



Tilburg Law School

LL.M. International and European law

track International law and Human Rights

2015-2016

Master Thesis

Somewhere over the rainbow:

**The contemporary situation for LGBTI asylum seekers in
the Netherlands**

A critical analysis of the Dutch asylum policy and practice regarding asylum applications based on sexual orientation and their compliance with international refugee law, the Common European Asylum System and human rights standards.

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Tilburg, 3 August 2016

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ACKNOWLEDGMENTS

Hereby, I proudly present to you my master thesis on the contemporary situation for LGBTI asylum seekers in the Netherlands. This thesis is written for my Master degree in International and European Law at Tilburg University and is the result of an intensive and time consuming research spanning over the last seven months. Having had countless stressful moments and sleepless nights, this eventually led to the thesis that lays in front of you. As this thesis would never have been possible without the help and guidance offered to me, I would like to take this opportunity to express my sincere gratitude to all the people who assisted me in one way or the other as I carried out my research.

First and foremost, I would like to express my special appreciation and thanks to Nicola Jägers, who kindly accepted to be my supervisor. I am really grateful for her assistance, expertise, support and understanding and want to thank her for her remarkable competence on guiding me through the elaboration of this master thesis. She kept on steering me into the right direction whenever she thought I needed it, but at the same time, she allowed this thesis to be my own work. All of this added considerably to my graduate experience. My appreciation is extended to Lukasz Dziezic for taking time out from his busy schedule to serve as my second reader. I also want to convey my honest gratitude to all the inspiring professors I was able to meet throughout this Master Programme and to Tilburg University for the education I received.

I could not forget to thank my dear friends, colleagues and some of my fellow students for their love and sincere interest in my work and taking their time to evaluate my research and to provide me with essential feedback. Thank you for offering me a place for clearing my mind and having a couple of good laughs, which kept me in good spirits throughout the course of my work.

Finally, my deepest gratitude goes to my mother and the rest of my family on whom I could always count on for love. Thank you for providing me with your unfailing moral, financial and spiritual support and continuous encouragement throughout my study and through the process of researching and writing this thesis. You were my safe harbour whenever I needed it. This accomplishment would not have been possible without you.

Max Smeulders

Tilburg, 3 August 2016

ABSTRACT

In this thesis, the following research question will be answered:

“To what extent are the Dutch asylum policy and practice with regard to asylum applications based on sexual orientation in compliance with international refugee law, the Common European Asylum System and human rights standards?”

Violence and persecution because of one’s sexual orientation is a globally spread phenomenon. As a consequence, every year, an estimated number of ten thousand lesbian, gay, bisexual, transgender and intersex individuals apply for asylum in the European Union due to a fear of being persecuted for reasons of their sexual orientation. By virtue of its good track record regarding the protection of LGBTI rights, the Netherlands has been one of the main destinations in Europe for LGBTI asylum seekers. While some may think of the Netherlands as some sort of ‘gay paradise’, it should be noted that a liberal policy towards LGBTI individuals does not equate to an equally liberal policy towards LGBTI asylum seekers. For this reason, the objective of this master thesis is to critically assess whether the Dutch asylum policy and practice as regards those persecuted because of their sexual orientation is in line with international refugee law, the Common European Asylum System and human rights standards. The analysis allows for the identification of the points of discord between, on the one hand, the Dutch policy and practice and, on the other hand, the abovementioned international and European standards. This thesis concludes that the current asylum policy and practice, despite undergoing a strong development, remain flawed and are therefore not fully in compliance with international and European legal norms.

In order to reach an answer to the central research question, this thesis is divided in three parts. The first part consists of Chapter 2, which analyses the extent of the right to asylum and sets forth the legal framework for assessing asylum applications based on sexual orientation in the Netherlands, to which references will be made in the subsequent chapters. The second part encompasses chapters 3, 4 and 5 and forms the core of this thesis, for it comprises the analysis that is key to answering the central research question. Chapter 3 identifies and examines into detail the substantive requirements that LGBTI asylum seekers have to meet in order to be eligible for asylum, thereby taking the 1951 Refugee Convention, the UNHCR’s interpretative Handbook and Guidelines and the (recast) EU Qualification Directive as a point of departure. Subsequently, it assesses to what extent these requirements are incorporated in the Dutch asylum policy, which is illustrated by Dutch case law. Chapter 4 focuses on the Dutch asylum practice and the most significant obstacles LGBTI asylum seekers encounter in the Netherlands. Chapter 5 examines the contribution of the Court of Justice of the European Union in shaping the Dutch asylum policy and practice with regard to asylum applications based on sexual orientation by means of a case study of the landmark case of *X, Y and Z v Minister voor Immigratie, Integratie en Asiel*. The third part of this thesis comprises chapter 6, which is meant as a concise summary of the main points raised in this thesis and provides an answer to the central research question.

Keywords: Human rights law; International refugee law; LGBTI asylum claims; LGBTI rights; The Netherlands and LGBTI rights.

TABLE OF CONTENTS

Acknowledgments	i
Abstract	ii
Table of contents	iii
List of abbreviations	v
1. Introduction	1
1.1 Problem indication and significance.....	1
1.2 Research questions and objectives.....	4
1.3 Thesis outline.....	5
1.4 Research methodology, sources and limitations.....	7
2. Legal framework for assessing LGBTI asylum applications	9
2.1 Introduction.....	9
2.2 A right to asylum?.....	9
2.3 International refugee law.....	12
2.4 The Common European Asylum System.....	14
2.4.1 The (recast) Qualification Directive.....	16
2.4.2 The (recast) Procedures Directive.....	17
2.5 The relationship between the CEAS and the 1951 Refugee Convention.....	19
2.6 Human rights standards: the ECHR and the Charter.....	20
2.7 The Dutch legal system and its relationship with higher norms.....	21
2.8 Concluding remarks.....	21
3. Sexual orientation as a ground for refugee status?	23
3.1 Introduction.....	23
3.2 The notion of a ‘well-founded fear’.....	24
3.2.1 The combined (subjective-objective) approach.....	25
3.2.2 The objective approach under the recast Qualification Directive.....	26
3.3 ‘[...] Being persecuted’.....	27
3.3.1 Agents of persecution.....	31
3.3.2 The approach taken by the Dutch policy.....	32
3.4 ‘For reasons of [...] membership of a particular social group’.....	34
3.4.1 The approach taken by the Dutch policy.....	38
3.5 ‘Being outside the country of nationality or former habitual residence’.....	39
3.6 ‘Protection against persecution: Unable or unwilling to avail of state protection’.....	40
3.7 Concluding remarks.....	42
4. The Dutch asylum practice and procedural obstacles for LGBTI asylum seekers	47
4.1 Introduction.....	47
4.2 The asylum seeker’s personal interview under EU law.....	48
4.2.1 The asylum seeker’s personal interview under Dutch law.....	48

4.3 Evidentiary standards	50
4.4 Concluding remarks	51
5. The contribution of the CJEU in shaping the Dutch asylum policy and practice	53
5.1 Introduction.....	53
5.2 Facts of the case and procedural history	54
5.3 Analysis of the CJEU’s judgment.....	56
5.3.1 Question 1: ‘Membership of a particular social group’	56
5.3.2 Question 3: ‘Acts of persecution’	59
5.3.3 Question 2: ‘Concealment of one’s sexual orientation’	63
5.4 The Dutch response: Application of the Court’s judgment	64
5.5 Discretion: Adaptation of the Dutch asylum policy and its application in practice.....	67
5.6 ‘Criminalisation in the country of origin’ applied in practice	69
5.7 Concluding remarks	70
6. Conclusion	72
7. Bibliography	74

LIST OF ABBREVIATIONS

CEAS	Common European Asylum System
Charter	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
COI	Country of origin information
EC	European Community
EC Treaty	Treaty Establishing the European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)
ECtHR	European Court of Human Rights
EU	European Union
EXCOM	Executive Committee of the Programme of the High Commissioner
HRC	United Nations Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
ILGA	International Lesbian, Gay, Bisexual, Trans and Intersex Association
IND	Immigratie- en Naturalisatiedienst (Immigration- and Naturalisation Service)
LGBTI	Lesbian, gay, bisexual, transgender and intersex
NGO	Non-governmental organisation
PD	Procedures Directive (Council Directive 2005/85/EC)
Practitioners' Guide	International Commission of Jurists' Practitioners' Guide for Refugee Status Claims based on sexual orientation and gender identity
QD	Qualification Directive (Council Directive 2004/83/EC)
Recast PD	Recast Procedures Directive (Directive 2013/32/EU)
Recast QD	Recast Qualification Directive (Directive 2011/95/EU)
SEA	Single European Act
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
VCLT	Vienna Convention on the Law of Treaties

1. INTRODUCTION

Consider the following depiction of mankind:

“All human beings are born free and equal in dignity and rights.

All human beings – not some, not most, but all.”¹

This introductory chapter starts by sketching the context in which this thesis is embedded and the nature of the issues to be scrutinised. Furthermore, this chapter formulates the central research question, describes the research methodology and provides for an outline of this thesis.

1.1 Problem indication and significance

The abovementioned claim unequivocally indicates that all human beings around the world should take pride in who they are. All of us are unique, we are all different, but at the same time we are equal. In an ideal world where everyone’s human rights would be respected, it would not matter what the sexual orientation or gender identity of a person is, whether someone is attracted to men or women or both, or whether someone identifies as a man or a woman or something in between. All individuals would be treated with dignity and respect, irrespective of who they are or whom they love.² That being said, this is still a distant dream rather than reality for many lesbian, gay, bisexual, transgender and intersex [hereafter: “LGBTI”] individuals, as they are (still) not accepted in a large part of the world.³ While advances in the rights of LGBTI individuals have been made in several, mainly Western, countries with national parliaments and governments adopting legislation in favour of LGBTI individuals and outlawing any kind of discrimination for reasons of sexual orientation, in many other countries, their situation has drastically deteriorated with an estimated 175 million individuals living in environments, where harassment, discrimination and persecution are the order of the day.⁴ In those countries, LGBTI individuals face a double 'punishment' as a

¹ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 1 <<http://www.refworld.org/docid/3ac6b3712c.html>> accessed 7 April 2016; Ban Ki-moon, ‘Leadership in the Fight against Homophobia’ (Speech Headquarters of the United Nations 2012) <<http://www.un.org/sg/statements/index.asp?nid=6504>> accessed 7 April 2016; UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, October 2012, HCR/GIP/12/01 para 5 <<http://www.refworld.org/docid/50348afc2.html>> accessed 22 May 2016.

² Hillary Rodham Clinton, ‘Remarks in Recognition of International Human Rights Day’ (Speech held at the UN Palais des Nations in Geneva on 6 December 2011) <<http://m.state.gov/md178368.htm>> accessed 16 July 2016.

³ It is necessary to point out that the term “LGBTI”, which is an abbreviation for lesbian, gay, bisexual, transgender and intersex individuals, will be used in this thesis as an umbrella term for those with a sexual orientation that differs from heterosexuality. This thesis only covers cases in which ‘sexual orientation’ is referred to as the grounds for seeking asylum, without the intention to assume that the particularities of transgenders and intersex individuals do not deserve specific research. The difficulties faced by transgender and intersex individuals often differ from those faced by lesbian, gay and bisexual individuals. Although the two groups of asylum seekers are both included under the term “LGBTI”, their cases are not identical. Cases involving transgenders, are covered by “gender-related persecution” rather than persecution due to sexual orientation.

⁴ Organisation for Refuge, Asylum and Migration, ‘Opening doors: A Global Survey of NGO Attitudes Towards LGBTI Refugees and Asylum Seekers’ (Report) (June 2012) 5-7 <<http://oramrefugee.org/publications/>> accessed 10 April 2016; J.L. Gartner, ‘(In)credibly Queer: Sexuality-based Asylum in the European Union’ in *Transatlantic Perspectives on Diplomacy and Diversity* (Humanity in Action Press 2015) <<http://www.humanityinaction.org/knowledgebase/578-in-credibly-queer-sexuality-based-asylum-in-the-european-union>> accessed 10 April 2016; V Rodríguez Martínez, ‘Refugee law and homosexuality: need for special protection?’ (LL.M. Thesis, University of Groningen 2012) 5.

consequence of their choice to live according to their sexual orientation or gender identity: rejection by their own families and the hostility and condemnation of society, and in some cases even the active persecution by state authorities.⁵

This includes a plurality of hostile actions towards sexual and gender minorities and severe human rights violations, *inter alia*, arbitrary arrest and detention, pervasive discrimination, extortion, systematic mental, physical or verbal abuse, a lack of official protection, torture and murder.⁶ Furthermore, LGBTI individuals are frequently denied medical treatment or subjected to forced procedures such as sterilisation, ‘conversion’ therapy, hormone therapy and genital-normalising surgeries under the guise of ‘reparative therapies’. These procedures are rarely, if ever, medically necessary and lead to severe and life-long physical and mental pain and suffering and can amount to torture and ill-treatment.⁷ At the same time, seventy-five countries (somehow) criminalise same-sex sexual acts, and at least eight of them carry the death penalty.⁸ There are also countries where LGBTI individuals are not criminalised, but homo – and transphobic violence is widespread and neglected by the state.⁹ Homophobic legislation in countries like Saudi Arabia and Uganda fosters a climate in which violence against LGBTI individuals by the state and non-state actors is condoned and met with impunity.¹⁰ Given the existence of such hostile legislation and persecutory environments, many LGBTI individuals are forced to live their lives in silence, due to a fear of their ‘real identity’ being revealed.¹¹ The relatively safe environment for LGBTI individuals in the European Union [hereafter: “EU”] has been a motivation for some of those who were born in the wrong country and suffer persecution, because they do not conform to prevailing cultural norms,

⁵ V Rodríguez Martínez, ‘Refugee law and homosexuality: need for special protection?’ (LL.M. Thesis, University of Groningen 2012) 5; Country report Sudan 23 July 2015 55-56; Country report Sri Lanka 2 October 2014 39; Country report Afghanistan 17 September 2014 64-66.

⁶ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9 art 9(2); UNHRC ‘Report of the Office of the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez’ (1 February 2013) 22nd Session (2013) UN Doc A/HRC/22/53 paras 76-79; UNHRC ‘Report of the Office of the United Nations High Commissioner for Human Rights on discrimination and violence against individuals based on their sexual orientation and gender identity’ (4 May 2015) 29th session (2015) UN Doc A/HRC/29/23 para 44; UNHRC ‘Report of the Office of the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment’ (5 January 2016) 31st Session (2016) UN Doc A/HRC/31/57 para 15.

⁷ UNHRC ‘Report of the Office of the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez’ (1 February 2013) 22nd Session (2013) UN Doc A/HRC/22/53 paras 76-79; UNHRC ‘Report of the Office of the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment’ (5 January 2016) 31st Session (2016) UN Doc A/HRC/31/57 para 48; Organisation for Refuge, Asylum and Migration, ‘Opening doors: A Global Survey of NGO Attitudes Towards LGBTI Refugees and Asylum Seekers’ (Report) (June 2012) 5-7 <<http://oramrefugee.org/publications/>> accessed 10 April 2016.

⁸ ILGA, ‘State-Sponsored Homophobia: A World Survey of Laws: criminalisation, protection and recognition of same-sex love’ (Report) (May 2015) 6-10 <http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2015.pdf> accessed 7 April 2016 (out of the eight states that carry out the death penalty for homosexual acts, only five states actually implement it); UNHRC ‘Report of the Office of the United Nations High Commissioner for Human Rights on discrimination and violence against individuals based on their sexual orientation and gender identity’ (4 May 2015) 29th session (2015) UN Doc A/HRC/29/23 paras 43-49; UNHRC ‘Report of the Office of the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment’ (5 January 2016) 31st Session (2016) UN Doc A/HRC/31/57 paras 13-15; —, ‘Clustered ID: SR on Torture and on Sale of Children – 21st Meeting, 31st Regular Session Human Rights Council’ <<http://webtv.un.org/watch/clustered-id-sr-on-torture-and-on-sale-of-children-21st-meeting-31st-regular-session-human-rights-council/4790891160001>> accessed 15 March 2016.

⁹ G Almeida Ferreira, ‘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’ (LL.M Thesis, Tilburg University 2015) 7-8.

¹⁰ UNHRC ‘Report of the Office of the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment’ (5 January 2016) 31st Session (2016) UN Doc A/HRC/31/57 para 15.

¹¹ For example, look at: Country report on Syria, 22 June 2015 59; Country report on Somalia, 18 December 2014 64; Country report Sudan 23 July 2015 55-56.

to flee their countries of origin in order to seek refuge.¹² As a consequence, an estimated number of ten thousand LGBTI asylum seekers arrive in the EU every year.¹³ By virtue of its good track record regarding the protection of LGBTI rights, the Netherlands has been one of the main destinations and receives a significant number of asylum applications each year.¹⁴

The Netherlands is often considered as one of the most LGBTI-tolerant countries in the EU and one of the most progressive countries in the world in respect of LGBTI rights. It is for this reason that the Netherlands is sometimes dubbed as the ‘promised land’ for LGBTI individuals and a ‘world leader’ as regards the acceptance of homosexuality.¹⁵ This is demonstrated by the fact that Article 1 of the Dutch Constitution prohibits discrimination “on any grounds whatsoever”, by its tolerant attitude towards the LGBTI community and the Netherlands being the first country in the world to legalise same-sex marriages, which can be considered as a highlight of an era marked by a long-running fight for equal rights.¹⁶ The Netherlands was also the first country to recognise sexual orientation as a persecution ground as early as 1981.¹⁷ The Dutch government emphasises this image even more with statements such as “*The Netherlands champions improvements in the legal position and safety of lesbian women, gay men, bisexuals and transgenders worldwide*” and “*The Dutch government seeks to secure equal rights for lesbian women, gay men, bisexuals and transgenders.*”¹⁸ With this rosy picture in their minds, LGBTI asylum seekers, among many others, come to the ‘gay-friendly’ Netherlands hoping to find a better life and a stable future free of the persecution they had to face in their home countries. Yet, while some may think of the Netherlands as some sort of ‘gay paradise’, the truth is that a liberal policy towards LGBTI individuals does not equate to an equally liberal policy towards LGBTI asylum seekers.

¹² V Rodríguez Martínez, ‘Refugee law and homosexuality: need for special protection?’ (LL.M. Thesis, University of Groningen 2012) 5.

¹³ Sabine Jansen en Thomas Spijkerboer, ‘Fleeing homophobia: Asylum claims related to sexual orientation and gender identity in Europe’ (September 2011) 15-16; UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A (2) of the 1951 Convention and/or Its 1967 Protocol relating to the Status of Refugees*, October 2012, HCR/GIP/12/01 para 1 <<http://www.refworld.org/docid/50348afc2.html>> accessed 22 May 2016.

¹⁴ Eurostat, ‘Asylum decisions in the EU’ (Press release) <<http://ec.europa.eu/eurostat/documents/2995521/7233417/3-20042016-AP-EN.pdf/34c4f5af-eb93-4ecd-984c-577a5271c8c5>> accessed 1 July 2016.

¹⁵ Saskia Keuzenkamp and David Bos, ‘Out in the Netherlands: Acceptance of homosexuality in the Netherlands’ (Report) (2007) 7-19 <http://www.scp.nl/english/Publications/Publications_by_year/Publications_2007/Out_in_the_Netherlands> accessed 10 April 2016; Willem Huijnk, ‘De acceptatie van homoseksualiteit door etnische en religieuze groepen in Nederland’ (Report) (November 2014) 7-17; From the research ‘Monitoring van sociale acceptatie van homoseksuelen in Nederland’ (2007) conducted by the Netherlands Institute for Social Research (SCP), it follows that the majority of the Dutch population has a positive attitude towards homosexuality and homosexuals;

¹⁶ Saskia Keuzenkamp and David Bos, ‘Out in the Netherlands: Acceptance of homosexuality in the Netherlands’ (Report) (2007) 7-11 <http://www.scp.nl/english/Publications/Publications_by_year/Publications_2007/Out_in_the_Netherlands> accessed 10 April 2016; —, ‘How do gay rights look in your country?’ <<http://edition.cnn.com/2015/06/22/opinions/lgbt-rights-around-world/>> accessed 20 March 2016; *Constitution of the Kingdom of the Netherlands*, June 2002 art 1 <<http://www.refworld.org/docid/3ae6b5730.html>> accessed 19 June 2016; The Dutch *Equal Treatment Act* further elaborates on the equal treatment of LGBTI individuals in the sphere of labour, social security and services.

¹⁷ A Adofo, ‘Fleeing Persecution: Asylum claims related to sexual orientation in the United Kingdom and the Netherlands (LL.M. Thesis, Tilburg University 2013) 43 <<https://arno.uvt.nl/show.cgi?fid=131146>> accessed 10 March 2016; Sabine Jansen en Thomas Spijkerboer, ‘Fleeing homophobia: Asylum claims related to sexual orientation and gender identity in Europe’ (September 2011) 19 <<http://www.europarl.europa.eu/document/activities/cont/201110/20111014ATT29326/20111014ATT29326EN.pdf>> accessed 10 March 2016.

¹⁸ Government of the Netherlands, ‘LGBT rights worldwide’ <<https://www.government.nl/topics/gay-rights/contents/lgbt-rights-worldwide>> accessed 10 March 2016; Government of the Netherlands, ‘Gay rights’ <<https://www.government.nl/topics/gay-rights>> accessed 10 March 2016.

