*, i.e. from returning an individual to his or her country of origin where that person risks facing persecution. However, this is not equal to a right to asylum, as "asylum entails admission, residence and protection; [while] *non-refoulement* is a negative duty, not to compel a person to return to a country of persecution"[25].

In sum, International Law does not give individuals an enforceable right to be granted asylum in a receiving state. International provisions guarantee the right of states to give asylum under the exercise of their sovereignty, as well as the individual right to *seek* asylum. The European Union, in its turn, through the **Charter of Fundamental Rights of the European Union** (hereinafter "the Charter") has taken a step further in the development of a right to asylum.

As a legally binding document, the Charter recognizes a 'right to asylum' in its Article 18. The scope of the Charter is limited to areas ruled by EU law, as established by article 51. Since the EU have expanded its competences on asylum matters, it is important to mention that article 18 of the Charter stipulates that

> "The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties')".[26]

Two observations must be made on this provision. Foremost, the Charter emphasizes that EU legislation on asylum must be drawn up with due respect for the Refugee Convention and its Protocol. As chapter two will show, the Treaty on the Functioning of the European Union (TFEU) also binds the Union to act in conformity with the Refugee Convention, by virtue of its Art. 78(1). Secondly, Article 18 establishes a "right to asylum", instead of a right limited 'to seek' or 'to enjoy' asylum. The right to asylum as established by the

[24] ibid p. 8.
[25] Paul Weis, 'The United Nations Declaration on Territorial Asylum' (1992) 30 *Canadian Yearbook of International Law* p. 166.
[26] Charter of Fundamental Rights of the European Union (2010) OJ C83/02, Art. 18.

Charter "is to be construed as the protection to which all individuals with an international protection need are entitled, provided that their protection grounds are established by international law"[27]. In other words, it is an enforceable right of individuals, not states, to be granted international protection when they meet the necessary criteria established by EU law.[28]

For the objective of this research, Article 21 of the Charter is of relevance as well. It affirms that

> "Any discrimination based on any ground such as **sex**, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or **sexual orientation** shall be prohibited".[29]

This provision on the prohibition of discrimination must be read in conjunction with the aforementioned right to asylum, providing a high level of protection for LGBTIs as the combined effect of the provisions means that asylum rules have to be applied indistinctively. In other words, Member States are prohibited from discriminating on grounds of sexual orientation when they are applying EU law, including those laws regulating asylum.

Therefore, as far as the nature of the right to asylum in the EU is concerned, LGBTI people are entitled to an individual and enforceable right to be granted asylum, without discrimination due to their sexual orientation or gender identity, as long as they meet the criteria established by EU law. In turn, EU Law must be in conformity with International Refugee Law.

1.3. The problems faced by LGBTI asylum-seekers in Europe

Until this point, this thesis has highlighted what causes LGBTIs to flee their countries of origin and the nature of their right to asylum in the European Union. Before discussing the relevant EU legal framework on asylum, it is necessary to point out the problems faced by LGBTIs during their asylum process in EU Member States. This step helps understanding which problems must be tackled by the EU legislator in order to guarantee an asylum procedure for LGBTI people which is in full conformity with international refugee law and human rights standards. In this section, the value of the Fleeing

[27] Gil-Bazo (n 17) p. 50.
[28] ibid p. 48.
[29] Charter of Fundamental Rights of the European Union (2010) OJ C83/02, art. 21.

Homophobia Report must be acknowledged, as it is the main comprehensive source on MS practices concerning LGBTI-related asylum claims in Europe.

The first problem identified by the report surrounds **criminalization**, in other words, the state of persecution faced by asylum-seekers in their countries of origin. As explained before in this chapter, at least 76 countries criminalize same-sex sexual acts. However, in five (5) European states[30], not even enforced criminalization was considered as a ground for refugee status. In eleven (11) Member States[31], only enforced criminalization is considered to amount to persecution justifying a refugee status, while in one MS (Italy) even unenforced criminalization is considered as a severe violation of one's fundamental rights, thus resulting in a well-founded need of international protection and therefore granting refugee status.[32]

Another issue is the **discretion requirement,** in other words, the rejection of asylum claims of LGBTI people under the argument that "they have nothing to fear in their country of origin as long as they remain 'discreet'"[33]. This reasoning was found at least once in the practice of virtually all MS, although policy guidelines and national court decisions in some of them have ruled out the validity of the discretion reasoning[34].

The methods to assert **credibility** are at the core of the issues faced by LGBTI people seeking asylum in the EU. They refer to the ways interviewers and decision-makers ascertain the reliability of the applicant's discourse, like his or her history, trajectory, previous persecution, and, ultimately, factual or identified sexual orientation and/or gender identity. In LGBTI-related asylum claims, much weight is given to proving that the applicant is, e.g., gay or lesbian. The problem of credibility divides into three sub-problems: medical examinations, intrusive questioning and stereotypical notions.

In at least eight (8) MS *medical examinations* performed by psychiatrists, sexologists or psychologists were used to assess the applicant's sexual orientation or gender identity.[35] While in some countries this was required or induced by state officials,[36] in others the applicants felt so much pressure to prove their sexual orientation that they opted to undergo a medical examination at their own initiative.[37] A grave

[30] Jansen and Spijkerboer, *Fleeing Homophobia* (n 2) p. 24.
[31] ibid pp. 22-23.
[32] ibid pp. 23-24.
[33] ibid p. 33.
[34] ibid pp. 35-38.
[35] ibid p. 49.
[36] ibid p. 50.
[37] ibid pp. 50-51.

example was the use of "phallometric testing" in Czech Republic until 2009. This test consisted of determining the applicant's sexual orientation by looking at the physical reaction to pornographic material.[38] After criticism of the UNHCR, which considered the test a degrading treatment and a violation of the right to privacy, this practice was suspended.[39]

The use of *abusive and intrusive questioning* was identified in at least eight (8) MS, but it is assumed to be a widespread practice among them.[40] Applicants have reported explicit questioning by decision-makers regarding their sexual preferences, sexual positions, details of their first sexual experience and even the character of the pornographic material they prefer[41]. Due to the nature of this questioning and to the difficulties of some LGBTI people to talk openly about their sexual orientation and/or gender identity, as well as because of cultural differences, their answer is "labelled as 'evasive', hence not credible by decision makers"[42].

Another instrument used to measure credibility is the reliance on *stereotypical notions*. Interviewers and decision-makers have judged the credibility of the applicant's sexual orientation and gender identity on assumed behavior, knowledge or appearance. Therefore, the credibility of LGBTI people has been contested, for instance, when they are not able to show familiarity with "gay scenes" or with "lesbian" books and magazines.[43] The fact that the applicant had heterosexual relations in the past has also been used to delegitimize his or her identification as lesbian, gay or bisexual, as well as when the applicant has been married to someone of the opposite gender, or has children.[44] Additionally, one's physical appearance (for instance, if 'too masculine for a gay men' or 'too feminine for a lesbian') has been used to assess sexual orientation.[45]

Another problem arises when the applicant only reveals his or her sexual orientation or gender identity at a later stage of the asylum process (during the appeal or in a second asylum application) – the so-called problem of **late disclosure.** There are a couple of reasons why LGBTI people may not reveal their sexual orientation or gender identity at

[38] ibid p. 52.
[39] On the criticism by the UNHCR check: UNHCR, *UNHCR's Comments on the Practice of Phallometry in the Czech Republic to Determine the Credibility of Asylum Claims based on Persecution due to Sexual Orientation*, April 2011, available at: http://www.refworld.org/docid/4daeb07b2.html accessed 10 June 2015.
[40] Jansen and Spijkerboer, *Fleeing Homophobia* (n 2) p. 55
[41] ibid.
[42] ibid.
[43] ibid p. 57.
[44] ibid p. 58.
[45] ibid pp. 60-61.

first: for example, they may not know that this could be relevant for their asylum process, or they may experience deep fear or difficulties when talking about their sexual orientation or gender identity due to experiences in their home-countries.[46] In at least two MS, applicants who reveal their sexual orientation at a later stage do not have their claims reassessed.[47] In almost all MS a late disclosure is regarded with suspicion and detracts from the credibility of the applicant's statement.[48]

Another issue concerns the **country of origin information (COI)**, in other words, the use of factual knowledge of a country's record concerning persecution of, discrimination against and protection for LGBTI people. The COI "is significant to enable decision-makers to relate a purported fear of persecution to the human rights situation of LGBTIs in the country of origin"[49]. In some countries, however, gathering information about the situation of LGBTI rights is no easy task. Furthermore, the COI needs to be complete and should not be limited to legal provisions. In at least seven (7) Member States the lack of Country of Origin Information on the situation of LGBTIs was interpreted as meaning that they do not suffer persecution.[50] In others, the use of incomplete or selective COI lead to a denial of asylum protection for LGBTI people.[51]

In the light of the problems identified above, it is possible to affirm that not only is there a lack of harmonization among MS when it comes to assessing LGBTI-related asylum claims, but also that some practices often violate the rights of LGBTI people. More specifically, the practices identified above resulted in a violation of LGBTI's rights to private life (Article 7 of the Charter), to human dignity (Article 1 of the Charter) and not to be subjected to degrading treatment (Article 4 of the Charter). Moreover, the accumulation of those practices may result in an incorrect assessment of the asylum claims, thus violating LGBTI's right to asylum (Article 18 of the Charter) and their right not to be removed to a State where there is a serious risk they will be subjected to death penalty, torture or other inhuman or degrading treatment or punishment (i.e. to *non-refoulement*, Article 19 of the Charter).

[46] ibid p. 65.
[47] ibid p. 66.
[48] ibid pp. 67-69.
[49] ibid p. 71.
[50] ibid p. 72.
[51] ibid pp. 74-75.

Chapter 2: The Harmonization of the EU Asylum System on LGBTI Asylum Claims

The previous chapter demonstrated that LGBTI people flee their home countries to avoid persecution and severe violations of their human rights, seeking asylum in places such as the European Union, where they have an individual and enforceable right to asylum if they meet the criteria established by EU law. Chapter 1 also located the main problems faced by LGBTIs during their asylum process in the EU by analyzing the practices of Member States. This thesis can now proceed to identify the ***content of the EU harmonization on LGBTI asylum claims***, which is this thesis' second sub-question. For that purpose, this chapter starts by outlining the EU competence on asylum matters and by elaborating on the Common European Asylum System (CEAS). Later it analyzes the two parts which constitute the EU approach on LGBTI-related asylum: the EU legislation on asylum and the case-law of the Court of Justice of the European Union (CJEU).

2.1 The EU Mandate on Asylum

Member States of the EU are bound by International and European provisions when assessing matters of asylum[52]. While the EU mandate on asylum dates back to the Treaty of Amsterdam in 1999, EU states were already parties to the 1951 Refugee Convention and to its 1967 Protocol, which forms the international legal cornerstone of asylum matters.[53] The 1951 Refugee Convention establishes a legally binding definition of *refugee* and determines a State's responsibilities vis-à-vis asylum applicants. It also codifies the principle of *non-refoulement*, which is now recognized as customary international law.[54] The subsequent EU legislation on asylum does not supplant the obligations established by International Refugee Law. On the contrary, as this chapter demonstrates, EU law on asylum must be in line with International Refugee Law.

The origin of a common policy on asylum in Europe is linked to the abolishment of internal border checks, established by the Schengen Conventions of 1985 and 1990[55].

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[52] In International Law, the term "asylum" refers both to refugee status and to other forms of protection. In EU secondary law, the term "international protection" is most commonly used and it refers to both refugee status and "subsidiary protection". There is no available work on the differences for LGBTI people between those two instruments of protection in the EU.

[53] Alice Edwards, 'International Refugee Law', in Daniel Moeckli et al. *International Human Rights Law* (2nd Edition, Oxford University Press 2014) p. 513.

[54] UNHCR, '*The Principle of Non-Refoulement as a Norm of Customary International Law*' - Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93, 31 January 1994, available at: http://www.refworld.org/docid/437b6db64.html last accessed 08 June 2015.

[55] Pieter Boeles et al, *European Migration Law* (2nd Edition, Intersentia 2014), pp. 246-250.

Since the Schengen Conventions established the free movement of individuals between its states party, asylum-seekers could also move from one Member-State to another and submit an asylum application in the state of their choice, or even submit multiple applications to increase their chances to receive asylum. To circumvent the problem of asylum shopping and secondary movements between them, European states agreed on the Dublin Convention.[56] The Dublin Convention was an international agreement which set criteria for determining the state responsible for an asylum application. At first, however, it was not part of the EU legal domain, nor did it have a supranational court to interpret its provisions. It was not until the Treaty of Amsterdam was adopted in 1999 that the European Union gained competence to adopt binding measures in the field of asylum and refugee protection, which would share the innate characteristics of the EU legal order and could be subject of consideration by the Court of Justice of the European Union.[57]

The current mandate of the European Union on asylum and refugees derives from Title V of the Treaty on the Functioning of the European Union (TFEU).[58] Its Article 78 rules that the EU ***shall*** develop a common police on international protection by adopting legislation on matters ranging from procedures to a uniform status of asylum. Additionally, it establishes that all legislation deriving from this mandate must be in accordance with the 1951 Refugee Convention and its 1967 Protocol, and must comply with the *principle of non-refoulement*. Therefore, the TFEU clearly reaffirms MS obligations derived from International Refugee Law and extends this obligation to the acts of the EU itself.

The intention to create a Common European Asylum System (CEAS) was first expressed at the Tampere summit of the European Council in 1999.[59] The CEAS was established in two phases. The first one, completed in 2004, aimed at achieving minimum standards through the adoption of different EU legislative acts. During this phase, three Directives (the *Qualification, Reception Conditions,* and *Procedures* Directives) and two regulations (the *Dublin* and *Eurodac* Regulations) were adopted. A period of 'reflection' and evaluation preceded the second phase of the CEAS. The European Commission

[56] Convention Determining the State Responsible for Examining Applications for Asylum lodged in one of the Member States of the European Communities (Dublin Convention), 15 June 1990, OJ C 254/1, 19 August 1997.
[57] Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 1997 O.J. C 340/1.
[58] Consolidated version of the Treaty on the Functioning of the European Union (TFEU) OJ C 326, 26.10.2012, p. 47–390.
[59] Boeles (n 55) p. 248.

concluded that legislation adopted in the first phase of the CEAS left MS a large margin of appreciation, which resulted in a weak level of harmonization.[60] For this reason, the EU started negotiating recasts for the existing directives, which culminated in the adoption of the recast Qualification Directive in 2012, the recast Procedures Directive and the recast Reception Conditions Directive in 2013. In the same year, the Dublin III Regulation and the recast of the Eurodac Regulation were adopted.[61]

A few observations need to be made on the differences between the first and second phases of the Common European Asylum System. First, on the **influence of human rights in the field of asylum.** When the first Directives were established fundamental rights were understood as ***principles*** of EU Law,[62] while during the negotiations for the recasts the Charter of Fundamental Rights of the European Union was already recognized as ***primary EU law***, as established by the Treaty of Lisbon. Even though the CJEU had already given due importance to the influence of fundamental rights on migration matters,[63] the recognition of the Charter as having the same legal value as the founding treaties enhanced the importance of human rights in EU Law. As a consequence, the relationship between asylum and human rights had to be closely scrutinized by the EU legislator during the process of adopting the recast asylum directives.