As it will be shown in the subsequent chapters, seeking asylum on the basis of sexual orientation in the Netherlands is often fraught with difficulties, as LGBTI asylum seekers encounter various obstacles to have their right to asylum recognised.¹⁹ Yet, according to Sandra Jansen in her article ‘*Oud and Proud*’, the Dutch policy on LGBTI-related asylum claims has undergone a strong development in recent years.²⁰ Putting this into the context of recently published news articles stating that the Dutch asylum practice is not gay-friendly and articles highlighting the bad situation of LGBTI asylum seekers in Dutch asylum centres, a mixed image of the Dutch asylum policy emerges.²¹ Moreover, precise figures as to the number of LGBTI individuals applying for asylum each year in the Netherlands are not known, for many of them do not reveal their true circumstances and do not apply for asylum based on sexual orientation. They usually keep a low profile in order to avoid attracting discrimination and violence from other refugees, the local community or state authorities.²² Thus, a call for clarification is indispensable. As societies continue to shun, abuse and criminalise LGBTI individuals and as refugee rights for sexual minorities are increasingly articulated and claimed, it is likely that more people will flee to seemingly LGBTI-tolerant countries, such as the Netherlands.²³ This highlights the importance of having a policy in place which takes into account the vulnerable situation of LGBTI asylum seekers and is in line with international refugee law, the Common European Asylum System [hereafter: “CEAS”] and human rights standards. Therefore, I came to the conclusion that this would be a very interesting research subject as some countries that are considered to be ‘gay-friendly’ might actually not be as friendly as it seems.

1.2 Research questions and objectives

This thesis takes a closer look at the asylum policy and practice in the Netherlands for individuals seeking asylum on the basis of their sexual orientation, whereby the term ‘sexual orientation’ refers to an individual’s “capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender, or more than one gender”.²⁴

¹⁹ Janna Wessels, ‘Sexual orientation in refugee status determination’ Refugee Studies Centre working paper no. 73 3-4 <<http://www.refworld.org/pdfid/4ebb93182.pdf>> accessed 1 May 2016; European Union, *Charter of Fundamental Rights of the European Union*, (26 October 2012), 2012/C 326/391 art 18.

²⁰ Sabine Jansen, ‘Over de gevolgen van het XYZ-arrest voor LHBT-asielzoekers in Nederland Out & Proud?’ (2015) 3 AM&R <http://www.asielenmigrantenrecht.nl/a_mr/A&MR,%20nr%203%20Artikel%20Out%20en%20Proud.pdf> accessed 10 March 2016; Case C-199/12, C200/12 and C201/12 X, Y and Z v Minister voor Immigratie, Integratie en Asiel (CJEU 7 November 2013).

²¹ —, ‘Extra maatregelen voor LHBT-asielzoekers’ <<http://www.ad.nl/ad/nl/36281/Vluchtelingenstroom-West-Europa/article/detail/4241876/2016/02/10/Extra-maatregelen-voor-LHBT-asielzoekers.dhtml>> accessed 10 March 2016; NOS, ‘Kamer wil aparte opvang homoseksuele asielzoekers’ <<http://nos.nl/artikel/2090010-kamer-wil-aparte-opvang-homoseksuele-asielzoekers.html>> accessed 10 March 2016; NOS, ‘COC: Homoseksuele asielzoekers bedreigd in opvang’ <<http://nos.nl/nieuwsuur/artikel/2064475-coc-homoseksuele-asielzoekers-bedreigd-in-opvang.html>> accessed 10 March 2016; Maarten van Tartwijk, ‘Netherlands to Provide Haven for Gay Asylum-Seekers Facing Abuse’ <<http://www.wsj.com/articles/netherlands-to-provide-haven-for-gay-asylum-seekers-facing-abuse-1456857681>> accessed 10 March 2016; Cyril Rosman, ‘Hoe herken je echte homo onder asielzoekers?’ <<http://www.ad.nl/ad/nl/1012/Nederland/article/detail/4096893/2015/07/08/Hoe-herken-je-echte-homo-onder-asielzoekers.dhtml>> accessed 10 March 2016; Daan Marcelis, ‘Asielprocedure niet homovriendelijk’ <<http://www.oneworld.nl/love/asielprocedure-niet-homovriendelijk>> accessed 1 May 2016; —, ‘Hoogste rechter: asielbeleid homoseksuele vluchtelingen rammelt’ <<http://www.joop.nl/nieuws/hoogste-rechter-asielbeleid-homoseksuele-vluchtelingen-rammelt>> accessed 1 May 2016.

²² Volker Turk, ‘United Nations High Commissioner for Refugees: Invisible in the City: Urban Protection Gaps Facing Sexual Minorities Fleeing Persecution, HIAS LGBTI Symposium’ (2013) 25 International Journal of Refugee Law 128.

²³ Volker Turk, ‘United Nations High Commissioner for Refugees: Invisible in the City: Urban Protection Gaps Facing Sexual Minorities Fleeing Persecution, HIAS LGBTI Symposium’ (2013) 25 International Journal of Refugee Law 129.

²⁴ International Commission of Jurists, *Yogyakarta Principles - Principles on the application of international human rights law in relation to*

Considering the abovementioned, this thesis is structured around the following central research question which acts as a guidance:

“To what extent are the Dutch asylum policy and practice with regard to asylum applications based on sexual orientation in compliance with international refugee law, the Common European Asylum System and human rights standards?”

In order to come up with an answer to the central research question, the following sub-questions need to be answered first:

- a. What does the international legal framework for assessing asylum applications based on sexual orientation consist of?
- b. What are the requirements that LGBTI asylum seekers have to meet for acquiring refugee status, according to the international legal framework, and to what extent are these requirements incorporated in the Dutch legal framework?
- c. To what extent is the Dutch asylum practice, as regards the asylum interview and evidential standards, in asylum cases based on sexual orientation in compliance with EU asylum legislation and human rights standards?
- d. In what respect did the Court of Justice of the European Union shape the Dutch asylum policy with regard to asylum applications based on sexual orientation in the joined cases of *X, Y and Z v Minister voor Immigratie, Integratie en Asiel*?

The answer to the aforementioned research question has the objective of critically analysing the content of the Dutch asylum policy and the Dutch asylum practice as regards LGBTI-related asylum applications. By doing so, I want to find out if the Netherlands, or at least its asylum policy and practice, is as ‘gay-friendly’ as it is often portrayed. I hope to get background knowledge, as well as in-depth information and I intend to emphasise the importance of having a well-functioning policy in place which is in compliance with international refugee law, the CEAS and human rights standards. For that purpose, considerable weight is given to the perspective and rights of LGBTI asylum seekers. Moreover, this thesis aims at creating awareness as to the existence of systematic abuse of LGBTI people worldwide. Although this kind of treatment is a growing issue, many people are too hesitant to talk about it due to its sensitivity. Thus an in-depth study on this subject will create a much needed intervention into current advocacy on behalf of LGBTI asylum applications. Finally, it is important to acknowledge that this research is by no means done to express a complete disapproval of the current policy on LGBTI asylum applications in the Netherlands. It does, however, offer a picture of an area in which much advances have been made, but which still faces various obstacles to be considered complete.

1.3 Thesis outline

At the beginning of each chapter, a sub-question is phrased with the aim of answering the central research question. Each chapter is meant to analyse the sub-question into detail and an answer will be provided for in the brief conclusion at the end of each chapter.

sexual orientation and gender identity, March 2007 Preamble.

Chapter 2 analyses the ‘right to asylum’ and sets forth the legal framework for assessing asylum applications based on sexual orientation in the Netherlands, in order to identify the relevant legal sources and how they interrelate. By the end of this chapter, it should be possible to identify the legal framework for invoking refugee status based on sexual orientation and thus answering the first sub-question.

Chapters 3 and 4 examine whether the Dutch asylum policy and practice comply with international refugee law, the CEAS and human rights standards. Chapter 3 describes and compares the substantive elements concerning the recognition of LGBTI asylum seekers as refugees, and analyses to what extent the requirements for acquiring refugee status as laid down in the 1951 Convention relating to the status of refugees [hereafter: “Convention”] and the recast Qualification Directive [hereafter: “recast QD”] are incorporated in the Dutch asylum policy, illustrated by Dutch case law. Hereby, the Office of the United Nations High Commissioner for Refugees’ [hereafter: “UNHCR”] Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status [hereafter: “Handbook” and “Guidelines”] and the International Commission of Jurists’ [hereafter: “ICJ”] Practitioners’ Guide for Refugee Status Claims based on sexual orientation and gender identity [hereafter: “Practitioners’ Guide”] are taken as a point of departure, as they set benchmarks to which the Dutch asylum policy and practice can be compared. Despite being non-binding, States parties consider them to be authoritative and to have global scope and accept them as important sources.²⁵ Chapter 4 addresses the Dutch asylum practice. It examines to what extent the procedural guarantees for LGBTI asylum seekers are incorporated in the Dutch asylum policy for asylum applications based on sexual orientation and the obstacles LGBTI asylum seekers encounter. Hereby, references will *inter alia* be made to the recast Procedures Directive [hereafter: “recast PD”], the Charter of Fundamental Rights of the EU [hereafter: “Charter”] and the European Convention on Human Rights [hereafter: “ECHR”]. Among the issues discussed, are the asylum interview, the information relied on and the burden of proof.

Chapter 5 answers the fourth sub-question of this research by examining the contribution of the Court of Justice of the EU [hereafter: “CJEU”] in shaping the Dutch policy on asylum applications based on sexual orientation with regard to two contentious issues that have led to the rejection of various LGBTI asylum cases: the discretion requirement and criminalisation of same-sex sexual activity. This chapter will focus on the CJEU’s decision in the landmark case of *X, Y and Z v Minister voor Immigratie, Integratie en Asiel*, the significance and implications of the outcome of this case and whether the Dutch asylum policy and practice are in line with this outcome.²⁶

Chapter 6 serves as a conclusion and gathers the main findings of this research and reiterates the importance of ascertaining that the Dutch approach to LGBTI-related asylum claims is compatible with international refugee law, the CEAS and human right standards. The conclusion also seeks to identify avenues for a better protection of LGBTI asylum seekers in the Netherlands, and therefore, recommendations will be made.

²⁵ E Declerck, ‘The non-refoulement principle and the possible development of a human right to asylum for LGBTI’ (LL.M. Thesis, Ghent University 2015) 8-9.

²⁶ Case C-199/12, C200/12 and C201/12 *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* (CJEU 7 November 2013).

1.4 Research methodology, sources and limitations

The research I conducted for writing this thesis encompasses a comparative analysis of three levels of asylum law: firstly, the international level, whereby the Convention and its Protocol, the UNHCR's Handbook and Guidelines and the ICJ's Practitioners' Guide are taken as a point of departure; secondly, the level of the EU, where I will touch upon two of the Directives (the recast QD and recast PD) shaping the CEAS; and thirdly, I will evaluate the Dutch asylum policy and practice by making references to the Dutch Aliens Act and the Aliens Circular.²⁷ Due attention is also paid to the ECHR and Charter, which represent a human rights framework for the EU and its Member States, within which the aforementioned rules are to be applied. After having analysed the content of these legal systems separately, I examined and evaluated their similarities and differences by employing a comparative approach.²⁸

I started my research with a desk study, based on a comprehensive database of the available legal and policy literature such as articles by legal scholars and jurists on the subject, study books, journal articles, interviews, websites, theses and dissertations, international refugee guidelines, country reports and reports from various NGOs. The latter are not sources of law, therefore, I have only used them as examples for describing human rights violations in specific countries. Besides, in order to look up and review cases that appeared before Dutch courts, the European Court of Human Rights [hereafter: "ECtHR"] and the CJEU, I made extensive use of legal search engines, such as HUDOC for cases before the ECtHR, CURIA for cases before the CJEU and www.rechtspraak.nl for an overview of cases dealt with by Dutch courts. These cases are used to highlight certain aspects of the asylum policy and practice and to find out whether the current situation is in conformity with the outcome of these cases. The literature and other legal sources essential for conducting my research are referred to in footnote references below the text and listed in the Bibliography.

Whereas my original intention was to make a comparison between the asylum policies and procedures of the Netherlands and another EU Member State, during the process of writing this thesis, I found out that this plan would be too ambitious for the time schedule. So, due to time restraints, a shortage of in-depth knowledge of foreign legal systems and a language barrier, I limited my research to a case study of the Netherlands. Nevertheless, the Netherlands also offers an interesting case to study LGBTI asylum applications, as it is often considered as one of the most-gay friendly countries in the EU and one of the most progressive countries in the world in

²⁷ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) <<http://www.refworld.org/docid/3be01b964.html>> accessed 1 May 2016; UN, Protocol Relating to the Status of Refugees (31 January 1967), UNTS 606 267 <<http://www.refworld.org/docid/3ae6b3ae4.html>> accessed 6 May 2016; 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 1 May 2016; International Commission of Jurists, *Refugee status claims based on sexual orientation and gender identity: A practitioners' guide* (Geneva, International Commission of Jurists 2016) <<http://www.refworld.org/pdfid/56cabb7d4.pdf>> accessed 2 May 2016; Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9; Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60.

²⁸ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5; European Union, *Charter of Fundamental Rights of the European Union*, (26 October 2012), 2012/C 326/391.

respect of LGBTI rights. So, with this thesis I aim at finding out whether this liberal stance is also taken when it comes to reviewing asylum applications of LGBTI asylum seekers.

2. LEGAL FRAMEWORK FOR ASSESSING LGBTI ASYLUM APPLICATIONS

2.1 Introduction

Until this point, this thesis has addressed several preliminary issues, *inter alia*, the context in which this thesis is embedded and the issues to be scrutinised. Furthermore, the previous chapter dedicated attention to the often dreadful situation of LGBTI asylum seekers in their respective countries of origin, thereby demonstrating their need for international protection and the consequences they face if they would be returned. Now this thesis can proceed. Yet, before turning to the question to what extent the Dutch policy and practice regarding asylum applications based on sexual orientation are in compliance with international refugee law, the CEAS and human rights standards (chapters 3, 4 and 5), it is necessary to examine if LGBTI asylum seekers have an enforceable individual right to asylum (paragraph 2.2) and to analyse the patchwork of legal sources on asylum and refugee protection, the context in which they were adopted and how they interrelate (paragraphs 2.3-2.7). With this, this research starts the construction of the legal basis for LGBTI individuals' asylum applications in the Netherlands. The analysis will be performed by means of the first sub-question:

“What does the international legal framework for assessing asylum applications based on sexual orientation consist of?”

In order to answer this question, this chapter makes a tripartite distinction between sources on the international level, the EU level and the national level, as the protection of asylum seekers and refugees is characterised as an interplay between various overlapping legal regimes. Additionally, the ECHR and the Charter represent a human rights framework for the EU and its Member States, which must also be taken into account.

2.2 A right to asylum?

Classically, the ‘right to asylum’ was understood as the right, belonging to the state, to afford protection to an individual who has sought refuge within that state’s territory, if it so wishes.²⁹ This results from the principle of territorial sovereignty, according to which every state has exclusive control over its territory and over persons present within its territory.³⁰ As a consequence, states have a right to forbid the entrance of non-nationals, subject to their treaty obligations.³¹ The right

²⁹ M Rafiqul Islam and Md Jahid Hossain Bhuiyan, *An introduction to international refugee law* (Martinus Nijhoff, Leiden 2013) 154-156; P Boeles, Maarten den Heijer and others, *European Migration Law* (2nd edn Intersentia, Cambridge 2014) 243-244; 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 *Refugee Survey Quarterly* 37-38; G Almeida Ferreira, ‘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’ (LL.M. Thesis, Tilburg University 2015) 9-10.

³⁰ Maria Tereza Gil-Bazo, ‘Asylum as a General Principle of International Law’ (2015) 27 *International Journal of Refugee Law* 3-7; M Rafiqul Islam and Md Jahid Hossain Bhuiyan, *An introduction to international refugee law* (Martinus Nijhoff, Leiden 2013) 154; P Boeles, Maarten den Heijer and others, *European Migration Law* (2nd edn Intersentia, Cambridge 2014) 7; Felice Morgnstern, ‘The right to asylum’ (1949) 26 *British Yearbook of International Law* 327; A Cassesse, *International Law* (2nd edn Oxford University Press, Oxford 2005) 48-53; A Grahl-Madsen, *Territorial asylum* (Almqvist and Wiksell International, Stockholm 1980) 23.

³¹ P Boeles, Maarten den Heijer and others, *European Migration Law* (2nd edn Intersentia, Cambridge 2014) 15; U.S. Supreme Court 18 January 1892, *Nishimura Eiku v United States et al.* 142 U.S. 651, 142; *Abdulaziz, Cabales and Balkandali v UK* (App nos 9214/80, 9473/81 and 9474/81) (1985) Series A no 94 para 67.

of the state to grant asylum to those in need constitutes a general principle of international law, which is confirmed by international and regional legal instruments as well as in state practice.³² So, from this point of view, the right to asylum is perceived as a right of the state, rather than the right of an individual.³³ Yet, in current international law, the ‘right to asylum’ does no longer satisfy this rather simplified conception, as it consists of a myriad of constituent rights, none of which on their own amount to a right to asylum.³⁴ Within the context of this thesis it is important to examine these rights, as the ‘right to asylum’ would otherwise remain a rather nebulous phrase.

Whereas the right to grant asylum was originally bestowed upon states, individuals are entitled to leave any country, including their own, which is enshrined in various international human rights instruments, *inter alia*, in Article 13(2) of the Universal Declaration of Human Rights [hereafter: UDHR], in Article 12(2) of the ICCPR and in Article 2(2) of the fourth Protocol to the ECHR.³⁵ Besides, individuals have been granted the right seek asylum, as laid down in Article 14 UDHR.³⁶ This component of the right to asylum is recognised as part of customary international law, thus generally binding on all states.³⁷ It concerns the right to seek asylum that an individual has vis-à-vis his or her country of origin on the basis that a state does not ‘own’ its citizens.³⁸ Thus, an individual must be able to leave his or her country of origin in order to seek asylum. Furthermore, it is sometimes claimed that individuals possess the right to be granted asylum. Still, it is generally accepted that, under contemporary international law, an individual has no enforceable right vis-à-vis the state of refuge to be granted asylum.³⁹ Rather states are under the duty not to obstruct the individual’s right to seek asylum.⁴⁰ Although the Convention and the Protocol entail the right to be

³² Roman Boed, ‘The State of the Right of Asylum in International Law’ (1994) 5 *Duke Journal of Comparative & International Law* 4; UN General Assembly, *Universal Declaration of Human Rights* (10 December 1948), 217 A (III) art 1(3) and 14(1); Hersch Lauterpacht, ‘The Universal Declaration of Human Rights’ (1948) *British Yearbook of International Law* 354-373; Convention on Territorial Asylum (adopted 28 March 1954, entered into force 29 December 1954) OASTS 19; David A. Martin, ‘Reforming Asylum Adjudication: On Navigating the Coast of Bohemia’ (1990) 138 *University of Pennsylvania Law Review* 1247-1253 and 1256.

³³ David A. Martin, ‘Reforming Asylum Adjudication: On Navigating the Coast of Bohemia’ (1990) 138 *University of Pennsylvania Law Review* 1247-1253 and 1256; Roman Boed, ‘The State of the Right of Asylum in International Law’ (1994) 5 *Duke Journal of Comparative & International Law* 4.

³⁴ M Rafiqul Islam and Md Jahid Hossain Bhuiyan, *An introduction to international refugee law* (Martinus Nijhoff, Leiden 2013) 156.

³⁵ Commissioner for Human Rights of the Council of Europe, ‘The right to leave a country’ (Issue paper) (October 2013) 5-21; P Boeles, Maarten den Heijer and others, *European Migration Law* (2nd edn Intersentia, Cambridge 2014) 15; Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 13(2) <<http://www.refworld.org/docid/3ae6b3712c.html>> accessed 7 April 2016; UN General Assembly, *International Covenant on Civil and Political Rights* (16 December 1966), United Nations, Treaty Series, vol. 999 art 12(2); Council of Europe, *Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto*, 16 September 1963, ETS 46 art 2(2).

³⁶ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 14 <<http://www.refworld.org/docid/3ae6b3712c.html>> accessed 7 April 2016; Article 14 of the UDHR only provides a right to seek and to enjoy asylum, not explicitly a right to asylum. Moreover, the UDHR is a General Assembly Resolution and therefore not automatically legally binding. Parts of the UDHR reflect customary international law or have been subsumed within rights in the ICCPR or ICESCR, however, Article 14 UDHR was not included in either Covenant and state practice is not sufficiently consistent to suggest that Article 14 is a part of customary international law.

³⁷ Roman Boed, ‘The State of the Right of Asylum in International Law’ (1994) 5 *Duke Journal of Comparative & International Law* 6; G Almeida Ferreira, ‘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’ (LL.M. Thesis, Tilburg University 2015) 9-10.

³⁸ Roman Boed, ‘The State of the Right of Asylum in International Law’ (1994) 5 *Duke Journal of Comparative & International Law* 6; Maria Tereza Gil-Bazo, ‘Asylum as a General Principle of International Law’ (2015) 27 *International Journal of Refugee Law* 3-7; G Almeida Ferreira, ‘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’ (LL.M. Thesis, Tilburg University 2015) 9-10.

³⁹ Felice Morgenstern, ‘The Right of Asylum’, (1949) 26 *British Yearbook of International Law* 327; Roman Boed, ‘The State of the Right of Asylum in International Law’ (1994) 5 *Duke Journal of Comparative & International Law* 8-9; G Almeida Ferreira, ‘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’ (LL.M. Thesis, Tilburg University 2015) 10.

⁴⁰ M Rafiqul Islam and Md Jahid Hossain Bhuiyan, *An introduction to international refugee law* (Martinus Nijhoff, Leiden 2013) 153.

protected from refoulement, *i.e.* the right of a refugee not to be returned to his or her country of origin, or any other country for that matter, where he or she is at risk of being subjected to persecution, it is not as far-reaching as a right to asylum.⁴¹ Whereas the principle of non-refoulement is understood as the duty of a state not to return a person to a country in which he or she will be persecuted, asylum encompasses “admission, residence and protection.”⁴²

From the aforementioned, it is clear that international law does not give individuals an enforceable right to be granted asylum in the state of refuge. International provisions do, however, guarantee the right of states to give asylum under the exercise of their sovereignty, as well as the individual right to leave his or her country or origin in order to seek asylum. Yet, the EU has taken a step further by explicitly recognising the ‘right to asylum’ in the Charter which is binding upon all EU Member States and directly applicable in national legal orders.⁴³ 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’).”⁴⁴

The wording contained in Article 18 sets forth a ‘right to asylum’, instead of a right limited to ‘to seek’ or ‘to enjoy’ asylum. The right to asylum contained in Article 18 should 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”.⁴⁵ This is further highlighted by the object and purpose of the Charter, namely the protection of individually held rights.⁴⁶ So, in accordance with the Charter, the right to asylum is an enforceable right of individuals to be granted international protection when they satisfy the requirements prescribed in EU law. Within the context of the subject of this thesis, Article 18 should be read in conjunction with Article 21 of the Charter. Article 21 states that

⁴¹ David A. Martin, ‘Reforming Asylum Adjudication: On Navigating the Coast of Bohemia’ (1990) 138 *University of Pennsylvania Law Review* 1254-1256; Roman Boed, ‘The State of the Right of Asylum in International Law’ (1994) 5 *Duke Journal of Comparative & International Law* 16; G Almeida Ferreira, ‘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’ (LL.M. Thesis, Tilburg University 2015) 10; Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 art 33 (Refugee Convention) <<http://www.refworld.org/docid/3be01b964.html>> accessed 1 May 2016.

⁴² Paul Weis, ‘The United Nations Declaration on Territorial Asylum’ (1992) 30 *Canadian Yearbook of International Law* 166; Roman Boed, ‘The State of the Right of Asylum in International Law’ (1994) 5 *Duke Journal of Comparative & International Law* 16; G Almeida Ferreira, ‘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’ (LL.M. Thesis, Tilburg University 2015) 9-10.

⁴³ European Union, *Charter of Fundamental Rights of the European Union*, (26 October 2012), 2012/C 326/391; 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 *Refugee Survey Quarterly* 51.

⁴⁴ European Union, *Charter of Fundamental Rights of the European Union*, (26 October 2012), 2012/C 326/391 art 18.

⁴⁵ 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 *Refugee Survey Quarterly* 37-38; G Almeida Ferreira, ‘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’ (LL.M. Thesis, Tilburg University 2015) 11.

⁴⁶ William Thomas Worster, ‘The Contemporary International Law Status of the Right to Receive Asylum’ (uneditd) (2014) 26 *International Journal of Refugee Law* 6-7; A Zimmermann, J Dörschner and F Machts, *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP, Oxford 2011) 130.

“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.”⁴⁷

Combined, these provisions extend a high level of protection for LGBTI asylum seekers, for EU Member States are prohibited from discriminating on the basis of sexual orientation and/or gender identity when they apply EU law, including those laws regulating asylum. So, as far as the nature of the right to asylum in the EU is concerned, LGBTI asylum seekers 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.⁴⁸ At the same time, EU asylum legislation must be in accordance with the Convention and the 1967 Protocol [hereafter: “Protocol”] as well as ‘other relevant treaties’.⁴⁹ Now that it is established that LGBTI individuals are entitled to an enforceable right to asylum in the EU, it is necessary to determine the legal framework used for assessing their asylum applications.

2.3 International refugee law

The right to asylum made its first appearance in 1948, with the UDHR.⁵⁰ In this influential though not legally binding international declaration, it is clearly stated that “[e]veryone has the right to seek and to enjoy in other countries asylum from persecution”. A few years later, in 1951, and being grounded in Article 14 UDHR, the Convention was adopted at the UN Conference in Geneva and entered into force on 22 April 1954.⁵¹ The Convention was originally limited in influence, as its objective was to protect persons fleeing events occurring before 1 January 1951 as a result of World War II and within Europe. Yet, in 1967, with the adoption of the New York Protocol [hereafter: “Protocol”], the Convention’s temporal and geographic limitations were eliminated and, as a consequence, the Convention was given a universal coverage.⁵² It is these two instruments that comprise the cornerstone of the international refugee protection system and provide the pillars of domestic protection mechanisms for refugees and asylum seekers, including those persecuted for reasons of their sexual orientation.⁵³ Their importance becomes clear from the preamble of the

⁴⁷ European Union, *Charter of Fundamental Rights of the European Union*, (26 October 2012), 2012/C 326/391 art 21.

⁴⁸ G Almeida Ferreira, ‘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’ (LL.M. Thesis, Tilburg University 2015) 11.

⁴⁹ European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 26 October 2012, OJ L 326/47 art 78(1) <<http://www.refworld.org/docid/52303e8d4.html>> accessed 11 May 2016

⁵⁰ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 14 <<http://www.refworld.org/docid/3ae6b3712c.html>> accessed 7 April 2016.

⁵¹ G Oikonomou, ‘The development of the Common European Asylum System and the Greek example’ (LL.M. Thesis Tilburg University 2011) 15. Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) art 14 <<http://www.refworld.org/docid/3ae6b3712c.html>> accessed 7 April 2016.

⁵² UN General Assembly, *Protocol Relating to the Status of Refugees* (31 January 1967), United Nations, Treaty Series 606, 267 art 1(1); Introductory note to the Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137; G Oikonomou, ‘The development of the Common European Asylum System and the Greek example’ (LL.M. Thesis Tilburg University 2011) 15; Janna Wessels, ‘Sexual orientation in refugee status determination’ Refugee Studies Centre working paper no. 73 3-4 <<http://www.refworld.org/pdfid/4ebb93182.pdf>> accessed 7 May 2016; G Almeida Ferreira, ‘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’ (LL.M. Thesis, Tilburg University 2015) 2; E Declerck, ‘The non-refoulement principle and the possible development of a human right to asylum for LGBTI’ (LL.M. Thesis, Ghent University 2015) 6.

⁵³ Janna Wessels, ‘Sexual orientation in refugee status determination’ Refugee Studies Centre working paper no. 73 3-4 <<http://www.refworld.org/pdfid/4ebb93182.pdf>> accessed 7 May 2016; G Almeida Ferreira, ‘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’ (LL.M. Thesis, Tilburg University 2015) 2; Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as

recast QD, which states that “the [...] Convention and the Protocol provide the cornerstone of the international legal regime for the protection of refugees”.⁵⁴ This is further acknowledged by the fact that, to date, 148 states, including the Netherlands and all other EU Member States, are party to the Convention, its Protocol or both, thereby making it one of the most widely accepted treaties.⁵⁵ Moreover, Article 78 of the Treaty on the Functioning of the European Union [hereafter: “TFEU”], explicitly recognises that the CEAS must be in accordance with the Convention and other relevant treaties.⁵⁶ With this, it is established that the Convention and other relevant treaties of international refugee law are the legally binding framework for the EU asylum policy.⁵⁷

When the Convention and its Protocol were drafted, the protection of sexual minorities was not an issue of great importance and as a consequence, there is no provision on sexual orientation and/or gender identity in the Convention.⁵⁸ Nevertheless, the Convention remains an important source for international standards on LGBTI asylum applications, particularly due to the fact that States parties give meaning to – and interpret their obligations under – the Convention differently.⁵⁹ Furthermore, the relevance of the Convention and the Protocol is widely recognised, as States parties issued a Declaration reaffirming their commitment to the Convention and the Protocol.⁶⁰

For LGBTI asylum seekers, the Convention is important for three reasons. Firstly, it endorses the only internationally agreed definition of the criteria, that, if met, warrants the granting of refugee status and international protection.⁶¹ The binding definition of the term ‘refugee’ is at the core of

beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9 recital 4; P Boeles, Maarten den Heijer and others, *European Migration Law* (2nd edn Intersentia, Cambridge 2014) 293-294; Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) <<http://www.refworld.org/docid/3be01b964.html>> accessed 1 May 2016; UN General Assembly, Protocol Relating to the Status of Refugees (31 January 1967), UNTS 606 267 <<http://www.refworld.org/docid/3ae6b3ae4.html>> accessed 6 May 2016; A Wollmer, ‘International refugee law and the common European asylum system: Conformity or human rights violation?’ (LL.M. Thesis, Uppsala University 2014) 12; Directorate-General for external policies of the Union, ‘Current challenges for international refugee law, with a focus on EU policies and EU co-operation with the UNHCR’ (policy paper) (December 2013) EXPO/B/DROI/2012/15 6 <[http://www.europarl.europa.eu/RegData/etudes/note/join/2013/433711/EXPO-DROI_NT\(2013\)433711_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2013/433711/EXPO-DROI_NT(2013)433711_EN.pdf)> accessed 12 July 2016.

⁵⁴ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9 recital 4.

⁵⁵ UN High Commissioner for Refugees (UNHCR), ‘States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol’ (as of April 2015) 1 <<http://www.unhcr.org/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>> accessed 12 July 2016; E Declerck, ‘The non-refoulement principle and the possible development of a human right to asylum for LGBTI’ (LL.M. Thesis, Ghent University 2015) 6.

⁵⁶ D ter Telgte, ‘The accession of the EU to the ECHR to strengthen human rights protection within the Common European Asylum System: necessity or merely symbolic?’ (LL.M. Thesis, Utrecht University 2015) 12.

⁵⁷ Roland Bank, ‘The Potential and Limitations of the Court of Justice of the European Union in Shaping International Refugee Law’ (2015) 27 *International Journal of Refugee Law* 213-244.

⁵⁸ Janna Wessels, ‘Sexual orientation in refugee status determination’ Refugee Studies Centre working paper no. 73 3-4 <<http://www.refworld.org/pdfid/4ebb93182.pdf>> accessed 7 May 2016.

⁵⁹ James C. Hathaway, *The law of refugee status* (Toronto, Butterworths 1991) 3; G Almeida Ferreira, ‘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’ (LL.M. Thesis, Tilburg University 2015) 37-39; A Adofo, ‘Fleeing persecution: Asylum claims related to sexual orientation in the United Kingdom and the Netherlands’ (LL.M. Thesis, Tilburg University 2013) 20.

⁶⁰ Declaration of States parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, (16 January 2002) UN Doc. HCR/MMSP/2001/09. The Declaration was welcomed by the UN General Assembly in resolution A/RES/57/187, (18 December 2001) para 4; Introductory note to the Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

⁶¹ A Marcelle Reneman, ‘EU asylum procedures and the right to an effective remedy’ (LL.M. Dissertation, Leiden University 2013) 36; M Rafiqul Islam and Md Jahid Hossain Bhuiyan, *An introduction to international refugee law* (Martinus Nijhoff, Leiden 2013) 154;

a state's obligations under international law and is used as the basis for the definition contained in EU law.⁶² Its constituent elements will be examined into detail in the subsequent chapter. Secondly, the Convention is based on a number of fundamental principles, *inter alia*, the principles of non-discrimination and non-refoulement, and outlines the legal duties and obligations of the host-state. As to the principle of non-discrimination, states are obliged to apply Convention provisions without discrimination as to country of origin, race and religion.⁶³ Following developments in human rights law, the principle of non-discrimination is extended to age, disability, sex, sexual orientation and other grounds.⁶⁴ The principle of non-refoulement concerns the right not to be returned to the borders of the state where he or she fears persecution. This right is better known as the principle of non-refoulement and is laid down in Article 33(1) of the Convention. It reflects the commitment of the international community to ensure to all persons the enjoyment of human rights, such as the rights to life, freedom from torture and cruel, inhuman or degrading treatment or punishment, and to liberty and security of person. These and other rights are threatened when a refugee is returned to persecution.⁶⁵ While states are not under the obligation to grant asylum to refugees, they are bound by the principle of non-refoulement, which is currently the closest that an individual comes to a right to asylum in international law.⁶⁶ Thus, States parties must assess asylum applications before any action is taken to expel a person to his or her country of origin or to any intermediate country where there is a substantial risk that he or she will suffer onwards expulsion to persecution. The principle of non-refoulement is laid down in the Convention, but is also considered to be part of customary international law.⁶⁷ Thirdly, the Convention contains an extensive set of rights individuals are entitled to after being granted refugee status, such as the right to access to a court, the right to primary education, the right to work and a provision for documentation.⁶⁸ Despite its importance for LGBTI asylum seekers, the Convention does not clarify what type of procedures are to be adopted for assessing asylum applications, thereby leaving it to each State party to establish the procedure that it considers most appropriate. As a consequence, the asylum procedures adopted by states vary considerably.⁶⁹

2.4 The Common European Asylum System

As stated in the previous paragraph, the Convention and its Protocol constitute the cornerstone of the international legal regime for the protection of refugees. As a result, they have served as the

⁶² D ter Telgte, 'The accession of the EU to the ECHR to strengthen human rights protection within the Common European Asylum System: necessity or merely symbolic?' (LL.M. Thesis, Utrecht University 2015) 12; Joanna Lenart, 'Fortress Europe: Compliance of the Dublin II Regulation with the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2012) 28 *Utrecht Journal of International and European Law* 97; Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 1A (2) <<http://www.refworld.org/docid/3be01b964.html>> accessed 1 May 2016.

⁶³ Introductory note to the Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

⁶⁴ Introductory note to the Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

⁶⁵ UN High Commissioner for Refugees (UNHCR), *Note on the Principle of Non-Refoulement* (November 1997) <<http://www.refworld.org/docid/438c6d972.html>> accessed 17 June 2016.

⁶⁶ M Rafiqul Islam and Md Jahid Hossain Bhuiyan, *An introduction to international refugee law* (Martinus Nijhoff, Leiden 2013) 156; Roman Boed, 'The State of the Right of Asylum in International Law' (1994) 5 *Duke Journal of Comparative & International Law* 23.

⁶⁷ UN High Commissioner for Refugees (UNHCR), *Note on the Principle of Non-Refoulement* (November 1997) <<http://www.refworld.org/docid/438c6d972.html>> accessed 17 June 2016.

⁶⁸ Introductory note to the Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137.

⁶⁹ A Marcelle Reneman, 'EU asylum procedures and the right to an effective remedy' (LL.M. Dissertation, Leiden University 2013) 4-5; Michael Alexander, 'Refugee status determination conducted by UNHCR' (1999) 11 *IJRL* 254.

foundation of asylum legislation in the EU.⁷⁰ Before the creation of the CEAS, matters related to immigration and asylum were mainly arranged through bilateral or multilateral agreements by its Member States and third countries, hence, these matters were the exclusive competence of the Member States.⁷¹ This changed with the introduction of the Single European Act [hereafter: “SEA”] in 1986. The SEA introduced the term ‘internal market’, which encompasses “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured [...]”.⁷² In order to create the internal market, it was necessary to abolish the checks and controls on persons at the internal borders between Member States and to employ a system to handle the external frontiers.⁷³ This led to the Schengen Agreement and Convention of respectively 1985 and 1990, signed by France, Luxemburg, Germany, the Netherlands and Belgium. As a result of the adoption of the Schengen Agreement, the checks on persons at the internal borders were gradually abolished, yet, compensatory measures were implemented at the external borders, such as passport or visa controls.

Since the Schengen Agreement and Convention established the free movement of individuals within the territories of its States parties, asylum seekers were also able to 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 be granted asylum.⁷⁴ As a consequence, EU Member States were confronted with increasing numbers of asylum seekers, family migrants and illegally residing persons from third countries.⁷⁵ It was in this context, that Member States felt increasingly the urge to cooperate in matters of asylum and migration for a more effective policy of immigration control, which ultimately led to the creation of the CEAS.⁷⁶ However, it was not until the 1997 Treaty of Amsterdam that the EU (by that time the European Community) institutions were, for the first time, bestowed legal competences to adopt binding legal measures in the area of asylum and refugee protection.⁷⁷ This was set forth in Article 63 of the former Treaty of the European Community [hereafter: “TEC”], which is replaced by Article 78(1) TFEU.⁷⁸ The

⁷⁰ Athanassios Thakis, *Refugee Claims Based on Persecution Due to Sexual Orientation before the Court of Justice of the European Union* in Christina Akrivopoulou, *Protecting the Genetic Self from Biometric Threats* (Patra, Hellenic Open University and IGI Global 2015); P Boeles, Maarten den Heijer and others, *European Migration Law* (2nd edn Intersentia, Cambridge 2014) 295.

⁷¹ K Jadwiga Mierswa, ‘Is the Cornerstone of the Common European Asylum System crumbling? A Study on the Compliance of the Dublin II Regulation with human and fundamental Rights Provisions’ (LL.M. Thesis, University of Twente 2013) 12; G Oikonomou, ‘The development of the Common European Asylum System and the Greek example’ (LL.M. Thesis Tilburg University 2011) 15; Olga Ferguson Sidorenko, *The Common European Asylum System, Background, Current State of Affairs, Future Direction* (T.M.C. Asser Press, The Hague 2007) 2.

⁷² European Union, *Single European Act*, 1987 OJ L 169/1 (amending Treaty Establishing the European Economic Community (25 March 1957) 298 U.N.T.S. 11 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Axy0027>> accessed 1 June 2016.

⁷³ K Jadwiga Mierswa, ‘Is the Cornerstone of the Common European Asylum System crumbling? A Study on the Compliance of the Dublin II Regulation with human and fundamental Rights Provisions’ (LL.M. Thesis, University of Twente 2013) 13.

⁷⁴ G Almeida Ferreira, ‘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’ (LL.M. Thesis, Tilburg University 2015) 15-17.

⁷⁵ P Boeles, Maarten den Heijer and others, *European Migration Law* (2nd edn Intersentia, Cambridge 2014) 32-34.

⁷⁶ D ter Telgte, ‘The accession of the EU to the ECHR to strengthen human rights protection within the Common European Asylum System: necessity or merely symbolic?’ (LL.M. Thesis, Utrecht University 2015) 15; P Boeles, Maarten den Heijer and others, *European Migration Law* (2nd edn Intersentia, Cambridge 2014) 32; F Nicholson, *Challenges to Forging a Common European Asylum System*, in S. Peers and N. Rogers (ed), *EU Immigration and Asylum Law: Text and Commentary* (Martinus Nijhoff Publishers, Leiden 2006).

⁷⁷ P Boeles, Maarten den Heijer and others, *European Migration Law* (2nd edn Intersentia, Cambridge 2014) 245; Francesca Ippolito and Samantha Velluti, ‘The Recast Process of the EU Asylum System: A Balancing Act Between Efficiency and Fairness’ (2011) 30 *Refugee Survey Quarterly* 28.

⁷⁸ European Union, *Treaty Establishing the European Community (Consolidated Version)*, *Rome Treaty*, 25 March 1957 art 63; European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01 art 78.

CEAS rules are part of the legal order of the EU and, consequently, form an integral part of the legal systems of the EU Member States, which their courts are bound to apply.

After the adoption of the Treaty of Amsterdam and after the course for a CEAS had been set at the Tampere Summit of the European Council, a variety of Directives and Regulations were adopted, which together constitute the CEAS. The CEAS was built in two phases. The first phase was characterised by the adoption of instruments laying down minimum standards for asylum procedures and minimum standards for granting asylum. The second phase was aimed at restricting the discretion offered to Member States in order to arrive at a common asylum procedure and a uniform asylum status. Although Article 78 TFEU has given the EU the competence to harmonise asylum fully if it wishes, the Member States have as of yet been unable to agree on a fully integrated asylum system.

Whereas the main legal instruments of the current EU asylum *acquis*, for the purpose of assessing asylum claims based on sexual orientation, are the recast versions of the Qualification Directive, the Procedures Directive, the Reception Conditions Directive, the Eurodac Regulation and the Dublin III Regulation, the analysis contained in this thesis is limited to the first two Directives. Nevertheless, the other aforementioned Directive and Regulations are also relevant for LGBTI asylum seekers.

2.4.1 The (recast) Qualification Directive

The Qualification Directive [hereafter: “QD”] was adopted in 2004 and was applicable in the – by that time – 27 EU Member States, with the exception of Denmark, which opted-out of the QD.⁷⁹ Its purpose was to lay down minimum standards for the definition and content of refugee status and subsidiary protection in order to ensure that EU Member States apply common criteria for the identification of individuals genuinely in need of international protection, and, likewise, to ensure that a minimum level of benefits is available for these individuals in all Member States.⁸⁰ Furthermore, the QD defines the content of the right to asylum and contains the principle of non-refoulement, the substantive EU rights most frequently claimed by asylum seekers.⁸¹ The QD lies at the heart of European asylum law, since it lays down the conditions, drawn from Article 1A (2) of the Convention, as to who qualifies as a beneficiary of international protection and elaborates on which rights should be granted to these beneficiaries.⁸² These conditions are to guide Member States in the application of the Convention.⁸³ Compared to the Convention, the QD has made

⁷⁹ Council Directive (EC) 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12.

⁸⁰ Athanassios Thakis, *Refugee Claims Based on Persecution Due to Sexual Orientation before the Court of Justice of the European Union* in Christina Akrivopoulou, *Protecting the Genetic Self from Biometric Threats* (Patra, Hellenic Open University and IGI Global 2015); Council Directive (EC) 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12 recital 6; A Zimmermann, J Dörschner and F Machts, *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP, Oxford 2011) 131.

⁸¹ A Marcelle Reneman, ‘EU asylum procedures and the right to an effective remedy’ (LL.M. Dissertation, Leiden University 2013) 31.

⁸² Jonah Eaton, ‘The Internal Protection Alternative Under European Union Law: Examining the Recast Qualification Directive’ (2012) 24 *International Journal of Refugee Law* 766; D ter Telgte, ‘The accession of the EU to the ECHR to strengthen human rights protection within the Common European Asylum System: necessity or merely symbolic?’ (LL.M. Thesis, Utrecht University 2015) 20 and 41.