Secondly, since 2009, "asylum and immigration law must be adopted jointly by the European Parliament (EP) and the Council, deciding by qualified majority"[64]. The ordinary legislative procedure[65] places the EP and the Council on an equal footing, and has a voting system of qualified majority instead of unanimity. The EP in particular was a venue for the lobbying of NGOs aiming at more protection for the rights of migrants, also in the case of LGBTI rights.[66] In contrast, during the first phase of the CEAS, the Council had the sole competence of establishing the legislation and, since this had to be achieved by consensus, every MS had a right to veto any proposal. In this case, the EP was only consulted. In the perspective of NGOs, the Council was less accessible and less

[60] Federica Toscano, 'The Second Phase of the Common European Asylum System: a step forward in the protection of Asylum Seekers?*'* (2013) *Institute for European Studies working paper 7/2013* p. 8.
[61] Ibid.
[62] Gil-Bazo (n 17) p. 50
[63] See, for instance: C-540/03 *European Parliament v. Council of the European Union* [2008] ECR I-05769.
[64] Laurens Lavrysen, 'European Asylum Law and the ECHR: an uneasy coexistence' (2012) 4(1) *Goettingen Journal of International Law* p. 229.
[65] TFEU Article 294.
[66] Ulrike Hoffmann, 'Lobbying for the Rights of Refugees: An Analysis of the Lobbying Strategies of Pro-migrant Groups on the Qualification Directive and its Recast' (2012) 8(1) *Journal of Contemporary European Research*.

transparent.[67] Therefore, the expansion of the ordinary legislative procedure to the area of asylum resulted in better opportunities for the advocacy of better protection of the rights of asylum-seekers.[68]

Thirdly, the Treaty of Lisbon gave the **Court of Justice of the European Union** jurisdiction to rule on asylum and immigration matters. As consequence, the CJEU is now an important actor on delimiting the EU approach to asylum. Fourthly, while the first phase of the CEAS was developed under a mandate to adopt "minimum standards", the recast of the directives was elaborated under the current Article 78 TFEU, which allows the EU to adopt any legislation that will achieve 'uniform statuses' and 'common procedures'.[69]

With the exception of the Dublin and Eurodac Regulations, all other legislation on asylum are ***directives.*** As established by Article 288 of the TFEU, "a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods"[70]. Even though the CEAS is based on the idea that an individual should be offered an equivalent level of treatment on asylum matters in all Member States,[71] the current asylum directives give MS a margin of discretion in the way they implement the provisions. To some extent, this is expected since the provisions are framed in Directives, which lay down the end results which must be transposed by each MS to their domestic legislation. The CJEU plays an important role in reducing MS' discretion by issuing binding interpretations of key aspects of the directives.[72]

In sum, for LGBTI asylum-seekers the second phase of the CEAS represented a better opportunity to have their right to asylum guaranteed. Human rights became increasingly relevant to the area of asylum, which is a powerful instrument for claiming equal rights for LGBTIs. Moreover, the EP has been an important venue for LGBTI advocacy, certainly influenced by the lobbying of NGOs like Amnesty International and ILGA-Europe.[73]

For this research, it is relevant to point out that the assessment of asylum claims

[67] ibid pp. 32-33.
[68] ibid pp. 35-36.
[69] Boeles (n 55) pp. 249-250.
[70] TFEU Article 288.
[71] Boeles (n 55) p. 246.
[72] E. Drywood, 'Who's in and who's out? The Court's Emerging Case Law on the Definition of a Refugee' (2014) 51 *Common Market Law Review* p. 1124.
[73] Hoffmann (n 66) p. 26.

related to sexual orientation and/or gender identity have emerged, with the adoption of the Qualification Directive in 2002, as a topic within the EU mandate on asylum. Before that, MS had a larger leeway in interpreting the Refugee Convention to include or disregard LGBTI asylum claims. As the next chapter demonstrates, the interpretative mandate of the UNHCR consists of ***soft law***, thus not binding MS.[74] EU law, on its turn, explicitly recognizes sexual orientation and gender identity as persecutory grounds which may result in a need of international protection.[75] Due to the binding character of EU legislation, MS must ensure that their legislation complies with this interpretation.

In this thesis, the analysis of the EU legislation on asylum is limited to the Qualification Directive and Procedures Directive. Although other directives are also relevant for LGBTI asylum-seekers,[76] the problems identified in the first chapter relate particularly to the Qualification and Procedure Directives. Those problems can be sub-divided into two categories: ***substantive*** and ***procedural*** problems. Substantive problems refer to the content of the rights protected, in other words, it focuses on the extent and conditions for the right to asylum. In this sense, the Qualification Directive is particularly relevant. Procedural problems refer to issues arising from the process of assessment and granting of the right to asylum. In this case, the Procedures Directive is elucidative.

The Qualification Directive under the scope of LGBTI asylum claims

The Qualification Directive (QD) establishes common criteria for the identification of persons genuinely in need of international protection.[77] It provides authoritative standards for the application of the 1951 Refugee Convention, the cornerstone of the EU international protection regime.[78] The QD was adopted in 2004 and was applicable in the - by that time – 27 Member States of the EU, with the exception of Denmark, which opted-out of this Directive.[79] The recast QD, adopted in 2011, which strengthens the protection afforded to the individual by the first QD, does not apply in the United Kingdom, Ireland and Denmark.[80] The UK and Ireland are, however, still bound by the

[74] See: James Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd Edition, Cambridge University Press 2014), pp. 3-12.
[75] Recast Qualification Directive, Article 9(d).
[76] See, for instance: Petra Sussner, 'Invisible Intersections: Queer Interventions and Same Sex Family Reunification under the Rule of Asylum Law' in Thomas Spijkerboer (ed.), *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum* (Routledge, 2013).
[77] Recast Qualification Directive, Recital 12.
[78] ibid Recitals 4 and 23.
[79] Qualification Directive, Recitals 38-40.
[80] ibid Recitals 50-51.

first QD.

The QD[81] reflects, with the exception of the exclusion of MS nationals, the definition of refugee as stated in Article 1 of the 1951 Refugee Convention, by affirming that a

> "'refugee' means a third country national who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country […]".[82]

From this definition, it is useful to identify different aspects surrounding the refugee category: actors of persecution (who persecutes a refugee), actors of protection (who can offer protection to refugees), acts of persecution (which acts constitute persecution) and reasons of persecution (why are refugees persecuted). This is a general scheme for identifying refugees, and it helps clarifying the EU's approach to LGBTI asylum.

The QD establishes that **actors of persecution** include states, organizations controlling states or part of its territory, and non-state actors (if the *de facto* public authority is unwilling or unable to provide protection).[83] This means that a state's inaction or inability to protect LGBTI people can make non-state groups (such as homo and transphobic gangs) actors of persecution under the QD.

Actors of protection refers to institutions that can provide individuals protection from persecution. The QD mentions states and parties or organizations controlling at least part of the territory. The recast of the QD added that "protection against persecution or serious harm must be effective and of a non-temporary nature"[84]. This phrasing has particular importance for LGBTIs since it raises the threshold of protection that states must provide for LGBTIs in face of, e.g., violent attacks from homo and transphobic groups. In other words, when states are unable or unwilling to offer effective and permanent protection for LGBTIs suffering persecution, they cannot be regarded as actors of protection.

The Qualification Directives develops the concept of persecution - which is not explained in the 1951 Refugee Convention – by defining **acts of persecution.** According

[81] This thesis generally refers to the first Qualification Directive, unless stated that the specific provisions can only be found in the recast QD.
[82] QD, Chapter I, Article 2(d). To that definition, the inclusion of stateless people under those who can seek international protection and the observation to Article 12 (on grounds for exclusion from international protection) are added to the refugee definition in this same Article and sub-item.
[83] QD, Article 6.
[84] Recast QD, Article 7(2).

to Article 9 of the QD, an act must

> "(a) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, **in particular** the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
>
> (b) be an **accumulation of various measures**, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a)".[85]

A few observations must be made regarding this provision. The QD mentions Article 15(2) of the ECHR as an **open-ended** catalogue of rights which, if violated, indicates an act of persecution. Article 15(2) of the ECHR identifies the following non-derogable rights: right to life (Article 1 ECHR), prohibition of torture (and of inhuman or degrading treatment or punishment – Article 3 ECHR), prohibition of slavery (Article 4 ECHR), and the right to no punishment without law (Article 7 ECHR). However, from the wording 'in particular', the QD does not limit persecution to violations of non-derogable rights. Therefore, serious violations of other rights might constitute persecution depending on individual circumstances.

The other point of interest is that sub-item b recognizes that accumulative violations of one's fundamental rights can achieve the level of severity necessary to be considered an act of persecution. The following paragraph identifies examples of acts of persecution, as follows:

> "(a) acts of physical or mental violence, including acts of sexual violence;
> (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
> (c) prosecution or punishment which is disproportionate or discriminatory;
> (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;
> (e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include crimes or acts falling within the scope of the grounds for exclusion as set out in Article 12(2);
> (f) acts of a gender-specific or child-specific nature."[86]

This non-exhaustive list can be interpreted as accommodating different aspects of violations of human rights of LGBTIs. For instance, the reference to 'acts of physical or mental violence' can relate to different forms of state or state-sponsored homo or transphobia, such as unwillingness to tackle widespread violence against transgender individuals. Item 'b' refers to 'legal, administrative, police and/or judicial measures

[85] QD, Article 9(1).
[86] QD, Article 9(2).

which are in themselves discriminatory'. Legislation criminalizing same-sex sexual acts are discriminatory in their nature.[87] It is important to note that there is no explicit requirement that legal measures must be applied on an occasional basis. Rather, the focus is on the discriminatory character of the legislation. The focus on the discriminatory nature, rather than on the frequency, of persecution can also be found in item 'c'.

Article 9(1) of the QD affirms that there must be a connection between the acts of persecution and the **reasons for persecution**. In other words, refugee protection was not established to encompass all peril or violations of fundamental rights of all individuals. For this reason, refugee protection draws "a necessary distinction since it identifies those potential human rights victims who are fundamentally marginalized in their state of origin"[88]. There must be a causal link between the acts of persecution and the following protected grounds: race, religion, nationality, political opinion and membership of a particular social group.[89] For LGBTI asylum-seekers, the question has been whether or not they are recognized as a particular social group.

The QD defines a particular social group when its members (1) share an innate or fundamental characteristic to their identity **and** (2) are perceived as different by society.[90] According to the UNHCR, one of the two factors is enough to identify a particular social group.[91] In the case of LGBTI people, nevertheless, this is not problematic as they can be seen as a particular social group using the double criteria.[92] In fact, a paragraph was inserted into the recast QD to affirm that

> "Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of **sexual orientation**. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States. Gender related aspects, **including gender identity**, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group"[93]

This paragraph represents an improvement for LGBTI asylum seekers since it explicitly recognizes that sexual orientation and gender identity can compose a particular

[87] United Nations Human Rights Committee, *Toonen v. Australia* (1994) Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992, para. 7.6.
[88] Hathaway and Foster (n 74) p. 363.
[89] QD, Article 10.
[90] QD, Article 10(d).
[91] UNHCR 'Guidelines on International Protection No. 2: 'Membership of a Particular Social group' within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees' (2002) HCR/GIP/02/02 (hereafter 'UNHCR, *Guidelines on Membership of a Particular Social Group*').
[92] Joined Cases C-199/12, C-200/12 and C-2O1/12 *X, Y and Z v. Minister voor Immigratie en Asiel* [2013] paras. 46-49.
[93] QD, Article 9(d) [emphasis added].

social group, thus bringing LGBTIs into the scope of the definition of refugee. Before the QD, this understanding depended on the interpretation of the 1951 Refugee Convention and the acceptance of the guidelines of the UNHCR. It is important to point out that while sexual orientation was already present in the first QD, gender identity was only included in the recast of the QD, after pressure from NGOs.[94]

However, this provision can also be criticized. **Firstly**, the expression "depending on the circumstances of the country of origin" left MS with a margin of appreciation to decide what exactly those circumstances are. As a consequence, it lead to a disharmonized appreciation of the necessary conditions to regard LGBTIs as a particular social group. **Secondly**, the use of the term "might" instead of "shall" also gives MS some room to manouevre with a view to overlook LGBTIs as a protected group under refugee law. **Thirdly,** the phrase "sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States" is unclear and has no equivalence in any other grounds of persecution. For instance, on grounds of religion there is no remark on the exclusion of acts considered to be criminal in MS. This phrase might be harmful for LGBTI asylum-seekers as MS can use it to limit the scope of sexual orientation as a persecutory ground.[95] Notwithstanding the request to exclude this provision from the final text made by ILGA-Europe during the negotiations for the recast QD,[96] the phrase was maintained in the recast.

In sum, the recast QD is an important step for LGBTI asylum-seekers since it explicitly mentions that sexual orientation and gender identity can constitute a particular social group, ensuring LGBTIs a safer position within the CEAS. However, the QD by using terms such as 'might' and 'depending on the circumstances' has left MS with a considerable margin of appreciation in relation to the recognition of LGBTIs as particular social groups. The CJEU plays an important role in filling the interpretation gaps of the QD, as illustrated by the cases *X, Y and Z*[97] and *A, B and C*[98].

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[94] Hoffman (n 66) pp. 21-40.
[95] ILGA Europe, 'Policy paper: the recast of the EU legislation on asylum' (January 2011) http://www.ilga-europe.org/sites/default/files/Attachments/ie_policy_paper_asylum_recast_2011jan.pdf ILGA Europe, *Policy paper: the recast of the EU legislation on asylum*, January 2011, p. 6.
[96] ibid.
[97] Joined Cases C-199/12, C-200/12 and C-201/12 *X, Y and Z v. Minister voor Immigratie en Asiel* [2013].
[98] Joined Cases C-148/13, C-149/13 and C-150/13 *A, B and C v. Staatssecretaris van Veiligheid en Justitie* [2014].

The Procedures Directive under the scope of LGBTI asylum claims

The Procedures Directive (PD) establishes common procedures for granting and withdrawing international protection. It relates predominantly to the aforementioned ***procedural*** problems arising in the assessment of LGBTI asylum claims. In other words, it looks to the ***way MS shall assess*** asylum claims based on sexual orientation or gender identity**.** As the *Fleeing Homophobia Report* shows, even when the right to asylum for LGBTIs is fully recognized, the **procedure for assessing** LGBTI's claims is often in violation of International Law and international human rights standards.[99] Therefore, it is important to analyze to which extent the PD limits MS discretion when assessing asylum claims. Like the QD, the first Procedures Directive is now only applicable in the UK and in Ireland, while the recast of the PD is applicable in all the other MS except for Denmark.[100]

When discussing LGBTI asylum claims, it is helpful to identify ***general*** and ***specific*** provisions which are relevant for limiting MS discretion while assessing those claims. General provisions are those applicable to the assessment of all asylum claims, while specific provisions mention sexual orientation and/or gender identity, demonstrating awareness of the particularity of LGBTI's claims during the asylum process. Only the recast of the PD contains those specific provisions, largely due to the lobbying of NGOs such as ILGA-Europe.[101]

As far as ***general provisions*** are concerned, the PD establishes that MS shall base the assessment of asylum claims on ***facts***, in an objective and impartial manner.[102] They have to ensure that applicants receive free of charge information on legal and procedural matters.[103] Applicants also enjoy a right to receive legal advice and to receive a notification of the asylum decision.[104] MS have to ensure that decision-makers are properly trained and have the necessary knowledge to assess asylum-claims.[105]

However, general provisions may be insufficient to deal with the particularities of some applicants. For that reason, the recast PD established ***specific provisions*** to accommodate the needs of those applicants. Firstly, the PD recognizes that

> "Certain applicants may be in need of special procedural guarantees due, inter alia, to their age, gender, **sexual orientation, gender identity**, disability, serious illness, mental

[99] Jansen and Spijkerboer, Fleeing Homophobia (n 2) pp. 7-10.
[100] Recast PD, Recitals 58 and 59.
[101] See: ILGA Europe 'Policy paper: the recast of the EU legislation on asylum' (n 95).
[102] Recast PD, Article 10(3)(a) and Recitals 16-17.
[103] Recast PD, Article 12 and Recital 22.
[104] Recast PD, Article 11 and Recital 25.
[105] Recast PD, Article 4(4).

> disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence. Member States should endeavour to identify applicants in need of special procedural guarantees before a first instance decision is taken. Those applicants should be provided with adequate support, including sufficient time, in order to create the conditions necessary for their effective access to procedures and for presenting the elements needed to substantiate their application for international protection".[106]

This is an important recognition of the particularity of LGBTI applicants. Many LGBTI asylum seekers have difficulties talking about their sexual orientation or gender identity because of fear or shame.[107] They might also not be fully aware that their sexual orientation or gender identity is a basis for refugee status.[108] Since LGBTI applicants have fled from a hostile environment, they often struggle to be open about their sexuality and gender. Many of them have suffered or fear suffering persecution from public authorities in their country of origin, and remain reluctant to disclose their sexuality or gender identity to authorities of the receiving State for the same reason.[109]

Another provision of the recast PD relates specifically to the competence of the interviewer. Article 15(3) establishes that

> "Member States shall take appropriate steps to ensure that personal interviews are conducted under conditions which allow applicants to present the grounds for their applications in a comprehensive manner. To that end, Member States shall:
> (a) ensure that the person who conducts the interview is competent to take account of the personal and general circumstances surrounding the application, including the applicant's cultural origin, gender**, sexual orientation, gender identity** or vulnerability; […]"[110]

It can be inferred that **training** of authorities involved in the decision-making is key to ensuring that claims based on sexual orientation and/or gender identity are correctly assessed. In this sense, while the training of authorities working on asylum matters is the competence of each MS, they must "take into account the relevant training established and developed by the European Asylum Support Office (EASO)"[111]. As explained in more details in Chapter 4, the EASO established in 2014 a specific training on "Gender, Gender Identity and Sexual Orientation"[112], in order to contribute towards a better

[106] Recast PD, Recital 29 [emphasis added].
[107] Jansen and Spijkerboer, Fleeing Homophobia (n 2) p. 65.
[108] UNHCR Guidance on Sexual Orientation and Gender Identity, para. 38.
[109] Jansen and Spijkerboer, Fleeing Homophobia (n 2) pp. 65-69.
[110] Recast PD, Article 15(3).
[111] Recast PD, Article 4(3).
[112] See: EASO Training Curriculum https://easo.europa.eu/wp-content/uploads/BZ0413152ENC.pdf and EASO training plan 2015 https://easo.europa.eu/wp-content/uploads/EASO_Training-Plan-2015-Revised-as-of-April-2015.pdf.

understanding of LGBTI's asylum claims.

In sum, the recast of the PD has strengthened the protection for LGBTI asylum-seekers. The PD recognizes that the particularity of those claims might lead to the need of special procedures, such as more time and the need for specialized support before lodging an asylum claim. Besides that, the general provisions establishing the rules of individuality, impartiality and objectivity might help to ensure that LGBTI-related asylum claims are not based on stereotypes of gender and sexuality.

However, an important drawback of the PD must be identified. The PD allows MS to use the concept of "safe country of origin", as established in its Article 36. By this procedure, MS can generally assume that applicants from "safe" countries would not have suffered persecution as defined by the Qualification Directive.[113] Applicants from 'safe' countries can have their claims fast-tracked and have fewer opportunities to defend their cases. This procedure has been generally criticized for contravening the principles of judicial protection and violating international standards of refugee protection.[114] In relation to LGBTI applicants, some MS have included countries that criminalize same-sex sexual acts, such as Senegal and Ghana, as 'safe countries', [115] which can lead to incorrect decisions of inadmissibility and consequently a violation of the principle of *non-refoulement.*

Finally, although the recast PD can be seen as a positive step towards the recognition of the particularities of LGBTI asylum-seekers, it does not offer MS a clear guidance on ***how*** they should assess those claims. For this reason, the interpretation of the CJEU has taken a step further in limiting MS discretion.

2.2 The CJEU role on delimiting EU harmonization on LGBTI asylum claims

The Court of Justice of the European Union has, to date, had two opportunities to rule on the relationship between the EU asylum legislation and LGBTI refugees. The two cases were surrounded by expectations on the part of human rights activists, who hoped that the CJEU would take a firm stand on the rights of LGBTI asylum-seekers in the EU. The outcome of the cases, however, received mixed appraisals.[116] Before discussing the cases,

[113] Recast PD, Annex I 'Designation of safe countries of origin for the purposes of Article 37(1)'.
[114] See generally: Matthew Hunt, 'The Safe Country of Origin Concept in European Asylum Law: Past, Present and Future' (2014) 26(4) *International Journal of Refugee Law*: 500-535.
[115] Jansen and Spijkerboer, Fleeing Homophobia (n 2), p. 24.
[116] While ILGA-Europe generally welcomed the judgement, Amnesty International and the International Commission of Jurists considered it a 'setback for refugees'. See: European Council on Refugees and Exiles

it is important to address the competences and the role of the CJEU in asylum matters. This helps better understanding the nature and importance of the rulings.

The general mandate of the CJEU is to interpret EU law so as to guarantee compliance and uniformity by Member States. The Court has no jurisdiction over the 1951 Refugee Convention. The only court which can produce a direct and binding interpretation of the 1951 Refugee Convention is the International Court of Justice (ICJ)[117], although it has never done so.[118] However, since EU law acknowledges the 1951 Refugee Convention as a legally binding framework for EU asylum policies, the CJEU ***indirectly interprets*** the 1951 Refugee Convention.[119]

The two cases described in this section concern **preliminary rulings.** Preliminary rulings can be brought by lower and last instance courts of MS and they can consist of general questions seeking to clarify part of EU legislation. The preliminary ruling "is designed for answering abstract legal questions"[120], not for deciding on the case itself. It remains for the domestic court to apply the understanding of the CJEU in specific cases. Usually MS direct a question to the Court, which can chose to change or maintain the content of the question raised. Generally, when it comes to asylum matters the Court takes a 'gap-filling' and cautious profile in its rulings,[121] limiting itself to answer the question raised, instead of taking a general approach to the question.

The CJEU has a double objective when deciding on matters of asylum. On the one hand, it seeks to ensure uniformity and good receptiveness of its ruling – the CJEU is particularly pressured to reach consensus.[122] It would be incorrect to say, nonetheless, that it constrains itself to replicating the *status quo* in the majority of MS. This is because, on the other hand, the CJEU must pay due regard to fundamental rights and the conformity of EU law with international law, both human rights and refugee standards.[123]

The preliminary references discussed in this section were brought by the Dutch courts in need of clarification on different provisions of the Qualification and Procedures

(ECRE) 'Hope and Criticism following CJEU's ruling on claims from LGBTI asylum seekers' http://ecre.org/component/content/article/70-weekly-bulletin-articles/489-hope-and-criticisms-following-cjeu-ruling-on-claims-from-lgbti-asylum-seekers-.html accessed 09 June 2015.

[117] 1951 Refugee Convention, Article 38.

[118] J. Hathaway & M. Foster, *The Law of Refugee Status*, p. 3.

[119] Drywood (n 72) p. 1119.

[120] Roland Bank, 'The potential and limitations of the Court of Justice of the European Union in shaping International Refugee Law' (2015) 27(2) *International Journal of Refugee Law* p. 24.

[121] ibid p. 25.

[122] Nina-Louisa Arold Lorenz et al, *European human rights culture: a paradox of human rights protection in Europe?* (Leiden: Martinus Nijhoff, 2013) p. 66.

[123] Drywood (n 72) pp. 1115-1118.

Directives. As it has been demonstrated, the wording of the directives led to divergent interpretations from MS, which resulted in *de facto* disharmonized approaches on LGBTI asylum. In the face of lack of enough clarity on EU legislation, the CJEU emerged as a relevant actor in defining the EU approach towards LGBTI-related asylum claims.

The case ***X, Y and Z v. Minister voor Imigratie en Asiel*** was decided by the CJEU in November 2013. It concerned the request for asylum made by gay men from Sierra Leone, Uganda and Senegal – three countries where homosexuality is punished by imprisonment, even with life imprisonment in the case of Uganda. In all three cases, the Dutch court did not question the sexuality of the claimants, nor the credibility of their claims, but was rather unsure if their fear of suffering persecution was well-founded. In other words, the CJEU was asked to clarify when homosexuals can be considered persecuted in their countries of origin.

It is important to point out that while the interpretation of the CJEU helps understanding the MS obligations at a general level, the Court usually goes only as far as necessary to respond to the referred questions. In the case of X, Y and Z, the questions were phrased in a rather specific way, thus it is relevant to mention the questions in full:

> "(1) Do foreign nationals with a homosexual orientation form a particular social group as referred to in Article 10(1)(d) [of the Directive]?
> (2) If the first question is to be answered in the affirmative: which homosexual activities fall within the scope of the Directive and, in the case of acts of persecution in respect of those activities and if the other requirements are met, can that lead to the granting of refugee status? That question encompasses the following subquestions:
> (a) Can foreign nationals with a homosexual orientation be expected to conceal their orientation from everyone in their [respective] country of origin in order to avoid persecution?
> (b) If the previous question is to be answered in the negative, can foreign nationals with a homosexual orientation be expected to exercise restraint, and if so, to what extent, when giving expression to that orientation in their country of origin, in order to avoid persecution? Moreover, can greater restraint be expected of homosexuals than of heterosexuals?
> (c) If, in that regard, a distinction can be made between forms of expression which relate to the core area of the orientation and forms of expression which do not, what should be understood to constitute the core area of the orientation and in what way can it be determined?
> (3) Do the criminalisation of homosexual activities and the threat of imprisonment in relation thereto, as set out in the Offences against the Person Act 1861 of Sierra Leone (Case C-199/12), the Penal Code Act 1950 of Uganda (Case C-200/12) or the Senegalese Penal Code (Case C-201/12) constitute an act of persecution **within the meaning of Article 9(1)(a), read in conjunction with Article 9(2)(c) of the Directive**? If not, under what circumstances would that be the case?".[124]

[124] *X, Y and Z,* para. 37 [emphasis added].

In sum, the Dutch court asked for clarity (1) on the recognition of homosexuals as a particular social group, (2) on the possibility of expecting homosexuals to conceal or restrain their homosexuality in the country of origin in order to avoid persecution, and (3) if criminalization by imprisonment is "sufficient serious by its nature or repetition to constitute a severe violation of basic human rights" (Article 9(1)(a)) in the form of "prosecution or punishment which is disproportionate or discriminatory" (Article 9(2)(c)).

On the **first question**, the CJEU reaffirmed that "a person's sexual orientation is a characteristic so fundamental to his identity that he should not be forced to renounce it"[125] **and** that the existence of criminal laws indicates that homosexuals are perceived as a distinct group by society. The Court, following the QD provisions, understood that both elements (innate/fundamental characteristic **and** social perception) are required for establishing a particular social group. It continues to recognize that "the existence of criminal laws […] which specifically target homosexuals, supports the finding that those persons must be regarded as forming a particular social group".[126] In general, this is an important recognition, since it reaffirms that LGBTIs fall within the protected grounds of the 1951 Refugee Convention. It must be stated, however, that this interpretation was easily drawn from the wording of the QD, which explicitly mentions sexual orientation and gender identity as relevant grounds for identifying a particular social group.[127] Any different ruling would have been too contrary in the light of the understanding of many Member States, as well as the UNHCR and widespread international practice, such as in the United States, Canada and Australia, that LGBTIs form a particular social group.

As far as the **second referred question** is concerned, the CJEU refused to distinguish 'core' in the detriment of 'other' areas of the expression of sexual orientation. Therefore, MS should give equal importance to all aspects surrounding sexual orientation, from the right to privacy at home to the right to show affection in public. In this sense, "an applicant for asylum cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution".[128] Likewise, MS cannot expect the claimant to act with restraint or 'moderation' so as not to be persecuted. In fact, requiring an asylum claimant to hide or limit the very reason for the persecution would make null and void the

[125] ibid para. 46.
[126] ibid para. 49.
[127] QD, Article 10(1)(d)
[128] *X, Y and Z,* para. 70.

goal of refugee protection. It would be similar to, as a matter of comparison, requiring a Muslim to convert to another religion or not to pray every day in order to remain free from persecution.

The **third referred question** was very specific by its reference to particular articles of the QD. The Court was not asked to generally clarify when LGBTIs are persecuted in their countries of origin, in accordance with the QD. Rather, it was asked to answer the question whether criminal provisions with a sanction of imprisonment constitute a serious act of prosecution or punishment which is disproportionate or discriminatory. The Court started its reasoning by affirming that an act must be sufficiently serious to constitute persecution and that "not all violations of fundamental rights suffered by a homosexual asylum seeker will necessarily reach that level of seriousness"[129]. This is a general requirement for *all* asylum-seekers. The Court proceeded with a limited argumentation that the right to respect for private and family life, as "the fundamental right specifically linked to the sexual orientation concerned"[130], is a derogable right and its violation is not serious enough to be considered persecution. Therefore, it affirmed that "the **mere** existence of legislation criminalizing homosexual acts cannot be regarded as […] persecution"[131].

According to the CJEU, only legislation which stipulates a term of imprisonment and ***is actually applied*** infringes Article 8 of the ECHR (Article 7 of the Charter) and is serious enough to constitute persecution within the meaning of Article 9(2)(c) of the QD. It leaves it to national authorities, for instance, to examine the situation in the country of origin to verify whether or not the provisions are applied in practice.

In sum, the Court's decision on *X, Y and Z* dealt with important problems concerning LGBTI asylum-seekers in the EU. It importantly recognized that homosexuals are a particular social group and that they should not be required to conceal or act in restraint regarding their sexuality in their countries of origin. It also affirmed that laws criminalizing same-sex sexual acts with imprisonment, and which are actually applied, constitute persecution. The CJEU did not affirm that *only* LGBTIs coming from countries with those laws must be granted asylum, but rather stated that in other situations the existence of criminalization *alone* is not enough to constitute persecution. As will be

[129] ibid para. 53.
[130] ibid para. 54.
[131] ibid para. 55 [emphasis added]

argued in the next chapter, this is the most criticized interpretation of the CJEU concerning the *X, Y and Z* case.

The case **A, B and C v. Staatsecretaris van Veiligheid en Justitie** was decided by the CJEU in December 2014. While in *X, Y and Z* the Court had to rule mainly on the *substance* of the qualification of homosexuals as refugees, in *A, B and C* the focus was on *procedural* aspects of the assessment of LGBTI asylum claims. Hence, the question shifted from discussing the general recognition of LGBTI as refugees to discuss how MS should decide on those claims. This is particularly important as the reasons for denying refugee status to LGBTIs ranged from the mode of questioning the character of persecution to disbelieving the applicant's history.[132] In other words, the question turns to the ***credibility and assessment of the applicant's sexuality.***

The CJEU had to provide an answer to a question that, if compared to the ones in *X, Y and Z,* was much more open and gave the Court more leeway to extend its interpretative contribution and fill the gaps left by EU legislation. Even if a direct mention to the QD, the CJEU in practice looked at both the QD and PD to answer the question referred by the Dutch court, which was:

> 'What limits do Article 4 of [Directive 2004/83] and [the Charter], in particular Articles 3 and 7 thereof, impose on the method of assessing the credibility of a declared sexual orientation, and are those limits different from the limits which apply to assessment of the credibility of the other grounds of persecution and, if so, in what respect?'