⁸³ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification

significant progress by including sexual orientation as a possible reason for persecution, rather than following the Convention's neutral approach.⁸⁴ As the recognition of persons genuinely in need of international protection as refugees is based on the QD, it is important to have uniform rules in place to extend asylum seekers the same chances to be granted asylum and the same protection throughout all EU Member States. Therefore, the recast QD was adopted in 2011, which is applicable in all EU Member States, except for Denmark, Ireland and the United Kingdom.

The recast QD rectified the deficiencies of its predecessor and strengthens the protection afforded to LGBTI individuals, thereby ensuring them a safer position within the CEAS. The recast QD aims to ensure that EU Member States apply "common criteria" for recognising persons genuinely in need of international protection as refugees, within the meaning of Article 1 of the Convention.⁸⁵ These criteria can be found in chapters II and III of the QD and will be examined into detail in the subsequent chapter. Compared to the original QD, it aims to go beyond establishing "minimum standards" for determining refugee status.⁸⁶ So, the recast QD can be seen as an important step for LGBTI asylum seekers. Nevertheless, Member States retain the right to employ more favourable standards for the qualification for refugee protection and the content thereof.⁸⁷ The QD and recast QD contain vague terms such as 'might' and 'depending on the circumstances', which provided Member States with a margin of appreciation in relation to the recognition of LGBTI individuals as members of a particular social group, hereby failing to achieve the necessary level of harmonisation.⁸⁸ Therefore, the improvements may be limited in effect.

2.4.2 The (recast) Procedures Directive

The Procedures Directive [hereafter: "PD"] looks to the way Member States shall assess asylum claims based on sexual orientation or gender identity. It is the first internationally agreed upon legal instrument that lays down a minimum framework on procedures for granting and withdrawing international protection.⁸⁹ These procedures must be fair and effective.⁹⁰ The PD was adopted in 2005 on the basis of Article 63(1)(d) TEC and was applicable to all Member States, except for Denmark, which opted-out of the PD.⁹¹ The PD applies to asylum applications made by non-EU

of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9 recital 23; P Boeles, Maarten den Heijer and others, *European Migration Law* (2nd edn Intersentia, Cambridge 2014) 293-294.

⁸⁴ Council Directive (EC) 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12 art 10(1)(d); A Adolfo, 'Fleeing persecution: Asylum claims related to sexual orientation in the United Kingdom and the Netherlands' (LL.M. Thesis, Tilburg University 2013) 28-29.

⁸⁵ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9 recitals 12 and 24; P Boeles, Maarten den Heijer and others, *European Migration Law* (2nd edn Intersentia, Cambridge 2014) 293-294; G Almeida Ferreira, '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' (LL.M. Thesis, Tilburg University 2015) 19-20.

⁸⁶ P Boeles, Maarten den Heijer and others, *European Migration Law* (2nd edn Intersentia, Cambridge 2014) 295.

⁸⁷ P Boeles, Maarten den Heijer and others, *European Migration Law* (2nd edn Intersentia, Cambridge 2014) 295.

⁸⁸ G Almeida Ferreira, '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' (LL.M. Thesis, Tilburg University 2015) 22-23.

⁸⁹ Council Directive (EC) 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status [2005] OJ L 326/13 art 1, art 19 and recital 34; P Boeles, Maarten den Heijer and others, *European Migration Law* (2nd edn Intersentia, Cambridge 2014) 275 and 285; A Marcelle Reneman, 'EU asylum procedures and the right to an effective remedy' (LL.M. Dissertation, Leiden University 2013) 36.

⁹⁰ Council of the European Union, *Presidency Conclusions of the Tampere European Council, 15-16 October 1999* (16 October 1999) para 14.

⁹¹ Council Directive (EC) 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for

citizens in the territory of the Member States and to the withdrawal of refugee status.⁹² Besides a number of general provisions, the PD contains a catalogue of important rights for asylum seekers concerning, *inter alia*, the impartial and objective assessment of asylum applications, the availability of free of charge information on legal and procedural matters, the right to a personal interview, the right to interpretation services and the right to remain in the Member State pending the examination of the asylum application, and obligations that may be imposed on asylum seekers.⁹³ Under the PD, provisions were formulated in a rather vague manner. Furthermore, the PD left wide discretion for Member States and allowed them to employ specific procedures, even if these went below the level of the guarantees in the PD.⁹⁴

So, as part of the second phase of the creation of the CEAS, the recast PD was adopted in 2013, which, like the recast QD, is applicable in all EU Member States, except for Denmark, Ireland and the United Kingdom.⁹⁵ It provides higher standards and encompasses provisions that specifically refer to ‘sexual orientation. An example of this can be found in recital 29, which states that

“[c]ertain applicants may be in need of special procedural guarantees due, *inter alia*, to their age, gender, **sexual orientation, gender identity**, disability, serious illness, mental 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. (**emphasis added**)”⁹⁶

Another development can be found in Article 15(3) of the recast PD, which emphasises that Member States must ensure that the person who conducts the asylum interview is competent to take into account the applicant’s personal and general circumstances, *inter alia*, his or her sexual orientation.⁹⁷ Despite the fact that the recast PD contains significantly higher standards compared to the original PD and grants less discretion to the Member States, it does not establish a ‘common asylum procedure’, for the procedural standards retain flexibility to accommodate particularities of national legal systems.⁹⁸ As demonstrated by the Fleeing Homophobia report, even though LGBTI asylum seekers’ right to asylum is fully recognised, the procedure for examining asylum applications based on sexual orientation is often in violation of international refugee law and human rights

Granting and Withdrawing Refugee Status [2005] OJ L 326/13 recital 34.

⁹² Council Directive (EC) 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status [2005] OJ L 326/13 art 2(b) and art 3(1).

⁹³ Council Directive (EC) 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status [2005] OJ L 326/13 art 7, art 8, art 10(1)(a)(b), art 11 and art 12.

⁹⁴ Examples of such provisions are Articles 12 and 15 of the PD; A Marcelle Reneman, ‘EU asylum procedures and the right to an effective remedy’ (LL.M. Dissertation, Leiden University 2013) 40-41.

⁹⁵ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60 recitals 58 and 59.

⁹⁶ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60 recital 29.

⁹⁷ G Almeida Ferreira, ‘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’ (LL.M. Thesis, Tilburg University 2015) 15-16; Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60 art 15(3).

⁹⁸ P Boeles, Maarten den Heijer and others, *European Migration Law* (2nd edn Intersentia, Cambridge 2014) 275-276.

standards.⁹⁹ In order to find out if this applies to the Dutch asylum practice, it will be reviewed into detail in Chapter 4.

2.5 The relationship between the CEAS and the 1951 Refugee Convention

The Netherlands, and EU Member States in general, are bound by both the Convention as well as the legal instruments shaping the CEAS when assessing matters of asylum. This has been the case since the 1997 Treaty of Amsterdam, which provided EU institutions with the competence to adopt binding legal measures in the area of asylum and refugee protection.¹⁰⁰ However, already before the adoption of the Treaty of Amsterdam, EU Member States were States parties to the Convention and the Protocol.¹⁰¹ As opposed to its Member States, neither the EU itself nor its institutions are a party to the Convention and, as a consequence, the EU is not bound by it as a matter of international law.¹⁰² In this respect, Article 6(3) of the Treaty on European Union [hereafter: “TEU”] lays down that “[f]undamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law”.¹⁰³ It is generally accepted that the rights enshrined in the Convention form part of this body of fundamental rights and are considered to be general principles of EU law.¹⁰⁴

Against this background, the inclusion of Article 78(1) TFEU is significant. Whereas this provision enables EU institutions to take legislative measures to establish a CEAS, at the same time, it stipulates that the EU's asylum policy must be in accordance with the Convention and other relevant treaties.¹⁰⁵ This provision expressly authorises the influence of the Convention as an external legal source on EU asylum legislation and makes clear that any legislative instrument created by the EU must be in compliance with the Convention, thereby describing the Convention

⁹⁹ Sabine Jansen en Thomas Spijkerboer, ‘Fleeing homophobia: Asylum claims related to sexual orientation and gender identity in Europe’ (September 2011) 7-10; G Almeida Ferreira, ‘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’ (LL.M. Thesis, Tilburg University 2015) 24.

¹⁰⁰ Janna Wessels, ‘Sexual orientation in refugee status determination’ Refugee Studies Centre working paper no. 73 3-4 <<http://www.refworld.org/pdfid/4ebb93182.pdf>> accessed 1 May 2016; Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) <<http://www.refworld.org/docid/3be01b964.html>> accessed 1 May 2016; UN General Assembly, Protocol Relating to the Status of Refugees (31 January 1967), UNTS 606 267 <<http://www.refworld.org/docid/3ae6b3ae4.html>> accessed 1 May 2016; James C. Hathaway, *The law of refugee status* (Toronto, Butterworths 1991) 6; G Ku Wei Bin, ‘No Freedom in a Closet: The Persistence of Discretion Reasoning in the Refugee Status Determination Process or Lesbian, Gay, and Bisexual Asylum Applications to the European Union’ (LL.M. Thesis, Lund University 2014) 9.

¹⁰¹ Janna Wessels, ‘Sexual orientation in refugee status determination’ Refugee Studies Centre working paper no. 73 3-4 <<http://www.refworld.org/pdfid/4ebb93182.pdf>> accessed 1 May 2016; Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) <<http://www.refworld.org/docid/3be01b964.html>> accessed 1 May 2016; UN General Assembly, Protocol Relating to the Status of Refugees (31 January 1967), UNTS 606 267 <<http://www.refworld.org/docid/3ae6b3ae4.html>> accessed 1 May 2016; James C. Hathaway, *The law of refugee status* (Toronto, Butterworths 1991) 6; G Ku Wei Bin, ‘No Freedom in a Closet: The Persistence of Discretion Reasoning in the Refugee Status Determination Process or Lesbian, Gay, and Bisexual Asylum Applications to the European Union’ (LL.M. Thesis, Lund University 2014) 9.

¹⁰² K Hailbronner, D Thym and others, *EU immigration and asylum law: A commentary* (2nd edn C.H. Beck/Hart/Nomos, München 2016) 1028-1030 <<http://odysseus-network.eu/wp-content/uploads/2016/04/HAILBRONNER-THYM-legal-framework-asylum.pdf>> accessed 21 May 2016.

¹⁰³ European Union, *Consolidated version of the Treaty on European Union* (26 October 2012), 2012/C 326/01 art 6(3).

¹⁰⁴ A Zimmermann, J Dörschner and F Machts, *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP, Oxford 2011) 135.

¹⁰⁵ European Union, *Consolidated version of the Treaty on the Functioning of the European Union* (13 December 2007), 2008/C 115/01 art 78(1) <<http://www.refworld.org/docid/4b17a07e2.html>> accessed 24 May 2016.

as a normative parameter that can be invoked to challenge the legitimacy of secondary EU law.¹⁰⁶ In case EU asylum legislation deviates from the Convention's content, EU law must be interpreted in accordance with the Convention.¹⁰⁷

2.6 Human rights standards: the ECHR and the Charter

While EU asylum legislation has to be interpreted in the light of the Convention, at the same time both the Convention and the EU asylum provisions are to be interpreted and applied in conformity with the legal instruments protecting fundamental rights in the EU, *i.e.* the ECHR and the Charter. On the one hand, this human rights framework identifies violations of LGBTI individuals' fundamental rights and lays down states' obligations in this regard. On the other hand, human rights courts have examined specific cases of LGBTI asylum seekers.¹⁰⁸

The ECHR entered into force in 1953 and, in combination with its Protocols, contains a set of civil and political rights that apply to every individual within the jurisdiction of the States party to it, irrespective of that individual's nationality or legal status.¹⁰⁹ It is to provide for an independent judicial process at the ECtHR which can issue binding decisions as to whether there has been a breach of the ECHR by a State party to it. Whereas the ECHR does not contain an explicit reference to the right to asylum, it should be regarded as a 'relevant treaty' within the meaning of Article 78 TFEU.¹¹⁰ This is particularly due to the fact that Article 3 ECHR contains by far the best developed prohibition on refoulement, thereby offering protection to asylum seekers who are threatened with extradition, expulsion or deportation if this would expose them to ill-treatment.¹¹¹ Besides the ECHR, the Charter is also a relevant instrument for the protection of human rights in the EU. Since the entry into force of the Lisbon Treaty in 2009, the Charter became legally binding on both EU institutions and EU Member States when implementing EU law.¹¹² Various rights included in the ECHR can also be found in the Charter, such as the prohibition of torture and the right to respect for private life. Furthermore, the Charter contains economic and social rights. It is the task of the CJEU to ensure that the Charter is applied and interpreted correctly by EU institutions and its Member States. It does so by means of the preliminary reference procedure and by scrutinising the legality of acts through actions for annulment.¹¹³ The role of the CJEU in

¹⁰⁶ Claudia Matera, 'Another parochial decision? The Common European Asylum System at the crossroad between IHL and refugee law in Diakité' <<http://www.qil-qdi.org/another-parochial-decision-the-common-european-asylum-system-at-the-crossroad-between-ihl-and-refugee-law-in-diakite/>> accessed 30 May 2016; K Hailbronner, D Thym and others, *EU immigration and asylum law: A commentary* (2nd edn C.H. Beck/Hart/Nomos, München 2016) 1028-1030 <<http://odysseus-network.eu/wp-content/uploads/2016/04/HAILBRONNER-THYM-legal-framework-asylum.pdf>> accessed 21 May 2016.

¹⁰⁷ Hemme Battjes, *Europees asielrecht en zijn verbinding tot internationaal recht* (Summary) 697 <dare.ubvu.vu.nl/bitstream/1871/9779/2/Samenvatting.pdf> accessed 10 July 2016.

¹⁰⁸ G Almeida Ferreira, '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' (LL.M. Thesis, Tilburg University 2015) 45.

¹⁰⁹ D Moeckli, S Shah and others, *International Human Rights Law* (OUP, Oxford 2014) 420; A Marcelle Reneman, 'EU asylum procedures and the right to an effective remedy' (LL.M. Dissertation, Leiden University 2013) 57-58.

¹¹⁰ A Marcelle Reneman, 'EU asylum procedures and the right to an effective remedy' (LL.M. Dissertation, Leiden University 2013) 57-58.

¹¹¹ A Adofo, 'Fleeing persecution: Asylum claims related to sexual orientation in the United Kingdom and the Netherlands' (LL.M. Thesis, Tilburg University 2013) 22.

¹¹² Directorate-General for external policies of the Union, 'Current challenges for international refugee law, with a focus on EU policies and EU co-operation with the UNHCR' (policy paper) (December 2013) EXPO/B/DROI/2012/15 8-9 <[http://www.europarl.europa.eu/RegData/etudes/note/join/2013/433711/EXPO-DROI_NT\(2013\)433711_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/note/join/2013/433711/EXPO-DROI_NT(2013)433711_EN.pdf)> accessed 12 July 2016; European Union, *Charter of Fundamental Rights of the European Union*, (26 October 2012), 2012/C 326/391 art 51(1); European Union, *Consolidated version of the Treaty on European Union* (26 October 2012), 2012/C 326/01 art 6(1).

¹¹³ European Union, *Consolidated version of the Treaty on the Functioning of the European Union* (13 December 2007), 2008/C 115/01 art 263-265 and 267 <<http://www.refworld.org/docid/4b17a07e2.html>> accessed 24 May 2016.

shaping the Dutch asylum policy and practice as regards asylum applications lodged by LGBTI individuals will be discussed in chapter 5.

2.7 The Dutch legal system and its relationship with higher norms

The Dutch legal system has a monist character in which, put briefly, international law automatically, *i.e.* without having to be transposed, is part of the domestic legal system.¹¹⁴ This system is based on articles 93 and 94 of the Dutch Constitution. According to these provisions, Dutch courts may apply both written and unwritten international law and must give precedence to apply self-executing international provisions over national legal rules.¹¹⁵ Concerning EU law, as was decided by the CJEU, the EU has its own legal order, which became an integral part of the legal systems of the EU Member States, and which their courts are bound to apply.¹¹⁶ There is no discretion for national law as to the manner in which EU law affects national law.

Aliens legislation in the Netherlands has a multi-layered structure. Rules are laid down in the Aliens Act 2000, which contains many delegating and optional provisions; the Aliens Decree, which is a General Administrative Order; the Aliens Regulation, which is a Ministerial regulation; and the Aliens Circular, which contains policy rules.¹¹⁷ Yet, the most relevant legislative act is the Aliens Act 2000. This Act sets forth the conditions that apply with regard to the entry and admission of foreign nationals to the Netherlands, including the asylum procedure, and for the removal of foreign nationals who do not have any right of residence in the Netherlands.

2.8 Concluding remarks

All in all, it is generally accepted in current international law that the ‘right to asylum’ consists of a myriad of constituent rights, none of which on their own amount to a right to asylum. These rights include the right of a state to grant asylum, the right of an individual to seek asylum and the right of an individual to be granted asylum. Yet, there is no freestanding right to asylum in international law. The Charter, in its turn, has made significant progress by introducing an individual and enforceable right to asylum. As a consequence, LGBTI asylum seekers are entitled to a right to be granted asylum, without discrimination due to their sexual orientation or gender identity, as long as they meet the requirements established by EU law.¹¹⁸ Moreover, EU asylum law must be in line with the Convention and other relevant treaties.¹¹⁹

Within the context of this thesis, the obligations for the Netherlands with respect to asylum applications lodged by LGBTI individuals are governed by a complex body of legislation. First of all, the Netherlands is a State party to the Convention and its Protocol, the two instruments that comprise the cornerstone for refugee protection at the international level. It is these two instruments that served as the foundation of the CEAS. This set of rules is part of the EU’s legal

¹¹⁴ F Stronk and E van der Linden, *Judicial lawmaking and administrative law* (Intersentia, Oxford 2005) 140.

¹¹⁵ F Stronk and E van der Linden, *Judicial lawmaking and administrative law* (Intersentia, Oxford 2005) 140.

¹¹⁶ P Boeles, Maarten den Heijer and others, *European Migration Law* (2nd edn Intersentia, Cambridge 2014) 23; Case 26/62 *Van Gend en Loos* [1963] ECR 1 12; Case 6/64 *Costa Enel* [1964] ECR 593.

¹¹⁷ A Böcker, ‘The multi-layered structure of Dutch alien legislation: An historical and comparative analysis’ (2013).

¹¹⁸ G Almeida Ferreira, ‘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’ (LL.M. Thesis, Tilburg University 2015) 11.

¹¹⁹ European Union, *Consolidated version of the Treaty on the Functioning of the European Union* (13 December 2007), 2008/C 115/01 art 78(1) <<http://www.refworld.org/docid/4b17a07e2.html>> accessed 24 May 2016.

order and, consequently, forms an integral part of the legal systems of the EU Member States, which their courts are bound to apply. So, when dealing with matters of asylum, the Netherlands is bound by EU law, and at the same time, it has to adhere to its obligations under the Convention and Protocol directly as well as indirectly through EU law which has to be in line with the Convention. Moreover, the ECHR and the Charter represent a human rights framework for the EU and its Member States, within which asylum legislation shall be applied.

3. SEXUAL ORIENTATION AS A GROUND FOR REFUGEE STATUS?

3.1 Introduction

Now that the legal framework for assessing asylum applications based on sexual orientation in the Netherlands has been outlined, this chapter proceeds by having a closer look at the substantive requirements LGBTI asylum seekers have to satisfy in order to acquire refugee status. These requirements are stipulated in Article 1A (2) of the Convention, which is the point of departure in this chapter. The author of this thesis has chosen this approach, because refugee protection in the EU and its Member States is primarily based on the Convention.¹²⁰ Article 1A (2) states that the term ‘refugee’ shall apply to any person who:

“[...] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”¹²¹

Article 1A (2) provides for a comprehensive definition of the term ‘refugee’ as it is to be understood within the meaning of the Convention, without any restriction to certain ethnic, social or religious groups, and outlines the eligibility criteria that must be satisfied for an asylum seeker to qualify as a refugee under the Convention.¹²² It is important to acknowledge that this provision does not constitute an individual’s refugee status, but merely declares the individual concerned to be a refugee from the moment when he or she fulfils the conditions contained in the refugee definition.¹²³ From this it is apparent that a certain threshold must befall an asylum seeker before international protection is triggered and therefore not all asylum seekers who suffer harm can be refugees simply by seeking asylum in another country.¹²⁴ For reasons of having a better insight into the criteria and finding out what this threshold constitutes, the refugee definition will be broken down into five elements, namely: having (1) a well founded fear of (2) persecution, (3) based on (one of) the reasons specified above, while (4) being outside of the country of nationality or former

¹²⁰ P Boeles, Maarten den Heijer and others, *European Migration Law* (2nd edn Intersentia, Cambridge 2014) 295; James C. Hathaway, *The law of refugee status* (Toronto, Butterworths 1991) 6; Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9 recital 4.

¹²¹ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 1A (2) <<http://www.refworld.org/docid/3be01b964.html>> accessed 1 May 2016.

¹²² UN High Commissioner for Refugees (UNHCR), *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis* (1990) 5-9 <<http://www.refworld.org/docid/53e1dd114.html>> accessed 1 May 2016; A Zimmermann, J Dörschner and F Machts, *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP, Oxford 2011) 251-252; Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 1A <<http://www.refworld.org/docid/3be01b964.html>> accessed 1 May 2016.

¹²³ UN High Commissioner for Refugees (UNHCR), *Handbook 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 para 28; E Declerck, ‘The non-refoulement principle and the possible development of a human right to asylum for LGBTI’ (LL.M. Thesis, Ghent University 2015) 9.