As it is clear from the question, the CJEU was directly asked to rule on the limitations imposed on MS by obligations under human rights law when assessing LGBTI-related asylum claims. It is a clear example of the importance of fundamental rights in the field of asylum. This question gave the Court the opportunity to address some of the problems described in chapter 1 of this thesis, such as the use of abusive questioning by domestic authorities.

The CJEU reinforced the understanding that it is a duty of each MS to cooperate with asylum seekers in order to assess the relevant elements of their application.[133] MS are also supposed to modify their methods to respond to specific features of the

[132] Jenni Millbank, 'From discretion to disbelief: recent trends in refugee determinations process on the basis of sexual orientation in Australia and the United Kingdom' (2009) 13(2-3) *The International Journal of Human Rights* pp. 391-414.
[133] *A, B and C,* para. 56.

application of asylum.[134] The Court considered self-identification as LGBTIs a ***starting point*** of the asylum process, but left room for a credibility assessment afterwards. However, it restricted MS discretion on this matter in a number of ways.

First, the CJEU prohibited national authorities to limit themselves to questions reflecting stereotypical notions about homosexuals. It still considered, however, that "stereotyped notions may be a useful element at the disposal of competent authorities"[135]. This rather unfortunate phrase is not followed by guidance on how and which stereotypical notions could be useful for this purpose. In the general picture, nonetheless, the main message of the Court is that **stereotyped notions cannot be the only framework used for assessing credibility of LGBTI-related asylum claims.**

Secondly, the **use of abusive questioning on sexual practices** and intimate matters was considered a breach of the fundamental rights guaranteed by the EU Charter of Fundamental Rights, particularly the right to respect for private and family life (Article 7). This is of upmost relevance, as the *Fleeing Homophobia Report* had identified a widespread occurrence of intrusive questioning. As a consequence, MS must regard sexuality as a multifaceted aspect of one's identity, which is not limited to sexual acts or preferences.

Thirdly, **MS are precluded from accepting evidence of sexual acts (such as films or photos) or the submission to medical tests** aiming at 'proving' homosexual orientation. As stated by the Court, these actions would not necessarily have probative value and would certainly violate the right to human dignity, enshrined in Article 1 of the Charter. Even though the Court referred to the prohibition of ***allowing*** the submission of such tests or materials, it can be easily inferred that MS are precluded from ***requiring*** them during the asylum process.

Lastly, the CJEU interpreted the Qualification and Procedures Directive to affirm that **MS cannot reject an asylum claim solely because the applicant did not mention his or her homosexuality at the first possible occasion**. The Court, in line with the UNHCR guidelines, understood that LGBTIs are often afraid or face difficulties in mentioning their sexuality at the first possible occasion, or may even be unaware that it would be relevant to do so.[136] The person conducting the asylum interview must be aware

[134] ibid para. 54.
[135] ibid para. 62.
[136] Jansen and Spijkerboer, *Fleeing Homophobia* (n 2) p. 65.

of the "personal or general circumstances surrounding the application, including the applicant's cultural origin or vulnerability"[137].

2.3 The content of EU harmonization on LGBTI asylum claims

The current content of the EU approach towards LGBTI-related asylum claims is defined by both EU legislation and rulings of the CJEU. To serve the purpose of delineating the current EU harmonization in relation to LGBTI-related asylum claims, it is helpful to look once again at **substantive** and **procedural** aspects of harmonization.

Substantive matters refer to elements at the core of the recognition of LGBTI as refugees. Those elements can be identified by looking at how the EU interpreted the 1951 Refugee Convention in relation to LGBTI asylum. It is thus necessary to observe how the EU legislator and the CJEU answer the following questions: Do LGBTI people have an individual right to asylum in the EU? Are they within the scope of any of the five grounds of persecution of the 1951 Refugee Convention? Which situations in the country of origin amount to *persecution*? In which cases is discrimination serious enough to reach the level that international protection is needed? Can homosexuals be expected to conceal or act in restraint in relation to their sexuality or gender identity?

The current EU harmonization on LGBTI asylum answers those questions as follows. LGBTIs have an enforceable right to be granted asylum in the EU when they meet the criteria established by the Qualification Directive. Homosexuals have been recognized as a particular social group because sexual orientation is a fundamental characteristic to one's identity *and* the existence of discriminatory laws demonstrate that they are seen as different by society. The same recognition can be inferred for transgender and transsexual people. Therefore, LGBTIs fall within the scope of the five 'protected grounds' for refugee status, as established by the 1951 Refugee Convention and included in Article 10 QD.

Not all violations of the fundamental rights of LGBTIs are serious enough to constitute persecution. Criminalization in the country of origin *per se* is not enough to justify a well-founded fear of being persecuted. Only laws criminalizing same-sexual acts establishing a term of ***imprisonment which is actually applied*** directly incurs a well-founded fear of persecution. The CJEU set a higher threshold for what constitutes persecution for LGBTIs coming from other countries, but did not clarify this aspect.

[137] PD, Article 13(3)(a).

EU harmonization leaves MS a considerable discretion to decide which other situations in the country of origin are serious enough to amount to persecution. The general provisions of the QD on 'acts of persecution' are not clear enough to provide a strong guarantee for LGBTI asylum-seekers. The content of EU harmonization of the definition of persecution, in the case of LGBTIs, is unclear.

LGBTIs asylum seekers cannot be expected to conceal or act in restraint towards their sexuality in order to avoid persecution. Member States are prohibited from establishing 'core' and 'peripheral' areas of sexual orientation or gender identity. All aspects of the applicant's sexual orientation or gender identity have to be taken into account when considering the fear of suffering persecution

Procedural matters, on the other hand, refer to formal aspects of assessing LGBTI asylum claims. In other words, it relates to the EU approach on both guiding MS in the evaluation process ***and*** limiting their discretion – offering an answer to the general question "how should MS assess LGBTI asylum claims?".

The CJEU, based on the Charter of Fundamental Rights of the EU, limited MS discretion when assessing LGBTI asylum claims. MS are prohibited from carrying abusive questioning on sexual practices of the applicant, from accepting any sort of tests or evidence such as films or pictures to 'prove' their sexual orientation, and from denying asylum solely on the basis of a 'late disclosure' of the applicant's sexuality. The assessment of LGBTI asylum claims cannot be made *solely* on stereotypical notions, but "questions based on stereotyped notions may be a useful element"[138].

Apart from those certainly important limitations and from the general provisions of the PD, EU harmonization does not go as far as ***guiding*** MS on the way they should assess LGBTI asylum claims. Therefore, the EU approach excludes the most intolerable forms of assessing LGBTI asylum claims, but still leaves MS with discretion to define their own methods of assessing LGBTI asylum-seekers.

In light of the above, the CJEU had an important role on complementing EU legislation, forming EU harmonization on LGBTI asylum claims. General provisions on both substantive and procedural aspects are certainly helpful for guiding MS, but they are not

[138] *A, B and C*, para. 62.

enough to ensure that MS apply common standards and procedures for granting refugee to those LGBTI in need of protection.

Chapter 3: International Refugee Law and Human Rights standards on LGBTI asylum

In order to assess the conformity of EU harmonization on LGBTI asylum with international standards, two different – but intertwined – bodies of law have to be discussed: International Refugee Law and International Human Rights Law. As far as International Refugee Law is concerned, this chapter starts by discussing the content of the 1951 Refugee Convention and its 1967 Protocol in relation to LGBTI asylum. It continues to discuss the mandate of the UNHCR and the binding character of its interpretative guidelines. *Guideline nº 9 on Sexual Orientation and Gender Identity*[139] will receive thorough attention due to its direct relation to the topic.

As far as Human Rights Standards are concerned, the chapter presents an overview of key case-law of the European Court of Human Rights (ECtHR) relating to LGBTI asylum claims and, more generally, to the rights of LGBTI people. While the focus is on human rights standards at the European level, references are also made to decisions of UN treaty-bodies, which also relate to LGBTI asylum claims. This is instrumental insofar as it helps clarifying the severity of specific acts which violate the rights of LGBTIs, such as the existence of laws criminalizing same-sex sexual acts. In other words, "international human rights law can, thus, usefully serve to fill the gaps in the refugee protection architecture"[140].

Therefore, this chapter provides an answer to this thesis' third sub-question: *What are the International Refugee Law and Human Rights standards on LGBTI asylum claims?*

3.1. International Refugee Law and LGBTI Asylum

International Refugee Law is formed by treaty law and customary international law. The center of this field of law is found in the 1951 Refugee Convention and its 1967 Protocol. The principle of *non-refoulement* has been laid down in this Convention, but is also recognized as customary international law.[141] In general, *non-refoulement* refers to a state's obligation not to return a refugee to the country of origin where the refugee would face threats to life or freedom.[142]

[139] UNHCR, *Guidelines on Sexual Orientation and Gender Identity* (n 1) para. 40
[140] Alice Edwards, 'International Refugee Law', in Daniel Moeckli et al. *International Human Rights Law* (2nd Edition, Oxford University Press 2014) p. 518.
[141] ibid p. 514.
[142] 1951 Refugee Convention and its 1967 Protocol, art. 33.

The 1951 Refugee Convention provides the definition of a refugee and sets standards for the treatment and rights they are entitled to. Refugee protection was established to give individuals a surrogate protection when they are unable or unwilling to receive protection of their country of origin. Refugee Law has a strong humanitarian character and can also be regarded as a palliative branch of human rights law[143].

As it was observed in the previous chapter, the binding definition of a refugee by the 1951 Refugee Convention is at the ***core*** of a state's obligations under international law. Refugees are defined as those individuals who are outside their country of origin and

> "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion […] is unable or unwilling to avail himself of the protection of that country"

This definition has been transposed almost *verbatim* to the Qualification Directive, as the previous chapter demonstrated. Here as well, the meaning of terms such as 'persecution' and 'fear' are far from self-evident[144]. The interpretation of those terms are key to the granting or refusing refugee status. However, even though Article 38 of the Refugee Convention affirms that claims can be subjected to the International Court of Justice, in practice there is no authoritative entity emitting binding interpretations on the Convention.[145]

The United Nations High Commissioner for Refugees (UNHCR) has a broad mandate to supervise the applicability of the 1951 Refugee Convention, to assist governments in their duties under international refugee law, and to provide international protection itself under the mandate of the United Nations.[146] States are obliged to cooperate with UNHCR.[147]

Under the scope of LGBTI asylum, UNHCR has been active in pushing states to interpret the 1951 Refugee Convention in order to assure protection for those fleeing their countries of origin due to their sexual orientation and/or gender identity. In 2012, it published its *Guideline nº 9 on Sexual Orientation and Gender Identity,* with the aim of emitting legal interpretative guidance on the assessment of LGBTI-related asylum-claims. UNHCR also commissions the production of Country of Origin Information

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[143] James Hathaway, *The Rights of Refugees under International law* (Cambridge University Press, 2005), p. 5.
[144] Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd Edition, Oxford University Press 2007), p. 7.
[145] Hathaway and Foster (n 74) p. 3.
[146] UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees,* 14 December 1950, A/RES/428(V).
[147] 1951 Refugee Convention and its 1967 Protocol, art. 35.

(COI) specifically dedicated to supporting LGBTI asylum claims[148] and includes matters related to sexual orientation and gender identity in its general country profiles.

UNHCR guidelines and other documents **are not legally binding**.[149] Their legal value remains in the domain of *soft law*, and ultimately depends on the weight they are given by national courts and decision-makers. At the EU level, the Qualification Directive affirms that the UNHCR can provide 'valuable guidance' on the determination of refugee status,[150] and the CJEU has recognized the relevance of the guidelines of the UNHCR[151]. The UNHCR usually presents its position on asylum cases before the CJEU, be it by giving writing observations or as an oral intervener during the court proceedings. However, its interpretation and interventions are non-binding.

In order to identify the International Refugee Law standards on LGBTI asylum, two sources can be identified: the guidelines of the UNHCR (particularly *Guideline nº 9 on Sexual Orientation and Gender Identity*) **and** the oral and written interventions of the UNHCR before the CJEU. The bulk of the standard is found on the aforementioned guideline, while the oral and written interventions by the UNHCR serve to reiterate or to develop the guideline.

It must be stated that even though there is no specific provision on sexual orientation or gender identity, the 1951 Refugee Convention remains an important source of international standards on LGBTI asylum. The issue is the so-called 'interpretative challenge', in other words, how do states interpret and give meaning to the Convention.[152] States must interpret the Refugee Convention in good faith, promoting its effectiveness and with due attention to its goal.[153] For that, they must ensure that the Convention is functional and relevant in the ***present*** socio and legal context.[154] The guidelines of the UNHCR develop and replicate the conclusions of this interpretative exercise.

The UNHCR developed *Guideline nº 9 on Sexual Orientation and Gender Identity* after concluding that the refugee definition of LGBTIs remains inconsistent[155], leading to

[148] See, for instance, Asylum Research Consultancy (ARC), 'Country-of-origin information to support the adjudication of asylum claims from Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) asylum-seekers : Belize' (2012) http://www.refworld.org/docid/50af2ee72.html last accessed 08 June 2015.
[149] Boeles (n 55) pp. 294-295.
[150] QD, Recital 22.
[151] See: Case C-528/11, *Halaf*, [2013] para. 44.
[152] Hathaway and Foster (n 74) p. 3.
[153] See: *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155 http://www.refworld.org/docid/3ae6b3a10.html last accessed 10 June 2015.
[154] Hathaway and Foster (n 74) p. 6.
[155] UNHCR, *Guidelines on Sexual Orientation and Gender Identity* (n 1) para. 1.

the need to ensure "a proper and harmonized interpretation of the refugee definition"[156] on LGBTI asylum. This guideline gives considerable weight to **human rights law**, as an instrumental framework for understanding the need of international protection of LGBTIs. As it succinctly puts:

> "It is widely documented that LGBTI individuals are the targets of killings, sexual and gender-based violence, physical attacks, torture, arbitrary detention, accusations of immoral or deviant behaviour, denial of the rights to assembly, expression and information, and discrimination in employment, health and education in all regions around the world. Many countries maintain severe criminal laws for consensual same-sex relations, a number of which stipulate imprisonment, corporal punishment and/or the death penalty. In these and other countries, the authorities may not be willing or able to protect individuals from abuse and persecution by non-State actors, resulting in impunity for perpetrators and implicit, if not explicit, tolerance of such abuse and persecution"[157]

The guideline states that International Human Rights Law increasingly recognizes that sexual orientation and gender identity cannot be a ground for discrimination, and it is a state's obligation under human rights law to refrain from violating LGBTI's rights and to tackle homo and transphobia.[158] With this human rights framework in mind, the UNHCR starts to analyze the constituting terms of the refugee definition under the Convention and its relation with LGBTI asylum claims.

The guideline states that "persecution" can refer to serious human rights violations (such as a threat to life) or to the accumulation of less severe harm, which will depend ***on the circumstances of the case*.** The concept of "fear of persecution" must be assessed through the individual and general situation on the country of origin, and past persecution is not required for refugee status. Rather, a well-founded fear indicates a future-oriented approach, that is, the assessment of the risk the applicant might face if returned to the country origin.[159]

The guidelines, while with no intention to provide an exhaustive list of acts of persecution of LGBTIs, do cover a few acts which should give rise to refugee protection, such as rape, forced institutionalization, forced sex-reassignment surgery, forced hormonal therapy, forced submission to medical therapy or scientific experiment, detention on medical or psychiatric institutions solely on the base of sexual orientation or gender identity.[160] Even though family disapproval alone does not constitute persecution,

[156] ibid para. 4.
[157] ibid para. 2.
[158] ibid paras. 5-6.
[159] ibid para. 18.
[160] ibid paras. 20-25.

the threats of serious violence on their behalf can justify a fear of persecution. In the same way, severe cases of discrimination on the work sphere or access to other economic and social rights might reach the threshold of persecution. The UNHCR clearly highlights the importance of an ***individual*** assessment of asylum claims, instead of creating a list of acts of persecution.

On the matter of **laws criminalizing same-sex relations**, the Guideline states that when the punishment is death penalty, corporal punishment or prison terms, their characterization as persecution is 'particularly evident'.[161] However, it affirms that they do not need to be regularly applied in the country of origin, because "even if irregularly, rarely or ever enforced, […] [they] could lead to an intolerable predicament for an LGB person rising to the level of persecution"[162]. Most importantly

> "Depending on the country context, the criminalization of same-sex relations can create or contribute to an oppressive atmosphere of intolerance and generate a threat of prosecution for having such relations. The existence of such laws can be used for blackmail and extortion purposes by the authorities or non-State actors. They can promote political rhetoric that can expose LGB individuals to risks of persecutory harm. They can also hinder LGB persons from seeking and obtaining State protection"[163]

Therefore, the fact that a discriminatory law is not enforced cannot lead to the conclusion that LGBTIs do not possess a well-founded fear of being persecuted. First, the identification of persecutory acts on the basis of the *frequency*, and not the *nature*, of those acts do not have a legal foundation.[164] Second, partial non-enforcement of persecutory law is not enough to free LGBTIs from a well-founded fear of eventually being persecuted. Third, there is a constant risk that persecutory laws which are not 'usually' applied can start being systematically enforced. Finally, "the existence of the law may nonetheless be relevant to the existence of a well-founded fear of a different persecutory harm"[165], such as blackmailing or violence from private actors followed by negligence from the state to counteract and/or prevent those acts.

Put simply, the mere existence of a law criminalizing same-sex sexual acts ***can*** justify a fear of persecution depending on the specific circumstances of the case. Thus, the assessment of LGBTI asylum claims must be ***individual and fact-based,*** with regard to the personal and general circumstances of the applicant.

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[161] ibid para. 26.
[162] ibid para. 27.
[163] ibid paras. 25-28.
[164] Hathaway and Foster (n 74) pp. 128-129.
[165] ibid p. 130.

The UNHCR Guideline also interprets the 1951 Refugee Convention in order to exclude the possibility of refusing asylum claims due to the possibility of concealment or restriction of the applicant's sexual orientation or gender identity in order to avoid persecution. Even concealing their sexual orientation or gender identity, LGBTIs can still be under serious risk of persecution.[166]

The 1951 Refugee Convention accommodates both state and non-state actors as ***actors of persecution***. According to this guideline, the state is an actor of persecution when it enables discriminatory laws criminalizing same-sex relations or when individuals acting under the authority of the state are responsible for the act of persecution. Non-state actors can be family members, neighbors, homo and transphobic groups, and many others engaging in, *inter alia,* harassment, rape, bashings and torture. In this case, it is necessary that the state is unwilling or unable to provide protection. This protection must be ***effective and available*.** Usually when the police neglects cases of violence against LGBTIs or refuses to investigate and prosecute the perpetrators, it can be affirmed that the state does not offer protection for LGBTIs. [167]

On the grounds for persecution, the Guideline states that LGBTI can fit more than one of the Convention grounds (religion, nationality, race, membership of a particular social group, political opinion). If, for instance, a lesbian woman faces serious harm or punishment due to the inconformity of her sexual orientation with the religion she practices, she also falls under the persecutory ground of 'religion'.[168] When activists on the rights of LGBTI people are persecuted due to their pro-right statement or freedom of expression, they can fall under the 'political opinion' category.[169] That being said, a person does not need to actually be LGBTI in order to face persecution for reasons of sexual orientation or gender identity – *perceived* sexual orientation based on stereotypes, for an example, can mean that an individual is subjected to persecution.

The category 'particular social group' also encompasses LGBTI people. According to the UNHCR, this term "should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies **and evolving international human rights norms**"[170]. The UNHCR adopts two approaches to identify a particular social group: the 'protected characteristic' and 'social perception' approach.

[166] UNHCR, *Guidelines on Sexual Orientation and Gender Identity* (n 1) paras. 32-33.
[167] ibid paras. 34-37.
[168] ibid para. 42.
[169] ibid para. 50.
[170] UNHCR, *Guidelines on Membership of a Particular Social Group* (n 91) para. 3 [emphasis added].

The ‘protected characteristic’ identifies those groups formed by individuals who have an innate characteristic or a feature that is fundamental to their identity. In its turn, the ‘social perception’ approach examines if the group is recognized as different by the surrounding society. The two approaches should be alternative, not cumulative, according to UNHCR.[171] LGBTI applicants shall constitute a particular social group using either of the approaches, not requiring that both criteria are used in a cumulative manner.[172]

The Guideline also establishes standards on ***procedural*** aspects of the assessment of LGBTI refugee claims. This is important since the 1951 Refugee Convention alone “says nothing about procedures for determining refugee status, and leaves to States the choice of means as to implementation at the national level”[173]. However, under its mandate of supervising the effective implementation of the 1951 Refugee Convention, UNHCR has established general and specific procedural requirements.[174]

In the section of procedural issues, the Guideline highlights the particularity of LGBTIs during the procedural aspect of asylum claims. LGBTI can be deeply affected by trauma, shame or homophobia, and might be reluctant to reveal their sexual orientation or gender identity at first, or might struggle to do it at any stage. For this reason, LGBTI claims can be especially affected by accelerated asylum procedures or the application of the ‘safe country of origin’ concept.[175] LGBTI asylum-seekers must therefore be regarded as ‘unsuited’ for such procedures.

The Guideline establishes as an international refugee law standard that decision-makers cannot base the assessment of LGBTI asylum claims on **stereotypes**. All agents involved in the asylum process (e.g. interpreters and interviewers) must receive **specialized training** on the particularities of LGBTI refugee claims. The training must pay due regard to terminology and the complexity of sexual orientation and gender identity.[176]

On the issue of **credibility,** the UNHCR reinforces that the assessment of an asylum claims must be individualized and done in a ‘sensitive’ way. The focus of the credibility should **not be on sexual practices** but on **“feelings and experiences of difference, stigma, and shame”[177]** surrounding the applicant’s sexual orientation or

[171] UNHCR, *Guidelines on Sexual Orientation and Gender Identity* (n 1) para. 45.
[172] ibid paras. 44-49.
[173] Goodwin-Gill and McAdam (n 144) pp. 53-54.
[174] ibid pp. 528-532.
[175] UNHCR, *Guidelines on Sexual Orientation and Gender Identity* (n 1) para. 59.
[176] ibid para. 60.
[177] ibid para. 62 [emphasis added].

gender identity. Questioning must be non-judgmental and non-confrontational. The Guideline identifies a few topics that may be useful for the correct assessment of LGBTI refugees, such as inquiring about childhood, non-conformity with society or family, community relationship or religion.[178] The relevance of each of those areas will depend on each case. As far as romantic and sexual inquiries are concern, the Guideline limits itself to affirming that "detailed questions about the applicant's sex life should be avoided"[179].

The Guideline takes **self-identification as LGBTI** as an indication of sexual orientation or gender identity. Many a time, an asylum-seeker will not identify him/herself as 'gay' or 'transgender', and domestic authorities are neither capable nor required to define one's sexual orientation. The primary source of credibility should be the applicant's testimony. In cases where country of origin information (COI) is inexistent or contradictory, the benefit of the doubt must be on the applicant's side.[180]

The international refugee standard prohibits states from using medical tests to assess the applicant's sexual orientation. On the submission of intimate photos or videos as evidence of sexual orientation, the Guideline only states that "applicants should never be expected or asked to bring"[181] such material. There is no explicit prohibition of accepting this sort of material when it is submitted at the applicant's will.

The interventions of the UNHCR before the CJEU in *X, Y and Z* and *A, B, and C* are also a source of international refugee law standards. They complement and reinforce the standards of the Guidelines by looking directly at EU legislation on asylum claims. While in *X, Y and Z* the UNHCR was joined as a party by the Dutch Council of State, in *A, B and C* its influence was restricted to written interventions out of court. In both cases, the UNHCR highlighted that EU law recognizes the important role of the agency on guiding states for a correct interpretation of the 1951 Refugee Convention.[182]

It would be a repetitive exercise to describe the core of the opinion of the UNHCR in *X, Y and Z*, which is fully in line with *Guideline nº 9.* However, it is valid to stay that UNHCR strived hard to demonstrate that its standards have been recognized by different

[178] ibid para. 63.
[179] ibid para. 63 (vii).
[180] ibid paras. 64-66.
[181] ibid para. 64.
[182] UN High Commissioner for Refugees (UNHCR) 'UNHCR intervention before the Court of Justice of the European Union in the cases of Minister voor Immigratie en Asiel v. X, Y and Z' (2012) http://www.refworld.org/docid/5065c0bd2.html last accessed 09 June 2015.

domestic courts, therefore counting on jurisprudence and doctrine to give weight to its standards. At the end of its analysis, the UNHCR proposes answers to the questions referred to the CJEU. Generally, it gives more open and far-reaching answers, instead of constricting itself to the wording of the Qualification Directive.[183]

On the relation between LGBTI and the five grounds of persecution, the UNCHR defends that they ought to be recognized as a particular social group, but they can fall also under other grounds of persecution, such as religion. It reiterates that concealment or restraint cannot be taken into account when assessing LGBTI asylum claims. The identification of persecution has to take into account the general situation of LGBTI rights in the country of origin, and should **not be limited to a legal analysis.** Therefore, the existence of laws that are not often or ever enforced is not enough to conclude that LGBTIs do not suffer persecution in the country of origin.[184]

In its written observation in the case *A, B, and C*, UNHCR sought to identify the limits imposed by the Charter of Fundamental Rights of the EU during the assessment of LGBTI asylum claims. It observed that intrusive questioning on the applicant's intimate sex practices and experiences **breaches several fundamental rights**, such as the right to private life (Art. 7 of the Charter), the right not to be subjected to degrading treatment (Art. 4), the right to human dignity (Art. 1) and the right to respect for mental integrity (Art. 3(1)). On this note, it must be recalled that the CJEU only mentioned a breach of Art. 7.[185] Therefore, in comparison, the UNHCR had a stronger point of view on the severity of intrusive questioning, because it invokes more rights, including non-derogable rights. On the use of medical and other examinations, such as the phallometry test, the UNHCR mentioned the violation of those same rights. The CJEU only mentioned a breach of the right to human dignity.

The international agency also identified methods which, depending on the circumstances, can be incompatible with the Charter. First, assuming lack of credibility when the applicant does not disclose his/her sexual orientation at the first opportunity. This is at variance with Article 41 of the Charter, which grants individuals a right to a fair

[183] ibid.
[184] ibid Chapter 6.
[185] UN High Commissioner for Refugees (UNHCR) 'Written Observations of the United Nations High Commissioner for Refugees in the cases of A and Others (C-148/13, 149/13 and 150/13)' (2013) http://www.refworld.org/docid/5215e58b4.html last accessed 09 June 2015.

and impartial assessment of their affairs[186]. LGBTI applicants must have the opportunity to explain elements which appear to deviate from their credibility.[187]

The UNHCR is of the opinion that the limits imposed by the Charter applies to all applicants, not only LGBTI ones. However, the methods of assessing credibility "may need to be tailored to the particular ground of persecution"[188].

In sum, UNHCR has proven an important source for the development of International Refugee Law standards on LGBTI asylum, covering both substantive and procedural matters. *Guideline nº 9 on Sexual Orientation and Gender Identity* builds on a contemporary interpretation of the 1951 Refugee Convention in order to keep its purposes alive for many LGBTIs in need of international protection. Even though the Guideline is **not legally binding**, states are bound to cooperate with the UNHCR during the realization of their obligations under the 1951 Refugee Convention,[189] and therefore should give great value to the interpretative competence of the UNHCR. Most certainly, LGBTI asylum-seekers would benefit from an increasing importance of the UNHCR during the process of refugee determination, as well as during law and policy-making on asylum.

3.2 International Human Rights Law and LGBTI Asylum

International Human Rights Law also establishes standards for the assessment of LGBTI asylum. On the one hand, it identifies violations of the fundamental rights of LGBTI people and sets states' obligations in this regard. On the other hand, human rights courts have examined specific cases on LGBTI asylum. Due to its limited scope, this thesis is focused on the analysis of the case-law of the European Court of Human Rights (ECtHR). The legally binding character of the ECtHR's rulings make them an important value as they set authoritative standards in Europe.

The ECtHR receives individual complaints in relation to the European Convention on Human Rights ("ECHR") and provides binding decisions on possible violations of

[186] Article 41(1) of the Charter reads: "Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union.". European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02.
[187] UNHCR, *Written Observations of the United Nations High Commissioner for Refugees in the cases of A and Others (C-148/13, 149/13 and 150/13)*, 21 August 2013, C-148/13, C-149/13 & C-150/13, para. 3.22.
[188] ibid para. 4.1.
[189] UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V).

fundamental rights.[190] All individuals under the jurisdiction of a Contracting State can lodge a complaint before the ECtHR, including asylum-seekers.

The ECtHR has developed an extensive, though not entirely consistent, jurisprudence on sexual orientation and gender identity in relation to the ECHR.[191] Those cases touch matters ranging from freedom of expression to marriage. For this thesis, a few cases were selected according to their relevance for LGBTI asylum claims.

The first successful complaint relating to homosexuals before the ECtHR was *Dudgeon v. UK* in 1981.[192] The case concerned the existence of a law criminalizing homosexual acts between consenting adults in Northern Ireland. In this case, the ECtHR found that the discriminatory law violated ***the right to private life*** (Art. 8) of the applicant, which included his sexual life. Even if the law was not systematically enforced, "the very existence of this legislation continuously and directly affects his private life"[193]. Also ruling on 'sodomy' law, the ECtHR held in *Norris v. Ireland* that

> "A law which remains on the statute book, **even though it is not enforced in a particular class of cases for a considerable time**, may be applied again in such cases at any time, if for example there is a change of policy. The applicant can therefore be said to "run the risk of being directly affected" by the legislation in question".[194]

Therefore, the ECtHR not only recognized that laws criminalizing homosexuality are contrary to the right to private life (Art. 8), but also that they subject homosexuals to a risk of persecution even when only occasionally or never applied. On the international level, the Human Rights Committee in *Toonen v. Australia* reached the same conclusions.[195] Similarly, the UN Committee Against Torture concluded that the return by Sweden of a homosexual man to Bangladesh would expose him to risk of torture due to his sexual orientation.[196]

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[190] Steven Greer, 'Europe', in Daniel Moeckli et al. International Human Rights Law (2nd Edition, Oxford University Press 2014) p. 422.
[191] For a list of cases before the ECtHR in respect of homosexuality, see: Paul Johnson, 'Chronological list of decisions and judgements of the European Court of Human Rights and former European Commission of Human Rights in respect of homosexuality', revised and expanded list from the book: Paul Johnson, *Homosexuality and the European Court of Human Rights* (Routledge, 2012).
[192] *Dudgeon v. United Kingdom*, Appl. No. 7525/76, Council of Europe: European Court of Human Rights, 22 October 1981
[193] ibid para. 41.
[194] *Norris v. Ireland*, Application no. 10581/83, Council of Europe: European Court of Human Rights, 26 October 1988, para. 33 [emphasis added].
[195] Human Rights Committee, *Toonen v. Australia*, Communication No. 488/1992: Australia. 04/04/1994, CCPR/C/50/D/488/1992.
[196] United Nations Committee Against Torture, *Mondal v. Sweden*, Communication No. 338/2008, 07/07/2008, CAT/C/46/D/338/2008.