¹²⁴ G Ku Wei Bin, ‘No Freedom in a Closet: The Persistence of Discretion Reasoning in the Refugee Status Determination Process of Lesbian, Gay, and Bisexual Asylum Applications to the European Union’ (LL.M. Thesis, Lund University 2014) 9.

habitual residence, which is evidenced by an (5) unwillingness or inability to return to that country.¹²⁵ The following paragraphs will consider these elements one by one into detail with respect to their application to LGBTI asylum seekers, compare them to the provisions contained in the recast QD and review to what extent these elements are incorporated in the Dutch asylum policy. The assessment will be performed by means of the first sub-question, which is central to this chapter:

“What are the requirements that LGBTI asylum seekers have to meet for acquiring refugee status, according to the international legal framework, and to what extent are these requirements incorporated in the Dutch legal framework?”

3.2 The notion of a ‘well-founded fear’

The notion of ‘having a well-founded fear’ of being persecuted is the key phrase concerning the determination of refugee status.¹²⁶ Having a well-founded fear implicates that not all LGBTI asylum seekers qualify as refugees as only those involuntary migrants who are able to demonstrate a present or prospective genuine risk of being persecuted, which is not insubstantial or far-fetched, irrespective of the extent or nature of mistreatment that they have suffered in the past, are entitled to refugee status.¹²⁷ Such fear refers not only to persons who have actually been persecuted in the past, but also to those who risk being persecuted in the future.¹²⁸ Whereas neither the Convention nor the recast QD elaborate upon the level of risk required, the CJEU has set the standard at ‘the reasonable possibility that the individual concerned will be subject to acts of persecution’.¹²⁹ As the exact meaning of the phrase ‘well-founded fear’ is not sufficiently clear, its constituent elements will be analysed into detail hereafter by means of the two approaches developed in academic writings and case law: the combined (subjective-objective) approach and the objective approach.

¹²⁵ A Zimmermann, J Dörschner and F Machts, *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP, Oxford 2011) 251.

¹²⁶ UN High Commissioner for Refugees (UNHCR), *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis* (1990) 5-9 <<http://www.refworld.org/docid/53e1dd114.html>> accessed 1 May 2016; UN High Commissioner for Refugees (UNHCR), *Handbook 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 para 37; UN High Commissioner for Refugees (UNHCR), *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* (April 2001) para 11 <<http://www.refworld.org/docid/3b20a3914.html>> accessed 1 May 2016; P Boeles, Maarten den Heijer and others, *European Migration Law* (2nd edn Intersentia, Cambridge 2014) 299.

¹²⁷ Gina Clayton, *Textbook on immigration and asylum law* (Oxford, OUP 2012) 463; Guy S Goodwin-Gill and Jane McAdam, *The refugee in international law* (3rd edn Oxford, OUP 2007) 92; James C. Hathaway, *The law of refugee status* (Toronto, Butterworths 1991) 6; G Ku Wei Bin, ‘No Freedom in a Closet: The Persistence of Discretion Reasoning in the Refugee Status Determination Process for Lesbian, Gay, and Bisexual Asylum Applications to the European Union’ (LL.M. Thesis, Lund University 2014) 10-11; P Boeles, Maarten den Heijer and others, *European Migration Law* (2nd edn Intersentia, Cambridge 2014) 299.

¹²⁸ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, October 2012, HCR/GIP/12/01 para 18; H Tran, ‘Homoseksuele asielzoekers in de Nederlandse Asielprocedure’ (LL.M. Thesis, Tilburg University 2012) 8-9; Thomas Spijkerboer and Ben Vermeulen, *Vluchtelingenrecht* (1st edn Ars Aequi Libri, Nijmegen 2005) 29.

¹²⁹ P Boeles, Maarten den Heijer and others, *European Migration Law* (2nd edn Intersentia, Cambridge 2014) 299; 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 para 42; Case C-71/11 and C99/11 *Y and Z v Bundesrepublik Deutschland* (CJEU 5 September 2012) para 76.

3.2.1 The combined (subjective-objective) approach

As to the combined approach, favoured by the UNHCR, the UNHCR Handbook states that the term ‘well-founded fear’ consists of both an objective as well as a subjective element.¹³⁰ The word ‘fear’ encompasses the subjective part of the definition, namely the frame of mind of the person applying for refugee status and can be defined as “the emotion of pain or uneasiness caused by the sense of impending danger, or by the prospect of some possible evil”.¹³¹ In order to assess the subjective element, the personal and family background of the asylum seeker, his own interpretation of the situation, and his personal experiences need to be taken into account.¹³² The refugee definition was strengthened by adding an objective condition, namely that the fear needs to be ‘well-founded’.¹³³ This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation and therefore, both elements need to be taken into consideration.¹³⁴ In accordance with the ordinary meaning given to the term, ‘well-founded’ can be interpreted as an asylum seeker’s reaction to the conditions in his or her country of origin, and requires that the fear must be based on reasonable grounds.¹³⁵ The indicators for demonstrating that a fear of persecution is objectively well-founded, include background country material, such as human rights statistics, the legal framework in place in the country of origin and the efficacy of its protection mechanisms.¹³⁶ Yet,

¹³⁰ UN High Commissioner for Refugees (UNHCR), *Handbook 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 para 38 <<http://www.refworld.org/docid/4f33c8d92.html>> accessed 1 May 2016; A Zimmermann, J Dörschner and F Machts, *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP, Oxford 2011) 338-339; Muhammed Çaprak, ‘Subjectivity of “well-founded fear of being persecuted” criteria as a key factor for determining the refugee status’ (2015) 1 *International Journal of Legal Progress* 4-5; T Spijkerboer and B Vermeulen, *Vluchtelingenrecht* (1st edn Ars Aequi Libri, Nijmegen 2005) 28-29.

¹³¹ H Tran, ‘Homoseksuele asielzoekers in de Nederlandse Asielprocedure’ (LL.M. Thesis, Tilburg University 2012) 8; Cambridge Dictionaries Online <<http://dictionary.cambridge.org/dictionary/english/fear>> accessed 2 May 2016; A Zimmermann, J Dörschner and F Machts, *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP, Oxford 2011) 336-337; Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 1A <<http://www.refworld.org/docid/3be01b964.html>> accessed 1 May 2016; United Nations, *Vienna Convention on the Law of Treaties* (23 May 1969), United Nations, Treaty Series, vol. 1155, 331 <<http://www.refworld.org/docid/3ae6b3a10.html>> accessed 11 May 2016; V Rodríguez Martínez, ‘Refugee law and homosexuality: need for special protection?’ (LL.M. Thesis, University of Groningen 2012) 22-24; E Declerck, ‘The non-refoulement principle and the possible development of a human right to asylum for LGBTI’ (LL.M. Thesis, Ghent University 2015) 16-17.

¹³² UN High Commissioner for Refugees (UNHCR), *Handbook 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 paras 41-43 <<http://www.refworld.org/docid/4f33c8d92.html>> accessed 1 May 2016; Muhammed Çaprak, ‘Subjectivity of “well-founded fear of being persecuted” criteria as a key factor for determining the refugee status’ (2015) 1 *International Journal of Legal Progress* 1-2.

¹³³ Muhammed Çaprak, ‘Subjectivity of “well-founded fear of being persecuted” criteria as a key factor for determining the refugee status’ (2015) 1 *International Journal of Legal Progress* 1-2; UN High Commissioner for Refugees (UNHCR), *Handbook 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 para 38 <<http://www.refworld.org/docid/4f33c8d92.html>> accessed 1 May 2016; E Declerck, ‘The non-refoulement principle and the possible development of a human right to asylum for LGBTI’ (LL.M. Thesis, Ghent University 2015) 16-17.

¹³⁴ UN High Commissioner for Refugees (UNHCR), *Handbook 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 para 38 <<http://www.refworld.org/docid/4f33c8d92.html>> accessed 1 May 2016; Thomas Spijkerboer and Ben Vermeulen, *Vluchtelingenrecht* (1st edn Ars Aequi Libri, Nijmegen 2005) 28; H Tran, ‘Homoseksuele asielzoekers in de Nederlandse Asielprocedure’ (LL.M. Thesis, Tilburg University 2012) 8; International Commission of Jurists, *Refugee status claims based on sexual orientation and gender identity: A practitioners’ guide* (Geneva, International Commission of Jurists 2016) 67.

¹³⁵ H Tran, ‘Homoseksuele asielzoekers in de Nederlandse Asielprocedure’ (LL.M. Thesis, Tilburg University 2012) 8; UN High Commissioner for Refugees (UNHCR), *Handbook 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 para 41 <<http://www.refworld.org/docid/4f33c8d92.html>> accessed 1 May 2016.

¹³⁶ International Commission of Jurists, *Refugee status claims based on sexual orientation and gender identity: A practitioners’ guide* (Geneva, International Commission of Jurists 2016) 67-68 <<http://www.refworld.org/pdfid/56cabb7d4.pdf>> accessed 2 May 2016.

when analysing the subjective and objective elements, the considerations do not have to be based merely on the asylum seeker's personal experience. The experiences from friends, family members, relatives and members of the same group can also be relevant.¹³⁷ There are varying degrees to which the subjective and objective element of the 'well-founded fear criterion' may be weighed in an individual case.¹³⁸ It is not the frame of mind of the asylum seeker that is decisive, but the objective yardstick by which it is measured.¹³⁹ It is, thus, not sufficient for an asylum seeker to have a subjective feeling of fear.¹⁴⁰ So, LGBTI asylum seekers applying for refugee status must subjectively perceive the threat of persecution to be real, thus inducing fear. However, due to the fact that different people perceive fear in different ways, the threat of persecution needs to be objectified to be considered well-founded for the purpose of being granted refugee status.¹⁴¹ Yet, critics claim that the application of the combined approach might lead to a denial of protection despite the existence of a real risk of persecution when the asylum seeker lacks the subjective element. Hathaway argues that

[...] by stressing both the subjective element, as well as the objective one, the courts thus place additional burden on the applicants, by forcing them to prove that they are, or were, actually in anguish.¹⁴²

It is in such cases, where asylum seekers fail to provide sufficient evidence to satisfy the subjective element, that the objective approach might be favourable.¹⁴³

3.2.2 The objective approach

The objective approach corresponds with the approach taken by Article 4(3) of the recast QD and perceives the notion of 'well-founded fear' in a strictly objective manner.¹⁴⁴ The Dutch asylum policy adheres to this objective approach taken by EU law with regard to the 'well-founded fear' element, as the wording of Article 4(3) of the recast QD has literally permeated into Article 31(4) of the Dutch Aliens Act 2000. This view implies that the refugee definition does not contain a subjective element and is shared by Hathaway:

"Well-founded fear has nothing to do with the state of mind of the applicant for refugee status, except insofar as the claimant's testimony may provide some evidence of the state of affairs in her home country."¹⁴⁵

¹³⁷ UN High Commissioner for Refugees (UNHCR), *Handbook 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 para 43 <<http://www.refworld.org/docid/4f33c8d92.html>> accessed 1 May 2016; UN High Commissioner for Refugees (UNHCR), *Resettlement Handbook: Chapter 3 - Refugee Status and Resettlement* (UNHCR, Geneva 2011) 83 <<http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3d464c954&query=Resettlement%20Handbook>> accessed 1 May 2016.

¹³⁸ P Boeles, Maarten den Heijer and others, *European Migration Law* (2nd edn Intersentia, Cambridge 2014) 299.

¹³⁹ P Boeles, Maarten den Heijer and others, *European Migration Law* (2nd edn Intersentia, Cambridge 2014) 300.

¹⁴⁰ T Spijkerboer and B Vermeulen, *Vluchtelingenrecht* (1st edn Ars Aequi Libri, Nijmegen 2005) 28; H Tran, 'Homoseksuele asielzoekers in de Nederlandse asielprocedure' (LL.M Thesis, Tilburg University 2012) 8.

¹⁴¹ L Elena Bacaian, 'The protection of refugees and their right to seek asylum in the European Union' (LL.M. Thesis, University of Geneva 2011) 11-12.

¹⁴² James C. Hathaway, *The law of refugee status* (Toronto, Butterworths 1991) 65; K Jan Bem, 'Defining the refugee: American and Dutch asylum case law 1975-2005' (PhD Dissertation, VU Amsterdam 2007) 119-120.

¹⁴³ A Zimmermann, J Dörschner and F Machts, *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP, Oxford 2011) 339-340.

¹⁴⁴ H Tran, 'Homoseksuele asielzoekers in de Nederlandse asielprocedure' (LL.M. Thesis, Tilburg University 2012) 8.

¹⁴⁵ A Zimmermann, J Dörschner and F Machts, *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP, Oxford 2011) 340-341; K Jan Bem, 'Defining the refugee: American and Dutch asylum case law 1975-2005

By employing the objective approach, the recast QD and the Dutch policy deviate from international refugee law, whereas Article 78(1) TFEU clearly lays down that the asylum legislation must be in conformity with the Convention.¹⁴⁶ Article 31(4) of the Dutch Aliens Act 2000 states that the assessment of an application for international protection is to be carried out on an individual basis and includes taking into account, *inter alia*, relevant country of origin information, the statements and documentation presented by the asylum seeker, including information on whether he or she has been or may be subject to persecution or serious harm and his or her personal circumstances.¹⁴⁷ No attention is being paid to the state of mind of the applicant, so, from that perspective, the recast QD and the Dutch policy contain a stricter requirement than the one used in the Convention when assessing the objective element. According to the UNHCR Handbook, an asylum seeker's well-founded fear can also be based on the experiences of family members, friends and in case of LGBTI asylum seekers, other members of their social group.¹⁴⁸ Therefore, the approach followed by the UNHCR prevails in this respect.

According to Article 31(5) of the Dutch Aliens Act 2000, evidence that the asylum seeker has been subjected to persecution or serious harm in the past is a serious indication of the asylum seeker's well-founded fear of being persecuted.¹⁴⁹ This observation is in line with both the UNHCR's view as well as the approach taken by the recast QD.¹⁵⁰ In Paragraph 3.2, it was stated that a person can also have a well-founded fear of being persecuted if it is sufficiently clear that he or she will be subjected to persecution upon return to the country of origin without already having been persecuted. As to this particular situation, the Dutch policy is also in line with the Convention and European norms, as a threat of being persecuted is a clear indication for a well-founded fear.

3.3 '[...] Being persecuted'

With regard to the second condition, the persecution requirement, there is no universally accepted definition of the term 'persecution'.¹⁵¹ Nevertheless, from Article 33 of the Convention it can be

(PhD Dissertation, VU Amsterdam 2007) 119-120; James C. Hathaway, *The law of refugee status* (Toronto, Butterworths 1991) 65.

¹⁴⁶ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9; European Union, *Consolidated version of the Treaty on the Functioning of the European Union* (13 December 2007), 2008/C 115/01 art 78(1) <<http://www.refworld.org/docid/4b17a07e2.html>> accessed 24 May 2016.

¹⁴⁷ Dutch Aliens Act 2000 art 31(4); see also: Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9; see for example District Court The Hague 2 December 2014, Awb 14/17164 paras 8-9.

¹⁴⁸ UN High Commissioner for Refugees (UNHCR), *Handbook 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 para 43 <<http://www.refworld.org/docid/4f33c8d92.html>> accessed 1 May 2016; UN High Commissioner for Refugees (UNHCR), *Resettlement Handbook: Chapter 3 - Refugee Status and Resettlement* (UNHCR, Geneva 2011) 83 <<http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3d464c954&query=Resettlement%20Handbook>> accessed 1 May 2016.

¹⁴⁹ Dutch Aliens Act 2000 art 31(5).

¹⁵⁰ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9 art 4(4); UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, October 2012, HCR/GIP/12/01 para 18; H Tran, 'Homoseksuele asielzoekers in de Nederlandse Asielprocedure' (LL.M Thesis, Tilburg University 2012) 8-9; Thomas Spijkerboer and Ben Vermeulen, *Vluchtelingenrecht* (1st edn Ars Aequi Libri, Nijmegen 2005) 29.

¹⁵¹ UN High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951*

inferred that a threat to life or physical freedom constitutes persecution, as would other serious violations of human rights.¹⁵² According to the UNHCR Guidelines, persecution can

“[...] involve serious human rights violations, including a threat to life or freedom as well as other kinds of serious harm. In addition, lesser forms of harm may cumulatively constitute persecution. What amounts to persecution will depend on the circumstances of the case, including the age, gender, opinions, feelings and psychological make-up of the applicant.”¹⁵³

The UNHCR Guidelines also acknowledge that being compelled to forsake or conceal one’s sexual orientation and gender identity, where this is instigated or condoned by the state may constitute persecution.¹⁵⁴ As to the intensity of persecution, serious harm must befall an individual for persecution to be appreciated.¹⁵⁵ Of course, this does not mean that LGBTI asylum seekers cannot get protection unless something really serious occurs to him or her. The correct approach would be to analyse if an accumulation of circumstances can amount to serious harm:

“[...] an applicant may have been subjected to various measures not in themselves amounting to persecution (e.g. discrimination in different forms), in some cases combined with other adverse factors (e.g. general atmosphere of insecurity in the country of origin). In such situations, the various elements involved may, *if taken together*, produce an effect on the mind of the applicant that can reasonably justify a claim to well-founded fear of persecution on “cumulative grounds”.”¹⁵⁶

Convention and the 1967 Protocol Relating to the Status of Refugees (December 2011), HCR/1P/4/ENG/REV.3 para 51 <<http://www.refworld.org/docid/4f33c8d92.html>> accessed 1 May 2016; V Rodríguez Martínez, ‘Refugee law and homosexuality: need for special protection?’ (LL.M Thesis, University of Groningen 2012) 25-26.

¹⁵² UN High Commissioner for Refugees (UNHCR), *Resettlement Handbook: Chapter 3 - Refugee Status and Resettlement* (UNHCR, Geneva 2011) 84

<<http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3d464c954&query=Resettlement%20Handbook>> accessed 1 May 2016; UN High Commissioner for Refugees (UNHCR), *Handbook 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 para 51; *Convention Relating to the Status of Refugees* (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 art 33(1).

¹⁵³ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (October 2012), HCR/GIP/12/01 para 16 <<http://www.refworld.org/docid/50348afc2.html>> accessed 22 May 2016; UN High Commissioner for Refugees (UNHCR), *Handbook 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 para. 53; V Rodríguez Martínez, ‘Refugee law and homosexuality: need for special protection?’ (LL.M. Thesis, University of Groningen 2012) 39.

¹⁵⁴ V Rodríguez Martínez, ‘Refugee law and homosexuality: need for special protection?’ (LL.M. Thesis, University of Groningen 2012) 39; UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (October 2012), HCR/GIP/12/01 paras 30-33 <<http://www.refworld.org/docid/50348afc2.html>> accessed 22 May 2016.

¹⁵⁵ Kristen L. Walker, ‘Sexuality and Refugee Status in Australia’ (2000) 12 *International Journal of Refugee Law* 195; V Rodríguez Martínez, ‘Refugee law and homosexuality: need for special protection?’ (LL.M. Thesis, University of Groningen 2012) 39-40.

¹⁵⁶ UN High Commissioner for Refugees (UNHCR), *Guidance Note on refugee claims relating to sexual orientation and gender identity* (November 2008) para 10 <<http://www.refworld.org/docid/48abd5660.html>> accessed 20 May 2016; UN High Commissioner for Refugees (UNHCR), *Handbook 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 para 53 <<http://www.refworld.org/docid/4f33c8d92.html>> accessed 1 May 2016.

Despite the fact that discrimination is something many LGBTI individuals worldwide experience in their lives, this will not always reach the level of persecution.¹⁵⁷ In this sense, it has been sustained that discrimination should have “consequences of a substantially prejudicial nature for the person concerned, such as serious restrictions on his right to earn his livelihood [...]”¹⁵⁸ However, it is impossible to create a general rule concerning what cumulative measures can give rise to a valid claim to refugee status, as this will necessarily depend on the relevant circumstances of each case, including the particular geographical, historical and ethnological context and the subjective element which was referred to in Paragraph 2.2.1.¹⁵⁹

Whereas the Convention does not explain what is meant with the term ‘persecution’, the recast QD sets a step further in defining the phrase. Article 9(1) of the recast QD states that, in order to be regarded as an act of persecution within the meaning of Article 1(A) of the Convention, 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) 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)”¹⁶⁰

Article 9(1)(a) recast QD refers to the non-derogable rights listed in Article 15(2) ECHR by stating that, if violated, this amounts to an act of persecution per se. Yet, by including the term ‘in particular’, this provision also includes sufficiently serious violations of human rights, other than the non-derogable rights contained in Article 15(2) ECHR, as acts of persecution depending on the circumstances. Article 9(1)(b) follows the UNHCR Guidelines by recognising that an accumulation of various measures can also amount to acts of persecution and continues by setting out a list acts that might constitute acts of persecution.

As a violation of basically any human right can amount to an act of persecution, it is the severity of the violation that is important.¹⁶¹ In order to determine whether or not certain behaviour

¹⁵⁷ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (October 2012), HCR/GIP/12/01 para 20 <<http://www.refworld.org/docid/50348afc2.html>> accessed 22 May 2016; UN High Commissioner for Refugees (UNHCR), *Guidance Note on refugee claims relating to sexual orientation and gender identity* (November 2008) para 10 <<http://www.refworld.org/docid/48abd5660.html>> accessed 20 May 2016.

¹⁵⁸ UN High Commissioner for Refugees (UNHCR), *Handbook 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 para 54 <<http://www.refworld.org/docid/4f33c8d92.html>> accessed 1 May 2016; V Rodríguez Martínez, ‘Refugee law and homosexuality: need for special protection?’ (LL.M Thesis, University of Groningen 2012) 40-41.

¹⁵⁹ UN High Commissioner for Refugees (UNHCR), *Handbook 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 para 52.