In parallel and distinctively from the law of refugee protection, the ECtHR has created a strong set of case-law on the *principle of non-refoulement*. Even though this is not a right which is explicitly protected under the ECHR, the ECtHR derived its meaning from Article 3 on the prohibition of torture. Therefore, states are prohibited from removing, expelling or extraditing someone when there is enough ground to believe he or she will risk being subjected to torture, inhuman or degrading treatment or punishment.[197] At the EU level, in its turn, the Charter of Fundamental Rights of the European Union explicitly recognizes a right to *non-refoulement*.[198]

Even though the right to *non-refoulement* is distinct from the right to refugee protection in many ways[199], the analysis of the case-law on Art 3. (read in line with the principle of *non-refoulement*) is still relevant since it helps clarifying concepts such as 'persecution' and 'risk of serious harm'. In particular, the ECtHR has ruled on cases concerning homosexuals who have claimed that a return to their country of origin would result in the returning state's violation of Art. 3 ECHR.

The first case related to a risk of removal of a homosexual asylum-seeker was *Sobhani v. Sweden* in 1998. After having his refugee status rejected by the Swedish authorities, Sobhani claimed that he would be arrested and executed upon return to Iran due to his sexual orientation. Therefore, if removed, Sweden would breach Art. 3 ECHR by subjecting him to inhuman and degrading punishment. In this case, the former European Commission on Human Rights indicated that Sweden should refrain from continuing with the removal order until the case was decided. Pending the decision of the Commission, Sweden decided to grant the applicant a residence permit. After the request of the applicant, the case was withdrawn.[200] Similarly, many cases brought before the ECtHR were withdrawn once the country decided to grant the applicant international protection pending the procedure.[201]

The most recent of those cases, *M.E. vs. Sweden*, deserves attention since it was only struck out before a decision of the Grand Chamber. Therefore, it permits an analysis

[197] For the landmark judgement on *non-refoulement* in the ECtHR, see: *Soering v. United Kingdom*, Application no. 14038/88, Council of Europe: European Court of Human Rights, 07 July 1989.
[198] Charter of Fundamental Rights of the European Union, art. 19 para. 2.
[199] See: Chapter 2.
[200] *Sobhani v. Sweden*, Application no. 32999/96, Council of Europe: European Commission of Human Rights, 10 July 1998, para. 33.
[201] See: *Sobhani v. Sweden*, Appl. No. 32999/96 [10 July 1998], *A.S.B. v. the Netherlands*, Appl. No. 4854/12, ECtHR [10 July 2012] and *M.E. v. Sweden*, Appl. No. 71398/12, ECtHR [26 June 2014]

of the decision in first instance, as well as the dissenting opinions of the judges, which are illustrative of the existence of different interpretations.[202]

The case was brought before the ECtHR by *M.E.*, a Libyan homosexual man who had his application for asylum rejected in Sweden in 2010 and who had married a permanent resident of that state the following year. After the denial of his application, the Swedish authorities concluded that he had to apply for family reunification for which he needed to return to Libya. The applicant, however, argued that he risked suffering persecution and ill-treatment due to his sexual orientation if forced to return to Libya, where homosexual acts are punished with imprisonment. He submitted a complaint under Art. 3 ***and*** Art. 8 ECHR (right to respect for private and family life). The ECtHR **rejected both arguments** and followed a highly problematic reasoning.[203]

The ECtHR concluded that the applicant's return to Libya would be of a temporary nature, 'only' during the time for the application for family reunification, and therefore "if the applicant would have to be discreet about his private life during this time, it would not require him to conceal or suppress an important part of his identity ***permanently***"[204]. In other words, the applicant was requested to conceal his sexual orientation temporally in order to avoid persecution, and the ECtHR did not consider this a violation of Art. 3 ECHR.

The dissenting opinion of judge Power-Forde perfectly summarizes the problematic reasoning of the majority of the judges. She criticizes the use of a test of 'duration' that finds no comparative in the jurisprudence of the ECtHR – in other words, it is impossible to define a maximum or minimum period of time during which someone can conceal an essential aspect of his or her identity, such as sexual orientation. She also condemns the implicit assumption of the majority that sexual orientation is limited to sexual acts in the private sphere, thus assuming it is possible for the applicant to be 'discreet' and avoid persecution or ill-treatment. The strong position of judge Power-Forde can be summarized by its concluding lines:

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[202] Paul Johnson 'M.E. v Sweden - European Court of Human Rights endorses expulsion of a gay man to a country that criminalises homosexuality' 2014 *ECHR Sexual Orientation Blog* http://echrso.blogspot.it/2014/06/me-v-sweden-european-court-of-human.html last accessed 07 June 2015

[203] For a criticism on the ECtHR first position on this case, see: Paul Johnson 'M.E. v Sweden - European Court of Human Rights endorses expulsion of a gay man to a country that criminalises homosexuality' in *ECHR Sexual Orientation Blog* http://echrso.blogspot.it/2014/06/me-v-sweden-european-court-of-human.html last accessed 10 June 2015.

[204] *M.E. v. Sweden*, Application no. 71398/12, Council of Europe: European Court of Human Rights, 26 June 2014, para. 88.

> "Sexual orientation is fundamental to an individual's identity and conscience and no one should be forced to renounce it—even for a while. Such a requirement of forced reserve and restraint in order to conceal who one is, is corrosive of personal integrity and human dignity".[205]

Afterwards, the case was brought before the Grand Chamber, but, as said, was struck off the role after Sweden eventually granted the applicant a residence permit for family reunification. Although the applicant wished the proceedings to be continued before the Grand Chamber, due to its relevance for similar cases ***and*** the belief that he was still a victim of the previous understanding of the Swedish authorities, the Grand Chamber decided to strike it off the role.[206]

In general, the *M. E.* case is a setback for LGBTI individuals risking *refoulement* in Europe. It deviates from the previous understanding in *Dudgeon* and *Norris* and neglects the real risk of suffering ill-treatment and discriminatory punishment of LGBTI individuals who are forced to return to their countries of origin. The Grand Chamber lost the opportunity to continue with the case and correct the pathway of the first decision.

As expected, new cases concerning the removal of homosexuals to countries which criminalize same-sex sexual acts popped out, and are still pending. In *A. T. v Sweden*, an Iranian homosexual whose asylum claim had been refused by the Swedish authorities claimed that his return to Iran would subject him to torture, ill-treatment and even the death penalty. Several NGOs have published a written submission as an intervener in the case, hoping that *A. T.* will be a landmark for LGBTI asylum seekers.[207]

The main contribution of the ECtHR in *A. T.* could be recognizing that the existence of laws criminalizing homosexuality (such as the one in Iran) prove or at least indicate a high chance of a real risk of suffering degrading or inhuman treatment or punishment.[208] The ECtHR has already recognized that such laws violate Art. 8 ECHR (right to private life) even if unenforced.[209] However, a recognition of a violation to Art. 3 ECHR would be relevant since this is a non-derogable right, leaving states no margin of appreciation.

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[205] ibid, Dissenting Opinion of Judge Power-Forde.

[206] For a criticism on the position of the Grand Chamber on this case, see: Silvia Falcetta 'M.E. v Sweden: the Grand Chamber judgment' *ECHR Sexual Orientation Blog* http://echrso.blogspot.nl/2015/04/me-v-sweden-guest-post-by-silvia.html accessed 08 June 2015.

[207] The Aire Centre (Advice on Individual Rights in Europe), Amnesty International, ILGA-Europe, International Commission of Jurists and the UK Lesbian and Gay Immigration Group (UKLGIG), 'Written submission as interveners before the case A. T. v. Sweden (Application no 78701/14), 19 May 2015' (2015) http://goo.gl/ZKEsvi accessed 14 June 2015.

[208] On general notes concerning *A. T. v. Sweden* see: Paul Johnson, 'Gay asylum complaint in A.T. v Sweden - AIRE Centre and others' submission to the European Court of Human Rights' *ECHR Sexual Orientation Blog* http://echrso.blogspot.nl/2015/05/gay-asylum-complaint-in-at-v-sweden.html accessed 08 June 2015.

[209] *Dudgeon v. UK* [1981] (n 192) and *Norris v. Ireland* [1988] (n 194).

If that is the case, the contracting states would be prohibited from returning LGBTIs to one of the 76 countries which criminalize same-sex sexual acts. For some, this understanding is highly unlikely due to the impact it would have on the contracting states. To others, this understanding reflects the general recognition in international human rights law that laws criminalizing homosexual acts must be repealed.[210]

Finally, so far, human rights standards on LGBTI asylum are inconsistent and their relevance as a yardstick for the EU's approach to LGBTI asylum claims depends on the selectivity of the ECtHR case law. If one looks at the decision in *M. E. v. Sweden*, clearly human rights standards are lower than those offered by the CJEU in *X, Y and Z*. Under this lens, the ECtHR offers no better standard for LGBTI refugees. However, if the focus is on *Dudgeon v. UK* or *Norris v. Ireland*, the decision that even unenforced laws criminalizing homosexuality can give rise to human rights violation can contribute to a criticism of the CJEU's opinion on *X, Y and Z* that mere criminalization is not enough to constitute persecution.[211] The upcoming decision of the ECtHR on *A. T. v. Sweden* can be a landmark case for a step in the direction of protecting LGBTIs from *refoulement*.

3.3 Overview: International standards on LGBTI Asylum

This chapter has identified two main sources of international standards on LGBTI asylum. The first one is **international refugee law**, formed by the 1951 Refugee Convention and its 1967 Protocol and, most importantly, by the UNHCR interpretative and supervisory competence. *Guideline nº 9 on Sexual Orientation and Gender Identity* is the most relevant source for international refugee standards on LGBTI asylum. It provides an interpretation on substantive and procedural aspects of the 1951 Refugee Convention in order to accommodate the claims of LGBTI refugees, thus maintaining the Convention relevant at the present time.

A second source is **human rights law**, which in this thesis has been limited to the authoritative decisions of the European Court of Human Rights. Although distinct from refugee law, human rights can offer guidance on the severity of violations of the fundamental rights of LGBTIs. For instance, the ECtHR recognized that even unenforced laws criminalizing homosexual acts violate Art. 8 ECHR on the right to private life. The

[210] Johnson (n 207).
[211] *X, Y and Z*, para. 55.

ECtHR also developed its own case-law on *non-refoulement* through Art. 3 ECHR on inhuman or degrading treatment or punishment. So far the ECtHR has been unable to set a high standard of protection for LGBTI risking return to countries which criminalize homosexuality. The pending case of *A. T. v. Sweden* can help the ECtHR define its approach to this topic. **Human rights law** does not offer a consistent standard for LGBTI asylum-seekers, and is, as of now, less protective than **international refugee law.**

After identifying the EU approach on LGBTI asylum (chapter 2) and the International Refugee Law and Human Rights standards on LGBTI asylum (chapter 3), this thesis can proceed to the next chapter which answers the main research question: ***"Is the content of EU harmonization on LGBTI asylum claims in conformity with International Refugee Law and Human Rights standards?****"*.

Chapter 4: Assessing the conformity of EU Harmonization on LGBTI Asylum with International Refugee Law and Human Rights Standards.

The EU harmonization on LGBTI does not occur in a closed box protected from external regulation.[212] When assessing asylum claims based on sexual orientation and/or gender identity, Member States continue to be bound by international law, particularly international refugee law and human rights law. This is repeatedly recognized by EU primary and secondary law. The TFEU establishes that EU policy on asylum "must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties"[213]. Similarly, the Qualification Directive[214] and Procedures Directive[215] recognize the 1951 Refugee Convention as the cornerstone of international refugee law. The relevance of human rights law also permeates EU law on asylum.

Therefore, within the scope of LGBTI asylum claims, it is of particular relevance to assess the conformity of the content of the EU harmonization on LGBTI asylum claims with international standards. This thesis draws from the previous chapters to argue that the current EU harmonization on LGBTI asylum is a ***glass half-full***.[216] On the one hand, the content of the EU harmonization represents an improvement from the perspective of LGBTI asylum-seekers, particularly in comparison with less protective practices of some Member States.[217] The CJEU has played an important role by filling the gaps left by the EU legislator, by clarifying MS' obligations towards LGBTI applicants. **On the other hand, the content of the EU harmonization on LGBTI asylum is open to much criticism**. While not underestimating the recent advances, this chapter engages in a critical approach in order to identify those aspects which allow for the conclusion that EU

[212] Júlia Mink, 'EU Asylum Law and Human Rights protection: revisiting the principle of non-refoulement and the prohibition of torture and other forms of ill-treatment' (2012) 14 *European Journal of Migration and Law* p. 129.
[213] TFEU Art. 78.
[214] QD, Recital 3.
[215] PD, Recitals 3 and 25 and Article 29.
[216] The use of this metaphor comes from the title of the International Commission of Jurists (ICJ) observations on *X, Y and Z*. This thesis expands and develops the idea behind this metaphor, which in ICJ's observation is limited to the title. Check: International Commission of Jurists (ICJ) 'X, Y and Z: a glass half full for "rainbow refugees"? ' (2014) http://www.refworld.org/docid/538dca6f0.html accessed 15 June 2015.
[217] Sarah Kolf, 'Une illustration de la complexification de la législation en matière de droit d'asile : selon la CJUE, les demandeurs d'asile homosexuels peuvent constituer un groupe social spécifique' (2014) *Rapports droit interne et droit international ou européen*, Université Paris Ouest Nanterre La Défense http://m2bde.u-paris10.fr/node/2653?destination=node%2F2653 accessed 15 June 2015.

harmonization on LGBTI asylum **is not in full conformity with international refugee law and human rights standards.**

For this purpose, this chapter is divided in three different sections. Firstly, it identifies inconsistencies relating to ***substantive*** matters, such as the definition of persecution of LGBTIs in their countries of origin. Secondly, it highlights ***procedural*** issues which are in odds with international refugee law and human rights standards, such as the use of stereotype notions and the concept of 'safe country of origin'. Thirdly, it draw general conclusions from this assessment, with attention for the role of the CJEU and the UNHCR in molding the content of EU harmonization on LGBTI asylum.

Substantive matters

Substantive matters relate to the core of the right to asylum of LGBTIs in the EU and touch issues such as the concept of persecution, the recognition of LGBTIs under the five grounds of persecution, and the possibility of requesting concealment of one's sexuality in order to avoid persecution. To put it briefly, it relates to qualification of a LGBTI as **refugee**.