¹⁶⁰ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9; G Ku Wei Bin, ‘No Freedom in a Closet: The Persistence of Discretion Reasoning in the Refugee Status Determination Process for Lesbian, Gay, and Bisexual Asylum Applications to the European Union’ (LL.M. Thesis, Lund University 2014); H Tran, ‘Homoseksuele asielzoekers in de Nederlandse asielprocedure’ (LL.M. Thesis, Tilburg University 2012) 21-23.

¹⁶¹ A Zimmermann, J Dörschner and F Machts, *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP, Oxford 2011) 354.

amounts to persecution, a distinction can be made between violations of three categories of human rights. The first category contains human rights that touch upon the primary physical and psychological basic conditions that need to be fulfilled before one can even function as a human being, such as the right to life (Article 2 ECHR) and freedom of inhuman and degrading treatment and punishment (Article 3 ECHR).¹⁶² Violations of such rights amount to persecution per se. Applying this to the specific situation of LGBTI asylum seekers, a violation of this category of rights can be established if a gay man is punished on account of his sexual orientation with a long-term prison sentence or even the death penalty.¹⁶³ Another example is the rape of a lesbian woman as punishment for her sexual orientation.

The second category encompasses civil and political rights, such as due-process rights, freedom of movement (Article 12.1 and 12.2 ICCPR) and the right to privacy (Article 8 ECHR). Violations of these rights essentially amount to persecution, unless it is demonstrated that the violation's character is relatively limited.¹⁶⁴ For example, the right to privacy of a lesbian woman is violated if she is hospitalised against her will by her family members, because they believe that homosexuality is an illness that can be cured.¹⁶⁵ Another example concerns the situation when a gay man is arrested on account of his sexual orientation and did not get a fair trial. Additionally, the UNHCR Guidance Note states that being forced to conceal one's sexual orientation, where this is instigated or condoned by the State, may amount to persecution. LGBTI persons will often conceal their sexual orientation in order to avoid persecutory harm, and the actions or omissions of the State that compel people to conceal their sexual orientations cannot only be considered discriminatory, but also as violating the rights to privacy, and freedom of opinion and expression.¹⁶⁶

The third category of rights encloses economic, social and cultural rights, such as the right to work (Article 6 ICESCR), the right to education (Article 13 ICESCR) and the right to a decent living standard (Article 11 ICESCR). In general, a violation of these rights does not amount to persecution, however, cumulatively it can amount to persecution.¹⁶⁷ For example, while being dismissed from a job generally is not considered as an act of persecution, if an individual can demonstrate that his or her sexual orientation would make it highly improbable to enjoy any kind of gainful employment in the country of origin, this may constitute persecution.

¹⁶² H Tran, 'Homoseksuele asielzoekers in de Nederlandse asielprocedure' (LL.M Thesis, Tilburg University 2012) 22; Thomas Spijkerboer and Ben Vermeulen, *Vluchtelingenrecht* (1st edn Ars Aequi Libri, Nijmegen 2005) 33-34.

¹⁶³ A Zimmermann, J Dörschner and F Machts, *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP, Oxford 2011) 420-423; H Tran, 'Homoseksuele asielzoekers in de Nederlandse asielprocedure' (LL.M. Thesis, Tilburg University 2012) 21-23.

¹⁶⁴ A Zimmermann, J Dörschner and F Machts, *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP, Oxford 2011) 355-356; H Tran, 'Homoseksuele asielzoekers in de Nederlandse asielprocedure' (LL.M. Thesis, Tilburg University 2012) 21-23.

¹⁶⁵ H Tran, 'Homoseksuele asielzoekers in de Nederlandse asielprocedure' (LL.M Thesis, Tilburg University 2012) 22-23; Thomas Spijkerboer and Ben Vermeulen, *Vluchtelingenrecht* (1st edn Ars Aequi Libri, Nijmegen 2005) 34.

¹⁶⁶ UN High Commissioner for Refugees (UNHCR), *Guidance Note on refugee claims relating to sexual orientation and gender identity* (November 2008) para 12 <<http://www.refworld.org/docid/48abd5660.html>> accessed 20 May 2016.

¹⁶⁷ A Zimmermann, J Dörschner and F Machts, *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP, Oxford 2011) 355-356; H Tran, 'Homoseksuele asielzoekers in de Nederlandse asielprocedure' (LL.M. Thesis, Tilburg University 2012) 21-23; Thomas Spijkerboer and Ben Vermeulen, *Vluchtelingenrecht* (1st edn Ars Aequi Libri, Nijmegen 2005) 34.

3.3.1 Agents of persecution

Acts of persecution are always conducted by one or more individuals that inflict harm on another individual or group of individuals.¹⁶⁸ According to the UNHCR Guidelines, persecution can emanate from the State as well as from non-State actors.¹⁶⁹ Persecution can be perpetrated by the authorities of the applicant's country of origin, through criminalisation of same-sex sexual acts and the enforcement of such legislation and through individuals acting on behalf of the State, such as police officers, soldiers of the national army and civilian administrators.¹⁷⁰ An example of a situation of that kind is when a police officer perpetrates acts of persecution towards a gay individual, despite the fact that homosexuality is no longer being criminalised, but there remains a homo- and transphobic environment.¹⁷¹ Persecution can also be attributed to non-state actors, such as the applicant's family members or homophobic gangs.¹⁷² If an LGBTI individual decides to file a charge for persecution, perpetrated by a fellow citizen, by the police, but the police do not respond, this is to be considered as condoning persecution by the State's authorities.¹⁷³ Thus, asylum seekers are generally required to ask their own government for protection and only if this protection is unavailable or ineffective, the asylum seeker will be eligible for refugee status.¹⁷⁴ The distinction between actors of the State and non-State actors made by the UNHCR Guidelines, is reflected in Article 6 of the recast QD. According to Article 6, non-State actors can be considered agents of persecution if the government is unwilling or unable to provide for effective protection against such harm.¹⁷⁵ Yet, the recast QD broadens the list of actors of persecution as it creates an extra option, namely 'parties or organisations controlling the State or a substantial part of the territory of the State'.¹⁷⁶

¹⁶⁸ A Zimmermann, J Dörschner and F Machts, *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP, Oxford 2011) 358; G Almeida Ferreira, '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' (LL.M. Thesis, Tilburg University 2015) 20.

¹⁶⁹ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, October 2012, HCR/GIP/12/01 paras 34-37 <<http://www.refworld.org/docid/50348afc2.html>> accessed 22 May 2016; G Almeida Ferreira, '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' (LL.M. Thesis, Tilburg University 2015) 20.

¹⁷⁰ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, October 2012, HCR/GIP/12/01 paras 34-37 <<http://www.refworld.org/docid/50348afc2.html>> accessed 22 May 2016; UN High Commissioner for Refugees (UNHCR), *Resettlement Handbook: Chapter 3 - Refugee Status and Resettlement* (UNHCR, Geneva 2011) 85 <<http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3d464c954&query=Resettlement%20Handbook>> accessed 1 May 2016.

¹⁷¹ Thomas Spijkerboer and Ben Vermeulen, *Vluchtelingenrecht* (1st edn Ars Aequi Libri, Nijmegen 2005) 36; H Tran, 'Homoseksuele asielzoekers in de Nederlandse asielprocedure' (LL.M. Thesis, Tilburg University 2012) 20-21; UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, October 2012, HCR/GIP/12/01 paras 34-37 <<http://www.refworld.org/docid/50348afc2.html>> accessed 22 May 2016.

¹⁷² G Almeida Ferreira, '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' (LL.M Thesis, Tilburg University 2015) 20.

¹⁷³ H Tran, 'Homoseksuele asielzoekers in de Nederlandse asielprocedure' (LL.M Thesis, Tilburg University 2012) 21.

¹⁷⁴ Thomas Spijkerboer and Ben Vermeulen, *Vluchtelingenrecht* (1st edn Ars Aequi Libri, Nijmegen 2005) 36.

¹⁷⁵ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9 art 6.

¹⁷⁶ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9 art 6; H Tran, 'Homoseksuele asielzoekers in de Nederlandse asielprocedure' (LL.M Thesis, Tilburg University 2012) 20-21; UN High Commissioner for Refugees (UNHCR), *Handbook 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 para 65

3.3.2 The approach taken by the Dutch policy

The term ‘persecution’ as such is not defined in Dutch legislation, yet, Article 3.36(1) of the Aliens Regulation prescribes that acts of persecution must be “sufficiently serious by [their] nature or repetition as to constitute a severe violation of basic human rights” thereby especially referring to the non-derogable rights contained in Article 15(2) ECHR, or “an accumulation of various measures”.¹⁷⁷ This is in compliance with the Convention and the recast QD and can be illustrated by means of the facts of a case concerning the coming-out of a gay man from India.¹⁷⁸ Due to his sexual orientation he was being deprived of his liberty, he had to quit his studies, was subjected to physical abuse, survived an attempted murder and was about to be hospitalised in a mental institution against his will. The Court ruled that these acts were sufficiently serious to constitute at least severe discrimination, thereby stating that the applicant is eligible for refugee status.

In the second paragraph, Article 3.36 sets forth a list of acts that can amount to persecution. This list is *verbatim* identical to the list contained in Article 9(2) of the recast QD.¹⁷⁹ Article 3.36(3) makes a reference to Article 1A (2) of the Convention, thereby stating that there needs to be a causal relationship between on the one hand the reason(s) for persecution and on the other hand the act(s) of persecution. In this respect, the Dutch policy wrongly follows the approach taken by Article 9(3) of the recast QD, an approach that is clearly not in line with the Convention, as the Convention requires a causal link between the well-founded fear of being persecuted and the reason(s) for persecution, which for LGBTI individuals is their membership of a particular social group.¹⁸⁰ A causal relationship between the reason(s) for persecution and the act(s) of persecution would implicate that it needs to be proved that the agent of persecution has the intention to persecute the LGBTI individual concerned for reasons of his or her sexual orientation. However, whereas the intention of the persecutor is relevant when determining refugee status, the Convention focuses on whether the asylum seeker experiences the acts concerned as acts of persecution.¹⁸¹

Furthermore, paragraph C2/3.2 of the Dutch Aliens Circular 2013 is in line with the Convention and the recast QD and states that “discrimination of aliens perpetrated by the authorities of the State or by fellow citizens is to be regarded as an act of persecution, if the alien is so severely

<<http://www.refworld.org/docid/4f33c8d92.html>> accessed 1 May 2016.

¹⁷⁷ Aliens Regulation art 3.36(1); Thomas Spijkerboer and Ben Vermeulen, *Vluchtelingenrecht* (1st edn Ars Aequi Libri, Nijmegen 2005) 32.

¹⁷⁸ District Court The Hague 11 November 2009, Awb 09/13455.

¹⁷⁹ Compare: Aliens Regulation art 3.36(2) and Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9 art 9(2).

¹⁸⁰ Thomas Spijkerboer and Ben Vermeulen, *Vluchtelingenrecht* (1st edn Ars Aequi Libri, Nijmegen 2005) 53; In order to see the differences, one should compare: Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9 art 9(3), Aliens Regulation art 3.36(3) and Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) Introductory note <<http://www.unhcr.org/3b66c2aa10.pdf>> accessed 1 May 2016; UN High Commissioner for Refugees (UNHCR), *Handbook 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 paras 66-67.

¹⁸¹ Thomas Spijkerboer and Ben Vermeulen, *Vluchtelingenrecht* (1st edn Ars Aequi Libri, Nijmegen 2005) 52; Tran, ‘Homoseksuele asielzoekers in de Nederlandse asielprocedure’ (I.L.M. Thesis, Tilburg University 2012) 13; P Boeles, Maarten den Heijer and others, *European Migration Law* (2nd edn Intersentia, Cambridge 2014) 306-307.

constrained in his or her livelihood that he or she can impossibly function socially and in society”.¹⁸² It is a positive development that the Dutch policy purports that discrimination can amount to an act of persecution, yet, there remains uncertainty as to what constitutes a situation in which an individual “can or cannot impossibly function socially and in society”. One should have a look at case law on this matter, in order to provide clarity. According to case law, an individual is found to be able to function socially and in society if he or she can study at university, is able to provide for his or her own means of existence and can travel abroad in connection with an exchange program.¹⁸³ Other examples constitute having access to shelter, work, health care and education.¹⁸⁴ An example which demonstrates the opposite, *i.e.* the situation where one is not able to function socially and in society, is when an individual cannot find a job, because he gets rejected on account of his sexual orientation.¹⁸⁵

Another situation amounting to persecution concerns criminalisation on the basis of a penal provision which specifically targets LGBTI individuals, *e.g.* criminalising the expression of homosexual feelings with a serious penalty.¹⁸⁶ Under these circumstances, LGBTI individuals cannot be required to ask their government for protection, which is in line with the Convention.¹⁸⁷ Yet, a distinction can be made, between persecution on account of homosexuality and persecution due to discrimination on account of homosexuality. Whereas the former is ‘relatively easy’ to prove, by demonstrating that homosexuality is a criminal act in the country of origin, the latter is more difficult to prove, as one has to present that there has been a serious constraint of one’s livelihood, which made it impossible to function socially and in society.¹⁸⁸ In case of persecution due to discrimination because of one’s sexual orientation, LGBTI individuals are required to turn to their national government for protection, whereas individuals persecuted for reasons of their sexual orientation are not obliged to do so.¹⁸⁹

As to the agents of persecution, Article 3.37a of the Aliens Regulation sticks to the approach taken by the recast QD, thereby listing three agents of persecution: the state, parties or organisations controlling the State or a substantial part of the territory of the State and non-state actors.¹⁹⁰ In cases where the authorities in the country of origin are the perpetrators of persecution due to the criminalisation of homosexuality or same-sex sexual acts, LGBTI individuals are often confronted by the Dutch authorities that their country of origin does not actively persecute LGBTI individuals,

¹⁸² Dutch Aliens Circular 2013 C2/3.2.

¹⁸³ District Court Groningen 29 November 2010, Awb 10/16405; H Tran, ‘Homoseksuele asielzoekers in de Nederlandse asielprocedure’ (LL.M. Thesis, Tilburg University 2012) 51.

¹⁸⁴ District Court Groningen 15 January 2010, Awb 09/48387, 09/48386.

¹⁸⁵ District Court Assen 10 May 2011, Awb 11/13046, 11/13045; H Tran, ‘Homoseksuele asielzoekers in de Nederlandse asielprocedure’ (LL.M. Thesis, Tilburg University 2012) 51.

¹⁸⁶ H Tran, ‘Homoseksuele asielzoekers in de Nederlandse asielprocedure’ (LL.M. Thesis, Tilburg University 2012) 51.

¹⁸⁷ UN High Commissioner for Refugees (UNHCR), *Handbook 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 paras 97-100 <<http://www.refworld.org/docid/4f33c8d92.html>> accessed 1 May 2016.

¹⁸⁸ H Tran, ‘Homoseksuele asielzoekers in de Nederlandse asielprocedure’ (LL.M. Thesis, Tilburg University 2012) 52.

¹⁸⁹ Paras 106 and 129 of the UNHCR Handbook state that national protection takes precedence over international protection; Thomas Spijkerboer and Ben Vermeulen, *Vluchtelingenrecht* (1st edn Ars Aequi Libri, Nijmegen 2005) 38; see also District Court Groningen 9 June 2011, Awb 11/16072.

¹⁹⁰ Aliens Regulation art 3.37a; Directive 2011/95/EU of the European Parliament and of the Council of 13

December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9 art 6.

thus implying that he or she has no justified fear of being persecuted.¹⁹¹ Thereto, asylum seekers are not only expected to demonstrate that persecution is perpetrated on account of the criminalisation of homosexuality, they also have to prove that this policy is actively enforced.¹⁹² Neither the UNHCR Handbook and Guidelines nor the recast QD requires asylum seekers to provide evidence of the fact that the policy of persecution is actually enforced. So, in this respect, the Dutch authorities do not comply with the norms laid down in the Convention and the recast QD, as well as national policy, for the Aliens Circular does not put LGBTI asylum seekers under the obligation to demonstrate the enforced policy of persecution. Moreover, in case there is a lack of an enforced policy of persecution or the actual situation in the country of origin is unknown, this does not imply that LGBTI individuals cannot or will not be persecuted in practice.¹⁹³ If the asylum seeker is able to provide information that there is a policy in place which punishes LGBTI individuals on the basis of their sexual orientation and from the submitted information stems that the position of LGBTI people is at risk, the Dutch authorities are obliged to examine the risks for the individual concerned.¹⁹⁴

3.4 'For reasons of [...] membership of a particular social group'

The 'for reasons of' element (or commonly referred to as the nexus requirement) refers to the requirement that the asylum seeker's well-founded fear of being persecuted must be linked to one of the five enumerated grounds provided for in Article 1A (2), in order to give rise to refugee status.¹⁹⁵ The five Convention grounds are: race, religion, nationality, membership of a particular social group and political opinion. In the specific case of asylum applications based on actual or implied sexual orientation, most claims are lodged under the notion of 'membership of a particular social group'.¹⁹⁶ This implies that LGBTI asylum seekers will have to demonstrate that there is a fear of being persecuted for reasons of the fact that he or she is a member of a particular social group, namely the group of persons with a non-heterosexual orientation. Nevertheless, other grounds may also be relevant depending on the context of the asylum application in a given case. Individuals may fear being persecuted for a number of interrelated reasons, e.g., an homosexual human rights activist may have his application based on the notion of 'political opinion' or 'membership of a particular social group'.¹⁹⁷

Legal authors and scholars have different opinions with regard to the intensity of the causal relationship between the fear of being persecuted and the Convention ground relied on. Some authors adhere to the view that the ground relied on must be one of the *essential or central reasons* why an individual fears persecution, whereas others have a different opinion and state that the

¹⁹¹ Sabine Jansen, 'Op de vlucht voor homohaar' (2006) 3 NAV 128; H Tran, 'Homoseksuele asielzoekers in de Nederlandse asielprocedure' (LL.M. Thesis, Tilburg University 2012) 49.

¹⁹² H Tran, 'Homoseksuele asielzoekers in de Nederlandse asielprocedure' (LL.M Thesis, Tilburg University 2012) 49.

¹⁹³ Sabine Jansen, 'Op de vlucht voor homohaar' (2006) 3 NAV 129-130; H Tran, 'Homoseksuele asielzoekers in de Nederlandse asielprocedure' (LL.M. Thesis, Tilburg University 2012) 49.

¹⁹⁴ District Court Haarlem 2 March 2010, Awb 10/5781, 10/5782; District Court Assen 28 September 2010, Awb 09/31329.

¹⁹⁵ International Commission of Jurists, *Refugee status claims based on sexual orientation and gender identity: A practitioners' guide* (Geneva, International Commission of Jurists 2016) 171 <<http://www.refworld.org/pdfid/56cabb7d4.pdf>> accessed 2 May 2016; Andreas Zimmermann, Jonas Dörschner and Felix Machts, *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP, Oxford 2011) 372.

¹⁹⁶ Andreas Zimmermann, Jonas Dörschner and Felix Machts, *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP, Oxford 2011) 372.

¹⁹⁷ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, October 2012, HCR/GIP/12/01 para 40 <<http://www.refworld.org/docid/50348afc2.html>> accessed 22 May 2016.

ground relied on has to be *one among several reasons* causing the well-founded fear of being persecuted.¹⁹⁸ According to the UNHCR, a causal link is found if the persecution ground relied on is a relevant factor contributing to the persecution, yet, it does not have to be its sole cause.¹⁹⁹ It is important to assess whether or not the asylum seeker experiences the behaviour as harmful not from the perspective of the persecutor, by analysing what his intention was. The difference between the two views has significant implications for the burden of proof.

As to the former view, the burden of proof for asylum seekers is higher compared to the latter, for asylum seekers have to verify that the ground relied on is the most significant reason why they are being persecuted. Provided that the persecutor intends to harm the individual due to his or her link with the Convention ground relied on, refugee status should be granted.²⁰⁰ When examining the individual's specific situation, the intention of the persecutor needs to be taken into account. The asylum seeker must demonstrate that the persecutor intends to affect him or her, owing to a persecution ground. Spijkerboer and Vermeulen argue that the burden of proof is too high, as the asylum seeker has to prove the underlying motivation of the persecuting State or non-State actors for the persecution or for denying protection. This will be particularly difficult in cases where no such evidence is available.²⁰¹ LGBTI asylum seekers would have to demonstrate that the agent of persecution has the aim of persecuting him or her, because of a Convention ground. As to the latter view, LGBTI asylum seekers 'only' have to demonstrate that their well-founded fear can be partially traced back to the ground for persecution. Because the wording contained in the Convention does not compel the adoption of a very strict standard, it appears appropriate to assume that it is sufficient that the ground must be just one of the perhaps many reasons for persecution.²⁰²

Article 9(1) of the recast QD affirms that there has to be a causal relationship between the acts of persecution and the reasons for persecution. As stated in paragraph 3.3.2, this is inconsistent with the approach taken by the Convention, as it requires a link between the well-founded fear of being persecuted and the ground for persecution. In the early days, LGBTI asylum seekers generally based their asylum applications on 'political opinion' or 'religion'. However, this has changed, since there is a growing consensus about the fact that LGBTI individuals can be considered as members of a particular social group.²⁰³ The Convention neither defines the phrase 'particular social group',

¹⁹⁸ Andreas Zimmermann, Jonas Dörschner and Felix Machts, *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP, Oxford 2011) 372-373; Thomas Spijkerboer and Ben Vermeulen, *Vluchtelingenrecht* (1st edn Ars Aequi Libri, Nijmegen 2005) 54-55; H Tran, 'Homoseksuele asielzoekers in de Nederlandse asielprocedure' (LL.M Thesis, Tilburg University 2012) 11-13; P Boeles, Maarten den Heijer and others, *European Migration Law* (2nd edn Intersentia, Cambridge 2014) 306-307.