The EU **has progressed** in regard to substantive matters in many ways. The Charter of Fundamental Rights of the EU grants individuals an enforceable right to be granted asylum when they meet the relevant criteria established by EU law, which in turn must be in conformity with the 1951 Refugee Convention.[218] The Charter, thus, reiterates the existence of a right to asylum, also found in the Qualification Directive. Since discrimination on grounds of sexual orientation and - by extension - gender identity is prohibited,[219] LGBTIs are as entitled as any other individuals to a right to asylum. The CJEU clarified the concept of a particular social group in the QD to affirm that homosexuals must be regarded as such, thus satisfying the requirement of being within the five Convention grounds.[220] The EU's approach to LGBTI asylum claims precludes MS from considering the possibility of expecting applicants to conceal their sexual orientation in order to avoid persecution.[221] It also affirmed that the existence of laws criminalizing homosexuality with imprisonment, and which are actually applied, *alone* can justify a well-founded fear of persecution. **Those advances should not be**

[218] Charter of Fundamental Rights of the EU, Art. 8.
[219] Charter of Fundamental Rights of the EU, Art. 21.
[220] *X, Y and Z*, paras. 41-49.
[221] ibid paras. 62-78.

underestimated. As the *Fleeing Homophobia* demonstrated, five MS have rejected asylum claims even in face of enforced criminalization in their country of origin.[222] **If before the CJEU ruling on *X, Y and Z* those recognitions depended on a proper interpretation of the 1951 Refugee Convention, now MS are legally bound to adopt them as part of EU law.**

However, some substantive aspects of the EU's approach on LGBTI asylum claims are not in line with international refugee law and human rights standards. In this section, four substantive matters of divergence between the EU approach and international standards are identified.

- *An incomplete interpretation of the different persecutory acts against LGBTIs*

Perhaps the most important issue of conflict between the EU approach and international standards is the interpretation of the ***acts which constitute persecution in the country of origin*** and the ones which do not. While the QD offered general guidance on ***acts of persecution*** (Art. 9), the CJEU had the opportunity to address the specific situation of homosexual applicants in *X, Y and Z.*

In that occasion, the CJEU was asked a very specific question: *is the existence of laws criminalizing homosexuality with a term of imprisonment a "prosecution or punishment which is disproportionate or discriminatory" (Art. 9(2)(c)) being serious enough by its nature to constitute a severe violation of basic human rights (Article 9(1)(a*)? As the previous chapter demonstrated, the CJEU replied that only those laws which are '**actually enforced'** constitute persecution in this sense.

By deciding not to rephrase the question referred by the national court, the CJEU lost the opportunity to address the issue through a holistic perspective, taking into account all items of Article 9 on the acts of persecution. It failed to recognize that other acts are of particular relevance for understanding the persecution faced by LGBTIs, such as "legal, administrative, police and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner"[223] and "acts of physical **or mental violence**, including acts of sexual violence".[224] Instead, the CJEU looked at criminalization as an abstract notion, detached from the societal environment by which it is surrounded.

[222] Jansen and Spijkerboer, *Fleeing Homophobia* (n 2) p. 24.
[223] QD, Article 9(2)(b).
[224] QD, Article 9(2)(a) [emphasis added].

The *X, Y and Z* ruling must be cautiously interpreted. The CJEU ***did not rule that only*** LGBTIs coming from countries which criminalize homosexuality with imprisonment and actually apply those provisions shall be granted refugee status. Rather, the CJEU affirmed that LGBTI asylum-seekers coming from those countries shall be regarded as possessing a well-founded fear of persecution **due to the existence of those enforced laws alone, irrespectively of other persecutory acts**. Therefore, the CJEU reinforces the protection of this specific group of LGBTI asylum-seeker, who shall be granted asylum if all other relevant criteria are met. However, the CJEU does not tackle a number of other issues surrounding the *persecution* faced by LGBTIs. It also fails to recognize that LGBTI may still have a well-founded fear of being persecuted under other circumstances than criminalization.

First, there is no explanation on what 'actually applied' means. The way MS interpret this phrasing can result in wider or stricter protection from LGBTI asylum-seekers. For instance, does this term mean that the provision must be applied at least once per year, or per month? Is the concept to 'apply' limited to prosecution under the rule of law by state authorities, or can it encompass undocumented punishment by non-state actors? The CJEU leaves those issues unanswered.

Second, the CJEU only mentions laws that criminalize same-sex sexual acts, but remains quiet about other laws which are also discriminatory by nature, such as the so-called 'anti-gay propaganda law' in Russia[225]. MS retain their discretionary power to decide if those laws are serious enough to constitute persecution.

Third, the Court of Justice overlooks the impact of unenforced laws which criminalize homosexuality. With this, it presupposes the existence of a 'benign' criminalization, which is inconsistent with *the factual and documented* consequences of discriminatory laws, which puts LGBTIs at risk of torture, extortion, abuse, mental and psychical harm, and other forms of persecution.[226]

International Refugee Law standards on LGBTI asylum, through the guidance of the UNHCR, clearly affirm that "even if irregularly, rarely, or ever enforced, criminal laws prohibiting same-sex relations could lead to an intolerable predicament for an LGB person rising to the level of persecution"[227]. The ECtHR, in its turn, recognized that the

[225] As a matter of illustration, see on the relation between the 'anti-gay' laws in Russia and the ECHR: Paul Johnson '"Homosexual propaganda" laws in the Russian Federation: are they in violation of the European Convention on Human Rights?' (2015) 3(2) *Russian Law Journal*.
[226] UNHCR, *Guidelines on Sexual Orientation and Gender Identity* (n 1) paras. 26-27.
[227] ibid para. 27.

existence, *alone*, of laws criminalizing homosexuality was enough to find a violation of Art. 8 ECHR, even when unenforced.[228] In face of the understanding of the CJEU that 'mere' criminalization is not persecution, Amnesty International considered *X, Y and Z* a 'setback' for refugees.[229]

- *Linking persecution to non-derogable rights*

The QD defines acts of persecution in accordance with Article 1(A) of the 1951 Refugee Convention as, *inter alia*, those sufficiently serious by nature or repetition "to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made"[230] according to the ECHR. It comes from the wording '***in particular***' that the intention of the EU legislator was to provide ***illustrative examples*** of rights that, if violated, likely indicated persecution. However, in *X, Y and Z*, the reference to non-derogable rights was used by the CJEU to narrowly interpret that 'mere' violation of derogable rights cannot constitute persecution.[231]

On the basis of this flawed reasoning, the CJEU concluded that the fundamental rights from which homosexuals risk a violation due to the existence of laws criminalizing homosexuality, such as the right to private life (Art. 8 ECHR), ***were derogable rights***, thus being insufficient to amount to persecution. This reasoning is deeply problematic for two main reasons. First, the CJEU disregarded the overall situation in countries criminalizing homosexual acts, where "the law enforcement authorities use the criminal law to extort, blackmail, detain and torture, without recourse of due process of law which would require a trial, conviction and sentencing"[232], thereby violating LGBTIs non-derogable rights, such as the prohibition of torture and others forms of ill-treatment (Art. 3 ECHR). Second, the 1951 Refugee Convention does not refer to non-derogable rights nor does it link persecution to a violation of some rights and not others.[233] UNHCR proposes an objective and individual assessment of asylum claims to identify persecution,

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[228] *Dudgeon v. UK* [1981] (n 192).
[229] Amnesty International, 'EU Court ruling a setback for refugees', Press Release: 07 November 2013, https://www.amnesty.org/en/press-releases/2013/11/eu-court-ruling-setback-refugees/ accessed 10 June 2015.
[230] QD, Article 9(1)(a)
[231] ICJ, 'X, Y and Z: a glass half full for "rainbow refugees"?' (n 215) paras 48-51.
[232] S. Chelvan, 'C-199/12, C-200/12, C-201/12 – X, Y, Z v Minister voor Immigratie en Asiel: a Missed Opportunity or a New Dawn?' *European Law Blog* http://europeanlawblog.eu/?p=2042 accessed 10 June 2015. See also: UNHCR, *Guidelines on Sexual Orientation and Gender Identity* (n 1) paras. 26-29.
[233] This would be, of course, an anachronism, since the 1951 Refuge Convention precedes the main international legally binding human rights instrument. The ECHR was adopted one year before, but it is a regional instrument, while international refugee law is virtually of universal application.

without reference to specific human rights.[234] Therefore, the link between persecution and non-derogable rights, as sustained by the CJEU, finds no legal basis in International Refugee Law.

Even though human rights standards should be regarded as a complementary guidance for Refugee Law, a state's obligations under the 1951 Refugee Convention are different from those under human rights treaties, such as the ECHR. The key source for the EU's approach on LGBTI asylum claims **must be the 1951 Convention and the standards of the UNHCR,** and not the ECHR. By focusing on non-derogable rights as a benchmark, the CJEU establishes a high standard for an act to be considered persecution, which finds no correspondence in international refugee law.[235] This is also an indication that the CJEU, when interpreting EU legislation on asylum, have generally seen it as a 'self-contained' regime, often falling short from giving enough weight to the UNHCR.[236]

- *The use of cumulative, not alternative, tests to identify a particular social group.*

Even though of minimal practical consequence, it must be stated that the EU's approach to the identification of a 'particular social group' is at odds with the guidelines of the UNHCR. The QD establishes a cumulative test, which was endorsed by the CJEU in *X, Y and Z*. According to this, a particular social group is comprised of members who share a characteristic that is innate or fundamental to their identity **and** which are perceived as distinct by their surrounding society.[237] UNHCR feels that **those are alternative, not cumulative tests.**[238]

In practice, the cumulative test established by the QD was not a problem, since the CJEU recognized that homosexuals constitute a particular social group. However, the CJEU mentioned that "the existence of criminal laws […] which specifically target homosexuals"[239] supports the finding that they constitute particular social group. The link between a particular social group and the existence of criminalizing laws should be strictly read as illustrative, not mandatory. If not, LGBs from countries where

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[234] See: UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3 http://www.refworld.org/docid/4f33c8d92.html accessed 10 June 2015.
[235] Bank (n 120) p. 14. **See also**: Julian Lehmann, 'Persecution, Concealment and the Limits of a Human Rights Approach in (European) Asylum Law – the Case of *Germany v. Y and Z* in the Court of Justice of the European Union' (2014) 26(1) *International Journal of Refugee Law* p. 79.
[236] ibid pp. 29-30.
[237] QD, Article 10(1)(d).
[238] UNHCR, *Guidelines on Sexual Orientation and Gender Identity* (n 1) paras. 44-46.
[239] ibid paras. 48-49.

homosexuality is not criminalized risk not being considered a particular social group. The same thing can be said for transsexual, transgender and intersex individuals, who may come from countries with no discriminatory law, but who still should be considered a particular social group, since gender identity is considered an innate and immutable characteristic.[240] Other individuals who risk exclusion are those who are not LGBTI but are perceived as such by society, still risking persecution.[241]

- *"Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States".*

Even in face of the criticism of ILGA-Europe,[242] the recast of the QD maintained the observation that, when verifying the existence of a particular social group, sexual orientation cannot include *acts* which are criminal in their national law.[243] The CJEU gave no clarification on the meaning of this provision,[244] but still endorsed. There is no apparent motive for the inclusion of this provision *only* in regard of sexual orientation (no similar observation is made in regards of, for instance, acts related with religion that are criminal in MS). Besides that, it indirectly constitutes a 'clause of exclusion' which finds no legal ground in the ones established by the 1951 Refugee Convention.

Two main problems may arrive from this inconformity with international refugee standards. First, it risks excluding LGB teenagers from the recognition as a particular social group, since they are below the age of consent and MS can, therefore, argue that their 'homosexual acts' would be criminal according to their national law.[245] Second, by linking the recognition of a particular social group with domestic legislation, the QD allows MS with *'anti-gay laws'* (those with clear restrictive character on the freedom of expression and assembly of LGBTIs) to refuse the recognition of homosexuals as a particular social group.[246]

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[240] ibid para. 47.
[241] See: UNHCR, 'UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted' (COM(2009)551, 21 October 2009) http://www.unhcr.org/4c5037f99.pdf accessed 11 June 2015 p. 8.
[242] ILGA Europe, 'Policy paper: the recast of the EU legislation on asylum' (n 95).
[243] QD, Article 10(1)(d)
[244] *X, Y and Z*, para. 66.
[245] Chelvan (n 231).
[246] ILGA Europe, 'Policy paper: the recast of the EU legislation on asylum' (n 95).

Procedural matters

Procedural matters relate to the process and assessment of asylum claims of LGBTIs by MS, and touch on issues such as the credibility of the applicant's sexual orientation, the use of stereotyped ideas of homosexuality and the recourse to questions of intimate nature. To put it briefly, it relates to **the way MS assess LGBTI asylum claims.**

It has to be recognized that the EU has set considerably high standards on procedural matters related to LGBTI asylum. The recast of the PD importantly recognizes that LGBTI applicants may be in need of special procedural guarantees.[247] This means that the complexity surrounding LGBTIs asylum seekers, such as the difficulty of talking about sexual orientation or gender identity or even of 'coming out' during the asylum procedure, should be taken into account by the competent authorities. Some authors, however, question the practical validity of this recognition.[248]

Additionally, the limits imposed by the CJEU in *A, B and C* on the methods of assessing credibility of LGBTI asylum-seekers bring the content of the EU harmonization very close to international refugee standards on LGBTI asylum claims. The CJEU prohibited the recourse to abusive questioning, the acceptance of intimate materials such as photos and videos, the use of stereotypes as the *only* framework of assessment, and the reliance solely on late disclosure to find a lack of credibility.[249]

In this section, four conflicting issues between the EU's harmonization on LGBTI asylum and international standards (international refugee law and international human rights standards) are described.

- *Stereotypes as a 'useful element' for assessing LGBTI asylum claims.*

In *A, B and C* the CJEU precluded MS from basing the assessment of LGB claims ***solely*** on stereotyped notions. However, the CJEU affirmed that "questions based on stereotyped notions may be a useful element at the disposal of competent authorities"[250], while not developing when, how and which stereotyped notions could be useful in those cases. The UNHCR guideline, on its turn, maintains that an objective approach disallows states from reaching conclusions based on stereotypes.[251] The unfortunate phrasing of the

[247] Recast PD, Recital 29.
[248] Céline Bauloz et al (ed.), *Seeking Asylum in the European Union: Selected Protection Issues Raised by the Second Phase of the Common European Asylum System* (Brill Nijhoff 2015) pp. 99-100.
[249] *A, B and C*, para. 72.
[250] ibid para. 62.
[251] UNHCR, *Guidelines on Sexual Orientation and Gender Identity* (n 1) paras. 49 and 60(ii).

CJEU will give MS discretion to use stereotypes.[252] This is very problematic since a decision on refugee status often lies ultimately on the credibility of the applicant as LGBTI, and the reliance on stereotypical notions may contribute to an incorrect assessment of the asylum claim, putting the applicant at risk of *refoulement*.[253]

- *Limitations, not guidance.*

Generally, in *A, B and C* the CJEU imposed important limitations to the way MS assess LGBTI asylum claims, in the light of the Charter of Fundamental Rights of the EU. However, the CJEU offered few guidance on how MS ***should actually assess*** those claims. It must be said, nonetheless, that the Court of Justice acted according to the question referred. Still, it can be said that "Europe's asylum determination authorities know what they are prohibited from doing, but […] are none the wiser on how they can prove a gay asylum claim"[254]. As a consequence, MS will apply different methods, probably creating a divergence between the likelihood of being granted refugee status in one MS or another.