¹⁹⁹ UN High Commissioner for Refugees (UNHCR), *Resettlement Handbook: Chapter 3 - Refugee Status and Resettlement* (UNHCR, Geneva 2011) 85
<<http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3d464c954&query=Resettlement%20Handbook>> accessed 1 May 2016; UN High Commissioner for Refugees, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* (UNHCR, Geneva 2001) para 23 <<http://www.refworld.org/docid/3b20a3914.html>> accessed 1 May 2016.

²⁰⁰ Andreas Zimmermann, Jonas Dörschner and Felix Machts, *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP, Oxford 2011) 373.

²⁰¹ Thomas Spijkerboer and Ben Vermeulen, *Vluchtelingenrecht* (1st edn Ars Aequi Libri, Nijmegen 2005) 53.

²⁰² P Boeles, Maarten den Heijer and others, *European Migration Law* (2nd edn Intersentia, Cambridge 2014) 306-307.

²⁰³ E Declerck, 'The non-refoulement principle and the possible development of a human right to asylum for LGBTI' (LL.M. Thesis, Ghent University 2015) 41; Janna Wessels, 'Sexual orientation in refugee status determination' Refugee Studies Centre working paper no. 73 9 <<http://www.refworld.org/pdfid/4ebb93182.pdf>> accessed 7 May 2016; Brian Henes, 'The Origin and Consequences of recognizing Homosexuals as a "Particular Social Group" for Refugee Purposes' (1994) 8 Temple International & Comparative Law Journal 383-387; Laurie Berg and Jenni Millbank, 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants' (2009) 22 Journal of Refugee Studies 195; Thomas Spijkerboer and Ben

nor provides a list of particular social groups, giving rise to various interpretations of the phrase. As a consequence, two generally accepted approaches for defining a ‘particular social group’ can be distinguished.²⁰⁴ While it can be problematic that these two approaches might arrive at different conclusions regarding whom they view included in the scope of this Convention ground, it is a welcome development that LGBTI asylum seekers have been recognised as members of a particular social group under both approaches.²⁰⁵

The first approach adopted to define a ‘particular social group’ as such, is the so-called ‘protected characteristics’ or ‘immutability’ approach. The term ‘protected characteristic’ refers to a “characteristic that is either beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.”²⁰⁶ Combining this approach with the persecution requirement contained in Article 1A (2), it implies that persecution is directed towards an individual who is a member of a group of individuals all of whom share a common, immutable characteristic or a characteristic that is so fundamental that they should not be compelled to forsake it.²⁰⁷ Human rights can provide guidance for identifying characteristics deemed so fundamental to human dignity that one ought not to be compelled to forego them.²⁰⁸ Applying this observation to LGBTI individuals, it is useful to have a look at Article 8 ECHR, containing the right to respect of private and family life. Sexual orientation is an important aspect of who we are as human beings and the way we perceive ourselves and how we relate to others. It is recognised as a fundamental part of the human identity and as a part of one’s private life.²⁰⁹ LGBTI individuals can therefore not be expected to conceal their sexual orientation, for this is a fundamental aspect of human dignity, based on Article 8 ECHR. As a consequence, LGBTI

Vermeulen, *Vluchtelingenrecht* (1st edn Ars Aequi Libri, Nijmegen 2005) 29; H Tran, ‘Homoseksuele asielzoekers in de Nederlandse asielprocedure’ (LL.M. Thesis, Tilburg University 2012) 11-13.

²⁰⁴ UN High Commissioner for Refugees (UNHCR), *Guidelines on international protection: “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*, 7 May 2002, HCR/GIP/02/02 para 5 <<http://www.refworld.org/docid/3d36f23f4.html>> accessed 1 May 2016; Helsinki Citizens’ Assembly and Organisation for Refugee, Asylum & Migration, ‘Unsafe Haven: The Security Challenges Facing Lesbian, Gay, Bisexual and Transgender Asylum Seekers and Refugees in Turkey’ (Report) (June 2009) 6.

²⁰⁵ Z Bobis, ‘You are not what you ought to be: Credibility Assessment in Sexuality-Based Asylum Cases’ (LL.M. Thesis, Central European University 2012) 12.

²⁰⁶ International Commission of Jurists, *Refugee status claims based on sexual orientation and gender identity: A practitioners’ guide* (Geneva, International Commission of Jurists 2016) 193-194 <<http://www.refworld.org/pdfid/56cabb7d4.pdf>> accessed 2 May 2016; *Matter of Acosta*, A-24159781, United States Board of Immigration Appeals, 1 March 1985 para 10, 233-234 <<http://www.refworld.org/docid/3ae6b6b910.html>> accessed 31 May 2016; *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993 <<http://www.refworld.org/docid/3ae6b673c.html>> accessed 31 May 2016; H Tran, ‘Homoseksuele asielzoekers in de Nederlandse Asielprocedure’ (LL.M. Thesis, Tilburg University 2012) 9.

²⁰⁷ UN High Commissioner for Refugees (UNHCR), *Guidelines on international protection: “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*, 7 May 2002, HCR/GIP/02/02 2-3 <<http://www.refworld.org/docid/3d36f23f4.html>> accessed 1 May 2016; E Arbel, C Dauvergne and J Millbank, *Gender in refugee law: From the margins to the centre* (Routledge, London 2014) 20-21; International Commission of Jurists, *Refugee status claims based on sexual orientation and gender identity: A practitioners’ guide* (Geneva, International Commission of Jurists 2016) 193-194 <<http://www.refworld.org/pdfid/56cabb7d4.pdf>> accessed 2 May 2016; *Matter of Acosta*, A-24159781, United States Board of Immigration Appeals, 1 March 1985 para 10, 233-234 <<http://www.refworld.org/docid/3ae6b6b910.html>> accessed 31 May 2016.

²⁰⁸ UN High Commissioner for Refugees (UNHCR), *Guidelines on international protection: “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*, 7 May 2002, HCR/GIP/02/02 para 6 <<http://www.refworld.org/docid/3d36f23f4.html>> accessed 1 May 2016.

²⁰⁹ UN High Commissioner for Refugees (UNHCR), *Guidance Note on refugee claims relating to sexual orientation and gender identity* (November 2008) para. 8 <<http://www.refworld.org/docid/48abd5660.html>> accessed 20 May 2016; H Tran, ‘Homoseksuele asielzoekers in de Nederlandse Asielprocedure’ (LL.M. Thesis, Tilburg University 2012) 10; District Court Dordrecht 9 November 2010, Awb 09/41353 para 2.2.2; Michele Grigolo, ‘Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject’ (2003) 14 EJIL 1039-1041; *Sutherland v. The United Kingdom* (App no 25186/94) ECHR 27 March 2001 para. 36.

people are within the scope of the ‘protected characteristics’ or ‘immutability’ approach.²¹⁰ This is also demonstrated in *Canada v Ward*, where the Canadian Supreme Court asserted that sexual orientation is “an innate and unchangeable characteristic”, thereby establishing that LGBTI individuals are capable of forming a particular social group within the meaning of Article 1A (2) of the Convention.²¹¹

LGBTI individuals have also been recognised as a particular social group under the alternative ‘social perception’ approach. This approach shifts the emphasis from the group-forming common characteristic’s immutability to its impact on how the group is perceived by society at large.²¹² For LGBTI individuals, the common characteristic would be their non-heterosexual orientation. According to this approach, a particular social group has been described as

“[...] a collection of persons who share a certain characteristic or element which unites them to be set apart from society at large [...] not only must such persons exhibit some common element; the element must unite them, making those who share it a cognisable group within their society.”²¹³

In practice, this would imply that recognising LGBTI individuals as members of a particular social group depends on a certain appearance or behaviour. This might lead to overtly stereotypical portrayal of LGBTIs, as the focus is on appearance and invites to prejudice.²¹⁴ There is the risk that LGBTI individuals will have to act discretely, for if he or she does not attract attention and behaves like a heterosexual would, he or she will not be recognised as an LGBTI individual and therefore not be a member of a particular social group. Thus, for determining the existence of a particular social group, the social perception approach should not be the only approach employed. This vision is connected with the approach taken by the UNHCR Guidelines, namely that both approaches should be reconciled, due to the different results that can be reached by employing only one of the approaches, which could lead to protection gaps. For example, the social perception standard might recognise as social groups associations based on a characteristic that is neither immutable nor fundamental to human dignity—such as, perhaps, occupation or social class.²¹⁵ The UNHCR Guidelines define a particular group as a group of persons who

²¹⁰ H Tran, ‘Homoseksuele asielzoekers in de Nederlandse Asielprocedure’ (LL.M. Thesis, Tilburg University 2012) 10.

²¹¹ G Ku Wei Bin, ‘No Freedom in a Closet: The Persistence of Discretion Reasoning in the Refugee Status Determination Process or Lesbian, Gay, and Bisexual Asylum Applications to the European Union’ (LL.M. Thesis, Lund University 2014) 15; International Commission of Jurists, *Refugee status claims based on sexual orientation and gender identity: A practitioners’ guide* (Geneva, International Commission of Jurists 2016) 195 <<http://www.refworld.org/pdfid/56cabb7d4.pdf>> accessed 2 May 2016; UN High Commissioner for Refugees (UNHCR), *Guidelines on international protection: “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*, 7 May 2002, HCR/GIP/02/02 para 6 <<http://www.refworld.org/docid/3d36f23f4.html>> accessed 1 May 2016; Z Bobis, ‘You are not what you ought to be: Credibility Assessment in Sexuality-Based Asylum Cases’ (LL.M. Thesis, Central European University 2012) 14; See also for example: *Islam (A.P.) v. Secretary of State for the Home Department* and *R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, (1999) United Kingdom: House of Lords (Judicial Committee), 25 March 1999 9.

²¹² UN High Commissioner for Refugees (UNHCR), *Guidelines on international protection: “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*, 7 May 2002, HCR/GIP/02/02 para 7 <<http://www.refworld.org/docid/3d36f23f4.html>> accessed 1 May 2016; Z Bobis, ‘You are not what you ought to be: Credibility Assessment in Sexuality-Based Asylum Cases’ (LL.M. Thesis, Central European University 2012) 16.

²¹³ *Applicant A v Minister for Immigration and Ethnic Affairs*, (1997) 190 CLR 225, Australia: High Court, 24 February 1997.

²¹⁴ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, October 2012, HCR/GIP/12/09 para 49.

²¹⁵ UN High Commissioner for Refugees (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 para 9.

“[...] share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human right.”²¹⁶

Compared to the approach taken by the UNHCR Guidelines, the recast QD has changed the word “or” by the word “and”, thereby accumulating both approaches into one.²¹⁷ Whereas the UNHCR takes the stance that satisfying one of the factors is sufficient for the existence of a particular social group, under the recast QD regime, both factors must be met.

3.4.1 The approach taken by the Dutch policy

It is generally known in policy that persecution on the basis of sexual orientation can be placed under persecution for reasons of membership of a particular social group, as contained in Article 1A (2) of the Convention.²¹⁸ The description of the term ‘particular social group’ contained in Article 10(1)(d) of the recast QD is *verbatim* permeated in 3:37(1)(4) of the Aliens Regulation.²¹⁹ As a consequence, the Dutch policy requires asylum seekers to satisfy both elements, the social perception element as well as the protected-characteristics element. When determining the well-foundedness of one’s fear, it is not relevant whether the asylum seeker is really an LGBTI individual or is only thought to be. Thus, a distinction can be made between LGBTI asylum seekers and asylum seekers who are perceived as such by the authorities of their country of origin.²²⁰ For acquiring refugee status, it is sufficient if it is credible that the authorities of the country of origin perceives him or her as such and if it is likely that persecution takes place or will take place. In this respect, the Dutch policy complies with the Convention and the recast QD.²²¹ The distinction between ‘real’ and ‘perceived’ LGBTI individuals should not be relevant, as the Aliens Circular establishes that an asylum seeker is recognised as a refugee if that person is considered to be LGBTI by the agents of persecution.²²² Therefore, the District Court Arnhem concluded that the Dutch authorities should focus on the question whether the asylum seeker is perceived to be homosexual, regardless of whether the asylum seeker is in fact gay or not.²²³

²¹⁶ UN High Commissioner for Refugees (UNHCR), *Guidelines on international protection: “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*, 7 May 2002, HCR/GIP/02/02 para 11 <<http://www.refworld.org/docid/3d36f23f4.html>> accessed 1 May 2016.

²¹⁷ UN High Commissioner for Refugees (UNHCR), *Guidelines on international protection: “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*, 7 May 2002, HCR/GIP/02/02 para 11 <<http://www.refworld.org/docid/3d36f23f4.html>> accessed 1 May 2016; Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9 art 10(1)(d).

²¹⁸ Aliens Circular para C2/3.2.

²¹⁹ Compare: Aliens Circular Para. C2/3.2. and Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9 art 10(1)(d).

²²⁰ Louis Middelkoop, ‘Geloofwaardigheidskwesties rond homoseksuelen in de Nederlandse asielprocedure’ (2010) 10 *Asiel & Migrantenrecht* 509; H Tran, ‘Homoseksuele asielzoekers in de Nederlandse Asielprocedure’ (LL.M. Thesis, Tilburg University 2012) 41-42.

²²¹ Louis Middelkoop, ‘Geloofwaardigheidskwesties rond homoseksuelen in de Nederlandse asielprocedure’ (2010) 10 *Asiel & Migrantenrecht* 509.

²²² Louis Middelkoop, ‘Geloofwaardigheidskwesties rond homoseksuelen in de Nederlandse asielprocedure’ (2010) 10 *Asiel & Migrantenrecht* 510.

²²³ District Court Arnhem 30 December 2010, Awb 10/14637; H Tran, ‘Homoseksuele asielzoekers in de Nederlandse Asielprocedure’ (LL.M. Thesis, Tilburg University 2012) 42.

3.5 'Being outside the country of nationality or former habitual residence'

An asylum seeker must, apart from being exposed to a well-founded fear of being persecuted for reasons of one or more of the grounds set out in this provision, find him- or herself outside the respective country of origin, in order to come within the scope of application *ratione personae* of the Convention, as the refugee definition contained in Article 1A (2) limits protection to persons who have crossed the border of their country of nationality *i.e.* those outside the territorial jurisdiction of the country of origin, or for those being stateless, the country of former habitual residence.²²⁴ There are no exceptions to this rule.²²⁵ Accordingly, an internally displaced individual who has a well-founded fear of being persecuted for any of the grounds enumerated in the Convention, but has remained within the frontiers of the country of origin, is not covered by Article 1A (2) and therefore cannot be considered a refugee.²²⁶ However, an internally displaced individual might become a refugee if he leaves the country of nationality or habitual residence due to a well-founded fear of being persecuted, or because he was already outside the country of origin, e.g. as a diplomat or a traveller, when an event occurred that made him fear persecution, torture or inhumane treatment, if he were to return to that country.²²⁷ Such individuals are referred to as 'refugees sur place'.²²⁸

The second sub-paragraph of Article 1A (2) intends to exclude from refugee status all persons with dual or multiple nationality who can avail themselves of the protection of at least one of the countries of which they are nationals. Wherever available, national protection takes precedence over international protection.²²⁹ Persons who have more than one nationality have to establish a well-founded fear of being persecuted with respect to each of the countries concerned in order to qualify for refugee status.²³⁰ However, this requirement is only applicable if the asylum seekers' second nationality carries with it the full range of rights normally enjoyed by citizens of the country concerned. If this is the case and the individual could be protected by one of the countries of which he is a national, he cannot be granted refugee status, because he can flee from one country of nationality where he is persecuted to the other. In order to acquire refugee status, the individual

²²⁴ Andreas Zimmermann, Jonas Dörschner and Felix Machts, *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP, Oxford 2011) 441-443; L Elena Bacaian, 'The protection of refugees and their right to seek asylum in the European Union' (LL.M. Thesis, University of Geneva 2011) 11-12; UN High Commissioner for Refugees, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* (UNHCR, Geneva 2001) paras 33-34 <<http://www.refworld.org/docid/3b20a3914.html>> accessed 1 May 2016.

²²⁵ UN High Commissioner for Refugees (UNHCR), *Handbook 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 para 88.

²²⁶ UN High Commissioner for Refugees (UNHCR), 'Internally displaced people' <<https://www.unhcr.org/gsi/files/6614/0351/6348/Bacaian.pdf>> accessed 1 May 2016; ICRC, 'Refugees and displaced persons' <<https://www.icrc.org/en/war-and-law/protected-persons/refugees-displaced-persons>> accessed 1 May 2016; Andreas Zimmermann, Jonas Dörschner and Felix Machts, *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP, Oxford 2011) 441.

²²⁷ UN High Commissioner for Refugees, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* (UNHCR, Geneva 2001) paras 33-34 <<http://www.refworld.org/docid/3b20a3914.html>> accessed 1 May 2016; L Elena Bacaian, 'The protection of refugees and their right to seek asylum in the European Union' (LL.M. Thesis, University of Geneva 2011) 11-12.

²²⁸ UN High Commissioner for Refugees, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* (UNHCR, Geneva 2001) paras 33-34 <<http://www.refworld.org/docid/3b20a3914.html>> accessed 1 May 2016.

²²⁹ UN High Commissioner for Refugees (UNHCR), *Handbook 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 para. 106.

²³⁰ S Prakash Sinha, *Asylum and international law* (Martinus Nijhoff, The Hague 1971) 100; Andreas Zimmermann, Jonas Dörschner and Felix Machts, *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP, Oxford 2011) 448-462; UN High Commissioner for Refugees (UNHCR), *Resettlement Handbook: Chapter 3 - Refugee Status and Resettlement* (UNHCR, Geneva 2011) 82 <<http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3d464c954&query=Resettlement%20Handbook>> accessed 1 May 2016; A Faye Jacobsen, *Human rights monitoring: A field mission manual* (Martinus Nijhoff, Leiden 2008) 436-437.

has to satisfy the conditions contained in the refugee definition of Article 1A (2) in all countries of nationality.²³¹

3.6 Protection against persecution: ‘Unable or unwilling to avail of state protection’

Pursuant to Article 1A(2) of the Convention, refugees are those who do not enjoy the protection of their country of origin or former habitual residence, because they are either unable or unwilling to avail themselves of that protection.²³² From this, it can be deduced that an asylum seeker is expected to have requested the authorities of his or her country of origin for protection, before being entitled to protection in the host state.²³³ This stems from the principle that national protection takes precedence over international protection.²³⁴ So, only if the country of origin is obviously unable or unwilling to offer protection, the host state has to offer this protection.²³⁵ The Convention clearly articulates “protection of that country” thereby referring to the country of nationality or former habitual residence of the individual concerned, rather than the protection of any other entity.²³⁶ Accordingly, the UNHCR’s Guidelines on International Protection No.4, state:

“[...] that it is inappropriate to equate the exercise of a certain administrative authority and control over territory by international organisations on a transitional or temporary basis with national protection provided by States. Under international law, international organisations do not have the attributes of a State.”²³⁷

Article 7(1)(b) of the recast QD and Article 3.37c of the Aliens Regulation deviate from this reading, by stating that “[p]rotection against persecution or serious harm can only be provided by the state or by parties or organisations, including international organisations controlling the state or a substantial part of the territory of the state, provided that they are willing and able to offer protection”.²³⁸ According to the International Commission of Jurists [hereafter: “ICJ”] and various

²³¹ UN High Commissioner for Refugees (UNHCR), *Resettlement Handbook: Chapter 3 - Refugee Status and Resettlement* (UNHCR, Geneva 2011) 82
<<http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3d464c954&query=Resettlement%20Handbook>> accessed 1 May 2016; L Elena Bacaian, ‘The protection of refugees and their right to seek asylum in the European Union’ (LL.M. Thesis, University of Geneva 2011) 11-12.

²³² UN High Commissioner for Refugees (UNHCR), *Handbook 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 para 97; International Commission of Jurists, *Refugee status claims based on sexual orientation and gender identity: A practitioners’ guide* (Geneva, International Commission of Jurists 2016) 207 <<http://www.refworld.org/pdfid/56cabb7d4.pdf>> accessed 2 May 2016.

²³³ H Tran, ‘Homoseksuele asielzoekers in de Nederlandse Asielprocedure’ (LL.M. Thesis, Tilburg University 2012) 19.

²³⁴ UN High Commissioner for Refugees (UNHCR), *Handbook 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 paras 106 and 129.

²³⁵ H Tran, ‘Homoseksuele asielzoekers in de Nederlandse Asielprocedure’ (LL.M. Thesis, Tilburg University 2012) 46.

²³⁶ UN High Commissioner for Refugees (UNHCR), *Handbook 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 para 97; International Commission of Jurists, *Refugee status claims based on sexual orientation and gender identity: A practitioners’ guide* (Geneva, International Commission of Jurists 2016) 208-209 <<http://www.refworld.org/pdfid/56cabb7d4.pdf>> accessed 2 May 2016; Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 art 1A (2); This is also acknowledged in the UNHCR’s Guidelines on International Protection no. 4: Internal Flight or Relocation Alternative” within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, namely in paragraph 17: “[...] it is inappropriate to find that the claimant will be protected by a local clan or militia in an area where they are not the recognised authority in that territory and/or where their control over the area may only be temporary. Protection must be effective and of a durable nature: It must be provided by an organised and stable authority exercising full control over the territory and population in question.”

²³⁷ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 4: “Internal Flight or Relocation Alternative” Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, July 2003, HCR/GIP/03/04 para 16.

²³⁸ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for

authors, this reading is “wrong in law”, for international organisations are unaccountable under international law and have no legal duty to provide protection.²³⁹ Therefore, it is not desirable for international organisations to range on the side of agents of protection, because they cannot be parties to international treaties and, as a consequence, cannot be held responsible in case they do not live up to their obligations under these treaties. Now that this is set forth, the remainder of this paragraph discusses the meaning of state protection for the purposes of the refugee definition in Article 1A (2) of the Convention, thereby examining the definition of the terms ‘unable’ and ‘unwilling’.