It must be stated, however, that there is no universally accepted model for assessing LGBTI asylum applicants.[255] Similarly to applicants seeking asylum on other grounds, the complexity of an individual's trajectory will hardly fit in a universally applied questionnaire. Nonetheless, it is essential that national authorities are competent and trained to understand the particularities of claims related to sexual orientation or gender identity.

- *The heavy weight on Country of Origin Information.*

In *X, Y and Z* the CJEU affirmed that "it is for the national authorities to undertake […] an examination of all the relevant facts concerning that country of origin, including its laws and regulations and the manner in which they are applied"[256]. Therefore, the understanding of the CJEU puts heavy weight on country of origin information (COI). This is not, in itself, a problem. However, several problems surrounding the use of COI

[252] S. Chelvan, 'C-148/13, C-149/13 and C-150/13, A, B and C v Staatssecretaris van Veiligheid en Justitie: Stop Filming and Start Listening – a Judicial Black List for Gay Asylum Claims' *European Law Blog* http://europeanlawblog.eu/?p=2622 accessed 15 June 2015.
[253] On the widespread use of stereotypical notions in the EU, see: Jansen and Spijkerboer, Fleeing Homophobia (n 2) pp. 57-63.
[254] Chelvan (n 251).
[255] UNHCR, *Guidelines on Sexual Orientation and Gender Identity* (n 1) para. 63.
[256] *X, Y and Z,* para. 58.

in LGBTI cases have been identified.[257] In some MS, the lack of specific COI on the situations of LGBTI is taken as an indication that they do not suffer persecution.[258] In others, COI is incomplete or only refers to the situations of homosexual men, thus leaving MS authorities in the dark concerning the situation of lesbian, transgender, transsexual and intersex individuals.[259] Another problem is a limitation to analyzing legal provisions, neglecting the severity of homo and transphobia in different areas of society.[260]

According to the standards of UNHCR, the lack or incompleteness of COI cannot be regarded as an indication that the applicant would not suffer persecution.[261] The primary source of evidence needs to be the applicant's own testimony.[262] When national authorities are unable to provide the relevant information, the decision-maker must look for impartial COI from NGOs and the UNHCR. If no information is to be found, applicants should be given the benefit of the doubt.[263] Nevertheless, MS practices indicate that impartial or lack of COI is interpreted as meaning that LGBTIs do not suffer persecution, thus being a reason for refusing refugee status.[264]

- *The use of the "Safe Country of Origin" mechanism.*

The use of the "Safe Country of Origin" mechanism allows MS to consider that the general situation in a certain country is 'safe' and will probably not give rise to well-founded asylum claims. Applicants from those countries can have their procedure fast-tracked. The Procedures Directive importantly recognizes that applicants can request the exclusion of a country from as a 'safe country' in their particular case.[265] It also highlights the importance of relying on the information provided by the UNHCR, the European Asylum Support Office (EASO) and other relevant organizations.[266] Notwithstanding the existence of those guarantees, the EU's approach on LGBTI asylum should recognize that "due to their often complex nature, claims based on sexual orientation and/or gender

[257] Jansen and Spijkerboer, Fleeing Homophobia (n 2) p. 71.
[258] ibid pp. 71-73.
[259] ibid p. 74.
[260] Ibid p. 75.
[261] UNHCR, *Guidelines on Sexual Orientation and Gender Identity* (n 1) para. 66.
[262] ibid para. 64.
[263] Janna Wessels, 'Sexual Orientation in Refugee Status Determination' (2011) 74 *Refugee Studies Centre Working Paper Series.*
[264] Jansen and Spijkerboer, Fleeing Homophobia (n 2) pp. 71-75.
[265] Recast PD, Art. 35-36.
[266] Recast PD, Art. 37.

identity are generally unsuited to accelerated processing or the application of "safe country or origin" concepts"[267].

This is important for three main reasons. **First**, some MS have classified countries that criminalize homosexuality as generally "safe countries", thus posing a risk that asylum claims of LGBTIs will be unfairly assessed.[268] To some extent, the recast PD contains more safeguards for asylum-seekers by limiting MS discretionary powers on establishing accelerated procedures.[269] **Second**, the use of 'safe country of origin' is not harmonized in the EU, in other words, MS have different formal or informal lists of 'safe countries', which leads to divergence in the practices of MS.[270] This runs counter to the objective of strengthening the Common European Asylum System, because this way asylum applicants are not treated in the same manner in all MS. **Third**, it can be generally argued that accelerated asylum procedures might come at the expense of a fair procedure, a right to remedy and, ultimately, the principle of *non-refoulement* if due regard is not paid to procedural guarantees, such as legal assistance and appropriate time frame for preparing an asylum claim.[271]

For now, a correct use of the 'safe country of origin' mechanism depends to a large extent on MS themselves and on the applicants' legal representative knowledge and practical possibility of requiring an exclusion from the accelerated procedure due to the complexity of their sexual orientation or gender identity. A firm standpoint of the CJEU in the future will certainly be welcomed.

Overview: Assessing conformity

In light of the elements identified above, it is instrumental to directly confront this thesis' research question: "Is the content of the EU harmonization on LGBTI asylum claims in conformity with International Refugee Law and Human Rights standards?" While the assertiveness of the answer highly depends on the *extent* of the conformity, the author of

[267] UNHCR, *Guidelines on Sexual Orientation and Gender Identity* (n 1) para. 59.
[268] Jansen and Spijkerboer, *Fleeing Homophobia* (n 2) p. 24.
[269] Marcelle Reneman, 'Speedy asylum Procedures in the EU: Striking a Fair Balance Between the Need to Process Asylum Cases Efficiently and the Asylum Applicant's EU Right to an Effective Remedy', (2014) 24(4) *International Journal of Refugee Law* pp. 717-748.
[270] Kolf (n 216).
[271] See on the use of 'safe country of origin' policies in Europe: Claudia Engelmann, 'Convergence against the odds: the development of safe country of origin policies in EU Member States (1990-2013)' (2014) 16 *European Journal of Migration and Law* pp. 277-302. See generally on the use of accelerated procedures in the EU: Reneman (n 268).

this thesis is of the opinion that **the EU harmonization on LGBTI asylum is not in full conformity with those international standards.**

Undoubtedly, the recast of the Qualification and Procedures Directive has brought important improvements for LGBTI asylum-seekers. However, it is an insufficient step[272] which requires the CJEU to play its important role to fill the gaps left by the EU legislator, ensuring a correct and harmonized application of EU law. The CJEU, however, has so far been unable to bring EU protection towards LGBTI asylum to the same level as international refugee law. States have a legal obligation to cooperate with the UNHCR in order to properly comply with the obligations under the 1951 Refugee Convention. The Guidelines of the UNHCR have to be seen as the main source for interpreting the EU Asylum Acquis. However, their character as ***soft-law*** makes their legal impact uncertain and dependable on a MS' (and the CJEU's) goodwill.[273]

Nonetheless, it seems incorrect to argue that EU's approach on LGBTI asylum leads to a 'race to the bottom harmonization'. Even though subject to much criticism, EU's approach serves as a leverage for many MS which had poor records of protection of the right to asylum of LGBTIs. EU's approach has tackled the most severe absurdities found by the *Fleeing Homophobia Report*, such as the use of abusive questioning, medical examinations, and the unrecognition of homosexuals as a particular social group.

Member States remain allowed to set higher standards than those agreed at the Qualification and Procedures Directive. For instance, while the CJEU ruled that 'mere' criminalization is not enough to constitute persecution, the Italian Supreme Court understood, in line with UNHCR that laws criminalizing homosexuality constitute "a severe interference in homosexual citizen's private life, threatening personal freedom and creating an objective situation of persecution that would justify the grant of international protection"[274]. It is too soon to assess if MS will limit themselves to complying with the CJEU instead of pursuing a more in-line interpretation of the 1951 Refugee Convention.

Therefore, it is more accurate to conclude that EU harmonization has come a long way bringing it close to the correct application of the 1951 Refugee Convention towards

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[272] Steve Peers, 'Legislative Update 2011, EU Immigration and Asylum Law: the Recast Qualification Directive' (2012) 14 *European Journal of Migration and Law* pp. 219-221.

[273] Mink (n 211). **See also**: Christof Roos and Natasha Zaun, 'Norms matter! The role of International Norms in EU Policies on Asylum and Immigration' (2014) 16 *European Journal of Migration and Law* pp. 45-68.

[274] La Corte Suprema di Cassazione (Supreme Court), 20 September 2012, no 15981/2012 **quoted by** Sabine Jansen, ILGA-Europe 'Good Practices related to LGBTI asylum applicants in Europe' (May 2014) p. 10 http://goo.gl/WqyPJW accessed 09 June 2015.

LGBTI asylum-seekers. However, from the perspective of those individuals in need of international protection due to their sexual orientation and/or gender identity, there is still a lot the EU can do. The most important step in the right direction would be recognizing that the existence of laws criminalizing homosexuality, alone, can justify or indicate a LGBTI's well-founded fear of being persecuted.

Conclusion

> *"Art. 78(1): The Union shall develop a common policy on asylum, subsidiary protection and temporary protection […]* ***This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees****, and other relevant treaties."*[275]
>
> *"One cannot speak of successful legal harmonization without being in full compliance with well-established, respective international human rights standards"*[276]

The two phrases cited above help to understand the objective of this thesis: to assess the conformity of EU harmonization on LGBTI asylum claims with international refugee law and human rights standards. Both Member States **and** the EU have a positive obligation to ensure that asylum policies are in accordance with the 1951 Refugee Convention and with the ECHR. From the perspective of asylum-seekers, the harmonization of EU law on asylum is only relevant insofar as it means a compromise of all MS not to deviate from its obligations under international refugee law and human rights standards. For LGBTI asylum-seekers, this have not entirely been the case.

In the face of the continuity and expansion of severe human rights abuses of LGBTIs globally, it is very likely that the number of LGBTI asylum seekers will increase.[277] Since in practice there is no international court ruling on matters of refugee status, the Court of Justice of the European Union plays an important role in indirectly interpreting the 1951 Refugee Convention. The CJEU has taken important steps in order to adjust the EU's approach to ensure a better compliance with international refugee standards and human rights obligations. Particularly with regards to procedural aspects, it has contributed considerably towards limiting MS discretion when assessing LGBTI-related asylum claims, safeguarding the fundamental rights of those applicants.

However, this thesis has identified major issues of dissent between the EU's approach and international standards. If it is true that the harmonization of EU policies on LGBTI asylum is better seen as work in progress, it is also valid to say that the EU has lost important opportunities to be more in line with the position of the UNHCR. Member States can set higher standards of protection than those established by EU Law, and fortunately they have done so. Nonetheless, the more capable the EU legislator and the CJEU are in ensuring the same level of protection for LGBTI as international standards

[275] TFEU, Art. 78(1).
[276] Mink (n 211).
[277] ICJ, 'X, Y and Z: a glass half full for "rainbow refugees"?' (n 215) para. 4.

(particularly UNHCR's *Guideline nº 9 on Sexual Orientation and Gender Identity*), the higher the chance of LGBTIs refugees not suffering *refoulement*. For those individuals who need protection for simply being who they are, the **content of the EU harmonization on LGBTI asylum** is not a technical matter, but rather a substantial decision between safety and danger, sometimes life or death. While this is a reality shared by all asylum-seekers, this thesis have shown that LGBTIs face specific problems when seeking asylum in the EU.

The mandate of the UNHCR to provide helpful guidance for the interpretation of the 1951 Refugee Convention need to acquire higher importance in the establishment of EU law on asylum. Particularly in the two cases related to LGBTI asylum before the CJEU, UNCRH is viewed as a relevant source, but, in practice, few references were made to its documents or guidelines. The CJEU seems to shelter EU asylum law from 'external' sources, such as the UNHCR guidelines. Even though its documents are not legally binding, there is no agency more capable of interpreting the 1951 Refugee Convention than the UNHCR. LGBTI asylum-seekers would certainly benefit from an increasing influence of this UN agency in EU asylum law.

Some authors have raised concerns that the CJEU is giving too much weight on the acceptability of its decisions on asylum matters by MS, to the detriment of ensuring full compliance with international refugee law.[278] The cautious approach taken by the CJEU in *X, Y and Z* and its limited approach on the definition of *persecution* of LGBTIs seems to concur with this criticism. It is essential that EU harmonization does not happen at the expense of the right to asylum of LGBTI asylum-seekers.

It is to be hoped that the CJEU, on the next possible occasion, will recognize that laws criminalizing homosexual *per se* can constitute persecution. However, the wording of the ruling in *X, Y and Z* does not give room for much optimism. It seems more likely that the CJEU will give further guidance on other acts (if not the existence of discriminatory laws) which can be serious enough to constitute persecution. The nature of the decision of the European Court of Human Rights in *A. T. v. Sweden* will possibly set the tone for future approaches of the CJEU on LGBTI asylum. If the ECtHR understands that the existence of laws criminalizing homosexual acts are, in themselves evidence of a risk of suffering a violation of Art. 3 (prohibition on torture and ill-treatment, understood in line with the principle of *non-refoulement*), the CJEU would

[278] Bank (n 120) p. 29. **See also**: Ippolito (n 11) p. 38.

very likely be of a likeminded position. However, inferring from similar case-law of the ECtHR, it is likely that this court will not have a chance to rule on the matter as Sweden can, like it did in *M. E. v. Sweden*, avoid a decision by the ECtHR by granting the applicant a residence permit, which might make the case inadmissible. While all of this are speculations, what is a fact is that there will be more cases before the two European courts in relation to LGBTI asylum.

Conclusively, this thesis has argued that the EU's approach to LGBTI asylum is not in full conformity with international refugee law and human rights standards. While the EU has taken many steps towards the protection of LGBTI's right to asylum, it remains to be seen if the EU will chose the pathway of better protection of LGBTI asylum-seekers or if it will be satisfied in leaving the glass half-full.

Annex I: Countries that Criminalize Same-Sex Sexual Acts

Africa (35): Algeria, Angola, Botswana, Burundi, Cameroon, Chad, Comoros, Egypt, Eritrea, Ethiopia, Gambia, Ghana, Guinea, Kenya, Liberia, Libya, Malawi, Mauritania, Mauritius, Morocco, Namibia, Nigeria, Senegal, Seychelles, Sierra Leone, Somalia, South Sudan, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia, Zimbabwe.

Asia (25): Afghanistan, Bangladesh, Bhutan, Brunei Darussalam, *Gaza (in the Occupied Palestinian Territory),* India, *South Sumatra and Aceh Province (in Indonesia),* Iraq, Iran, Kuwait, Lebanon, Malaysia, Maldives, Myanmar, Oman, Pakistan, Qatar, Saudi Arabia, Singapore, Sri Lanka, Syria, Turkmenistan, United Arab Emirates, Uzbekistan, Yemen.

Latin America & Caribbean (11): Antigua and Barbuda, Barbados, Belize, Dominica, Grenada, Guyana, Jamaica, St Kitts & Nevis, St Lucia, St Vincent & the Grenadines, Trinidad and Tobago.

Oceania (8): *Cook Islands*, Kiribati, Nauru, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu.

Total: 76 countries where same-sex sexual acts are illegal.

Source: International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA): Aengus Carrol and Lucas Paoli Itaborahy, 'State Sponsored Homophobia 2015: A world survey of laws: criminalization, protection and recognition of same-sex love' (May 2015) http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2015.pdf accessed 14 June 2015

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