The phrase ‘being unable to avail himself of such protection’ refers to circumstances that are beyond the will of the individual concerned, such as a country being in a state of war or other grave disturbances, which prevents the country of nationality from extending protection or makes such protection ineffective.²⁴⁰ A State might also be unable to provide adequate and effective protection if it lacks a domestic protection mechanism and instruments for the detection, prosecution and punishment of acts that are considered contrary to the Convention.²⁴¹ Such a system has to be implemented and enforced and affected individuals must have access to it, *e.g.* by lodging a complaint against the agents of persecution with an independent organ.²⁴² An effective system should be able to deter and prevent persecution, not merely punishing those responsible after the event has already taken place.²⁴³ Nevertheless, even with a system in place that provides for sufficiently effective protection, asylum seekers might still demonstrate a well-founded fear of being persecuted if they can show that the authorities know or should know of circumstances that give rise to their fear but the authorities are not about to take the additional protective steps that the individual circumstances reasonably require.²⁴⁴

The phrase ‘being unwilling to avail himself of such protection’ refers to refugees who refuse to accept the protection of the authorities of the country of their nationality.²⁴⁵ As explained earlier on in this chapter, persecutory acts can emanate from the State itself as well as from non-State actors. As to persecutory acts inflicted upon LGBTI individuals by the government of the country of origin concerned, this is a clear indication that the State is unwilling to provide protection to

refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9 art 7.

²³⁹ International Commission of Jurists, *Refugee status claims based on sexual orientation and gender identity: A practitioners’ guide* (Geneva, International Commission of Jurists 2016) 208 <<http://www.refworld.org/pdfid/56cabb7d4.pdf>> accessed 2 May 2016; J C Hathaway and M Foster, *The Law of Refugee Status* (2nd edn, Cambridge University Press 2014) 210; T Spijkerboer and B Vermeulen, *Vluchtelingenrecht* (1st edn Ars Aequi Libri, Nijmegen 2005) 45; H Tran, ‘Homoseksuele asielzoekers in de Nederlandse Asielprocedure’ (LL.M. Thesis, Tilburg University 2012) 19.

²⁴⁰ UN High Commissioner for Refugees (UNHCR), *Handbook 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 para 98; International Commission of Jurists, *Refugee status claims based on sexual orientation and gender identity: A practitioners’ guide* (Geneva, International Commission of Jurists 2016) 216 <<http://www.refworld.org/pdfid/56cabb7d4.pdf>> accessed 2 May 2016.

²⁴¹ International Commission of Jurists, *Refugee status claims based on sexual orientation and gender identity: A practitioners’ guide* (Geneva, International Commission of Jurists 2016) 216 <<http://www.refworld.org/pdfid/56cabb7d4.pdf>> accessed 2 May 2016; UN High Commissioner for Refugees (UNHCR), *Handbook 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 para 65.

²⁴² UN High Commissioner for Refugees (UNHCR), *Handbook 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 para 65.

²⁴³ International Commission of Jurists, *Refugee status claims based on sexual orientation and gender identity: A practitioners’ guide* (Geneva, International Commission of Jurists 2016) 216 <<http://www.refworld.org/pdfid/56cabb7d4.pdf>> accessed 2 May 2016.

²⁴⁴ International Commission of Jurists, *Refugee status claims based on sexual orientation and gender identity: A practitioners’ guide* (Geneva, International Commission of Jurists 2016) 224 <<http://www.refworld.org/pdfid/56cabb7d4.pdf>> accessed 2 May 2016.

²⁴⁵ UN High Commissioner for Refugees (UNHCR), *Handbook 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 para 100.

those in need, either through enforcement of discriminatory legislation criminalising same-sex sexual conduct or implementing general legislation in a discriminatory manner, by encouraging or condoning persecutory acts perpetrated by officials of the State at a local or regional level, especially those who are members of the police and other agencies that purport to protect people, or by tolerating or encouraging human rights abuses, despite being able to intervene.²⁴⁶ This is acknowledged by Lord Clyde, who held that “[a]ctive persecution by the [S]tate is the very reverse of protection”.²⁴⁷ It is in such cases that protection for LGBTI individuals is assumed to be absent. It is also possible that protection has been denied. Such denial might confirm the asylum seeker's fear of being persecuted and needs to be determined by means of the circumstances of the case concerned.²⁴⁸ For example, if an LGBTI individual was refused a national passport normally accorded to nationals, this may constitute a refusal of protection within the definition. Unwillingness of the State to offer protection can sometimes also be assumed in case of persecutory acts against LGBTI individuals committed by non-State actors, *inter alia* family members, relatives, neighbours or the community at large. This is the case when State protection is neither available nor effective, *e.g.* when the police does not (sufficiently) respond to calls for protection or the authorities refuse to investigate, prosecute or punish non-State perpetrators of violence against LGBTI individuals with due diligence.²⁴⁹

3.7 Concluding remarks

In the introduction to this chapter, the following question was posed:

“What are the requirements that LGBTI asylum seekers have to meet for acquiring refugee status, according to the international legal framework, and to what extent are these requirements incorporated in the Dutch legal framework?”

In order to be eligible for refugee status, LGBTI asylum seekers have to satisfy the requirements laid down in Article 1A (2) of the Convention, *i.e.* they must demonstrate that they face a well-founded fear of being persecuted in their respective countries of origin as a result of their membership in a particular social group, specifically the particular social group of individuals with a non-heterosexual orientation and there has to be a causal link. Furthermore, they have to be outside their country of origin and be unable or unwilling to avail themselves to the protection of that country. These elements have been analysed into detail, compared to the provisions in the recast QD and furthermore, this chapter reviewed to what extent these criteria are incorporated in the Dutch asylum policy.

²⁴⁶ International Commission of Jurists, *Refugee status claims based on sexual orientation and gender identity: A practitioners' guide* (Geneva, International Commission of Jurists 2016) 210-212 <<http://www.refworld.org/pdfid/56cabb7d4.pdf>> accessed 2 May 2016; UN High Commissioner for Refugees (UNHCR), *Handbook 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 para 98; H Tran, ‘Homoseksuele asielzoekers in de Nederlandse Asielprocedure’ (LL.M. Thesis, Tilburg University 2012) 20-21; UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, October 2012, HCR/GIP/12/09 paras 34-37.

²⁴⁷ *Horvath v Secretary of State for the Home Department* [2000] UKHL 37 (Lord Clyde).

²⁴⁸ 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 paras 98-99.

²⁴⁹ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, October 2012, HCR/GIP/12/09 paras 35-36.

All in all, it is fair to say that the Dutch policy follows the recast QD to a large extent with regard to the substantive requirements LGBTI asylum seekers have to meet to be eligible for refugee status. Yet, whereas the asylum policies of the EU and its Member States ought to be in compliance with the Convention, this is currently far from reality. I will briefly touch upon the main findings of this chapter hereafter:

Well-founded fear of being persecuted

According to the UNHCR Handbook, the phrase ‘well-founded fear’ encompasses a subjective and an objective element, meaning that not only the LGBTI asylum seeker’s frame of mind determines his refugee status, but that this frame of mind is supported by an objective situation.²⁵⁰ This view is not shared by the recast QD and the Dutch policy, as these instruments only take into account the objective element. Article 4(3) of the recast QD and Article 31(4) of the Dutch Aliens Act 2000 articulate that asylum applications are to be determined on an individual basis taking into account, *inter alia*, relevant country of origin information, the statements and documentation presented by the asylum seeker, including information on whether he or she has been or may be subject to persecution or serious harm and his or her personal circumstances.²⁵¹ As no attention is paid to the state of mind of the applicant concerned, the Dutch policy, therein following the recast QD, employs a more stringent view than the Convention. Moreover, whereas the UNHCR Handbook states that a well-founded fear can also be based on the experiences of family members, friends and in case of LGBTI asylum seekers, other members of their social group, this is not laid down in the Dutch policy.²⁵² An issue that the Convention, the recast QD and the Aliens Circular agree on is that, if an LGBTI asylum seeker has been subjected to persecution or serious harm in the past, this is a serious indication of the asylum seeker’s well-founded fear of being persecuted.²⁵³

The concept of persecution

Whereas the Convention does not explain what is meant with the term ‘persecution’, the recast QD and the sets a step further in defining the phrase, by stating that an act can amount to persecution, if that act is sufficiently serious or if there is an accumulation of various measures. This definition is *verbatim* incorporated in Article 3.36 of the Dutch Aliens Regulation, as is the list of acts that can amount to persecution which can be found in Article 9(2) of the recast QD, which is a welcome development. Despite the fact that the Dutch policy largely follows the Convention and the recast QD in this respect, there is also a point of divergence. Article 3.36(3) of the Aliens Regulation makes a reference to Article 1A (2) of the Convention, thereby stating that there needs to be a causal relationship between on the one hand the reason(s) for persecution and on the other

²⁵⁰ 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 para 38 <<http://www.refworld.org/docid/4f33c8d92.html>> accessed 1 May 2016.

²⁵¹ Dutch Aliens Act 2000 art 31(4); see also: Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9; see for example District Court The Hague 2 December 2014, Awb 14/17164 paras 8-9.

²⁵² UN High Commissioner for Refugees (UNHCR), *Handbook 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 para 43 <<http://www.refworld.org/docid/4f33c8d92.html>> accessed 1 May 2016; UN High Commissioner for Refugees (UNHCR), *Resettlement Handbook: Chapter 3 - Refugee Status and Resettlement* (UNHCR, Geneva 2011) 83 <<http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3d464c954&query=Resettlement%20Handbook>> accessed 1 May 2016.

²⁵³ Dutch Aliens Act 2000 art 31(5).

hand the act(s) of persecution. In this respect, the Dutch policy erroneously follows the approach taken by Article 9(3) of the recast QD, an approach that is clearly not in line with the Convention, as the Convention requires a causal link between the well-founded fear of being persecuted and the reason(s) for persecution, which for LGBTI individuals is their membership of a particular social group.²⁵⁴ Furthermore, whereas the UNHCR Guidelines list two agents of persecution, *i.e.* the State and non-State actors, the recast QD adds a third option to this list, namely parties or organisations controlling the State or a substantial part of the territory of the State'. This tripartite list can also be found in Dutch law, yet the Dutch asylum practice shows an important point of discordance with the UNHCR Guidelines and the recast QD. In cases where the authorities in the country of origin are the perpetrators of persecution due to the criminalisation of homosexuality or same-sex sexual acts, LGBTI individuals are often confronted by the Dutch authorities that their country of origin does not actively persecute LGBTI individuals, thus implying that they have no justified fear of being persecuted.²⁵⁵ Thereto, asylum seekers are not only expected to demonstrate that persecution is perpetrated on account of the criminalisation of homosexuality, they also have to prove that this policy is actively enforced.²⁵⁶ The UNHCR Handbook and Guidelines and the recast QD do not require asylum seekers to provide evidence of the fact that the policy of persecution is actually enforced. So, in this respect, the Dutch authorities do not comply with the norms laid down in the Convention and the recast QD, as well as national policy, for the Aliens Circular does not put LGBTI asylum seekers under the obligation to demonstrate the enforced policy of persecution.

The nexus requirement and reason for persecution

LGBTI asylum seekers have to demonstrate that they fear being persecuted for reasons of one of the grounds listed in Article 1A (2) of the Convention. This means that there has to be a causal relationship. In this respect, the recast QD and the Dutch policy wrongly require a relationship between on the one hand the reason(s) for persecution and on the other hand the act(s) of persecution. There are two dominant opinions with regard to the intensity of the causal relationship between the fear of being persecuted and the Convention ground relied on. Some authors adhere to the view that the ground relied on must be one of the *essential or central reasons* why an individual fears persecution, whereas others have a different opinion and state that the ground relied on has to be *one among several reasons* causing the well-founded fear of being persecuted.²⁵⁷ According to the UNHCR, a causal link is found if the persecution ground relied on is a relevant factor contributing

²⁵⁴ H Tran, 'Homoseksuele asielzoekers in de Nederlandse asielprocedure' (LL.M. Thesis, Tilburg University 2012) 13; In order to see the differences, one should compare: Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9 art 9(3), Aliens Regulation art 3.36(3) and Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) Introductory note <<http://www.unhcr.org/3b66c2aa10.pdf>> accessed 1 May 2016; UN High Commissioner for Refugees (UNHCR), *Handbook 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 paras 66-67.

²⁵⁵ Sabine Jansen, 'Op de vlucht voor homohaar' (2006) 3 NAV 128; H Tran, 'Homoseksuele asielzoekers in de Nederlandse asielprocedure' (LL.M. Thesis, Tilburg University 2012) 49.

²⁵⁶ H Tran, 'Homoseksuele asielzoekers in de Nederlandse asielprocedure' (LL.M. Thesis, Tilburg University 2012) 49.

²⁵⁷ Andreas Zimmermann, Jonas Dörschner and Felix Machts, *The 1951 Convention Relating to the Status of Refugees and Its 1967 Protocol: A Commentary* (OUP, Oxford 2011) 372-373; Thomas Spijkerboer and Ben Vermeulen, *Vluchtelingenrecht* (1st edn Ars Aequi Libri, Nijmegen 2005) 54-55; H Tran, 'Homoseksuele asielzoekers in de Nederlandse asielprocedure' (LL.M. Thesis, Tilburg University 2012) 11-13; P Boeles, Maarten den Heijer and others, *European Migration Law* (2nd edn Intersentia, Cambridge 2014) 306-307.

to the persecution, yet, it does not have to be its sole cause.²⁵⁸ As the wording contained in the Convention does not compel the adoption of a very strict standard, it appears appropriate to assume that it is sufficient that the ground must be just one of the perhaps many reasons for persecution.²⁵⁹

The ground mostly relied on in LGBTI asylum applications is ‘membership of a particular social group, namely the group of individuals with a non-heterosexual orientation. The Convention neither defines this term nor provides a list of particular social groups, giving rise to various interpretations of the phrase. As a consequence, two generally accepted approaches for defining a ‘particular social group’ can be distinguished.²⁶⁰ The first approach adopted to define a ‘particular social group’ as such, is the so-called ‘protected characteristics’ or ‘immutability’ approach. The term ‘protected characteristic’ refers to a “characteristic that is either beyond the power of an individual to change or is so fundamental to individual identity or conscience that it ought not be required to be changed.”²⁶¹ LGBTI individuals have also been recognised as a particular social group under the alternative ‘social perception’ approach. This approach shifts the emphasis from the group-forming common characteristic’s immutability to its impact on how the group is perceived by society at large.²⁶² For LGBTI individuals, the common characteristic would be their non-heterosexual sexual orientation.

Compared to the approach taken by the UNHCR Guidelines, the recast QD and the Dutch asylum policy have changed the word “or” by the word “and”, thereby accumulating both approaches into one.²⁶³ Whereas the UNHCR takes the stance that satisfying one of the factors is sufficient for the existence of a particular social group, under the recast QD regime, both factors must be met. The recast QD and the Dutch policy therefore maintain a more stringent criterion.

²⁵⁸ UN High Commissioner for Refugees (UNHCR), *Resettlement Handbook: Chapter 3 - Refugee Status and Resettlement* (UNHCR, Geneva 2011) 85

<<http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3d464c954&query=Resettlement%20Handbook>> accessed 1 May 2016; UN High Commissioner for Refugees, *Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees* (UNHCR, Geneva 2001) para 23 <<http://www.refworld.org/docid/3b20a3914.html>> accessed 1 May 2016

²⁵⁹ P Boeles, Maarten den Heijer and others, *European Migration Law* (2nd edn Intersentia, Cambridge 2014) 306-307.

²⁶⁰ UN High Commissioner for Refugees (UNHCR), *Guidelines on international protection: “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*, 7 May 2002, HCR/GIP/02/02 para 5 <<http://www.refworld.org/docid/3d36f23f4.html>> accessed 1 May 2016; Helsinki Citizens’ Assembly and Organisation for Refuge, Asylum & Migration, ‘Unsafe Haven: The Security Challenges Facing Lesbian, Gay, Bisexual and Transgender Asylum Seekers and Refugees in Turkey’ (Report) (June 2009) 6.

²⁶¹ International Commission of Jurists, *Refugee status claims based on sexual orientation and gender identity: A practitioners’ guide* (Geneva, International Commission of Jurists 2016) 193-194 <<http://www.refworld.org/pdfid/56cabb7d4.pdf>> accessed 2 May 2016; *Matter of Acosta*, A-24159781, United States Board of Immigration Appeals, 1 March 1985 para. 10, 233-234 <<http://www.refworld.org/docid/3ae6b6b910.html>> accessed 31 May 2016; *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993 <<http://www.refworld.org/docid/3ae6b673c.html>> accessed 31 May 2016; H Tran, ‘Homoseksuele asielzoekers in de Nederlandse Asielprocedure’ (LL.M. Thesis, Tilburg University 2012) 9.

²⁶² UN High Commissioner for Refugees (UNHCR), *Guidelines on international protection: “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*, 7 May 2002, HCR/GIP/02/02 para. 7 <<http://www.refworld.org/docid/3d36f23f4.html>> accessed 1 May 2016; Z Bobis, ‘You are not what you ought to be: Credibility Assessment in Sexuality-Based Asylum Cases’ (LL.M. Thesis, Central European University 2012) 16.

²⁶³ UN High Commissioner for Refugees (UNHCR), *Guidelines on international protection: “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*, 7 May 2002, HCR/GIP/02/02 para 11 <<http://www.refworld.org/docid/3d36f23f4.html>> accessed 1 May 2016; Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9 art 10(1)(d).

Protection against persecution

Asylum seekers are generally expected to have requested the authorities of their country of origin for protection, before being entitled to protection in the host State. Only if it is obvious that the country of origin is unable or unwilling to offer protection to an asylum seeker, another country has to offer this protection.²⁶⁴ As to the agents of protection, the Convention on the one hand and the recast QD and the Dutch asylum policy on the other hand display an important divergence. The Convention's wording contained in Article 1A (2) seems to imply that protection can only be offered by States. Nevertheless, Article 7 of the recast QD, followed by Article 3.37c of the Aliens Regulation, wrongly state that [p]rotection against persecution or serious harm can only be provided by the state or by parties or organisations, including international organisations controlling the state or a substantial part of the territory of the state, provided that they are willing and able to offer protection.²⁶⁵ Therefore, it is not desirable that international organisations range on the side of actors of protection, as they cannot be parties to international treaties and therefore, they cannot be held responsible in case they do not live up to their obligations under these treaties.

²⁶⁴ H Tran, 'Homoseksuele asielzoekers in de Nederlandse Asielprocedure' (LL.M Thesis, Tilburg University 2012) 46.

²⁶⁵ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9 art 7.

4. THE DUTCH ASYLUM PRACTICE AND PROCEDURAL OBSTACLES FOR LGBTI ASYLUM SEEKERS

4.1 Introduction

Now that the substantive requirements LGBTI asylum seekers have to meet in order to be eligible for refugee status have been examined in detail, this chapter proceeds by reviewing the Dutch asylum practice. Signed by 148 states, the Convention and the Protocol are the key legal documents in defining who classifies as a refugee, for they outline the rights of refugees and identify states' legal obligations vis-à-vis asylum seekers.²⁶⁶ However, having a closer look at these instruments, leads to the conclusion that there is no obvious legal framework setting forth the manner for examining asylum applications. The Convention does not indicate what type of procedures are to be adopted for the determination of refugee status, thereby leaving it to each State party to establish the procedure that it considers most appropriate. As a result, the asylum procedures adopted by states vary considerably.²⁶⁷ This is also acknowledged by the Fleeing Homophobia report, which states that, even though LGBTI asylum seekers' right to asylum is fully recognised, the procedure for examining asylum applications based on sexual orientation is often in violation of international refugee law and human rights standards.²⁶⁸ The preparation of the UNHCR Handbook and Guidelines intended to provide national authorities with guidance, yet, the legal value of these documents remains in the domain of soft law and it ultimately depends on the weight they are given by national courts and decision-makers.²⁶⁹ Furthermore these guidelines assume that States parties to the Convention are free to choose their own procedural system.²⁷⁰

This chapter aims to find out if the Dutch asylum practice in asylum applications based on sexual orientation is in compliance with EU asylum legislation and human rights standards and identifies the procedural obstacles frequently encountered by LGBTI individuals. This will be done by means of the following sub-question:

“To what extent is the Dutch asylum practice, as regards the asylum interview and evidential standards, in asylum cases based on sexual orientation in compliance with EU asylum legislation and human rights standards?”

²⁶⁶ Marcelle Reneman, *EU Asylum procedures and the right to an effective remedy* (Oxford, Hart Publishing Ltd. 2014) 54; Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) Introductory note <<http://www.unhcr.org/3b66c2aa10.pdf>> accessed 1 May 2016.

²⁶⁷ A Marcelle Reneman, 'EU asylum procedures and the right to an effective remedy' (LL.M. Dissertation, Leiden University 2013) 4-5; Michael Alexander, 'Refugee status determination conducted by UNHCR' (1999) 11 IJRL 254.

²⁶⁸ Sabine Jansen en Thomas Spijkerboer, 'Fleeing homophobia: Asylum claims related to sexual orientation and gender identity in Europe' (September 2011) 7-10; G Almeida Ferreira, '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' (LL.M. Thesis, Tilburg University 2015) 24.

²⁶⁹ G Almeida Ferreira, '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' (LL.M Thesis, Tilburg University 2015) 2,15.

²⁷⁰ A Marcelle Reneman, 'EU asylum procedures and the right to an effective remedy' (LL.M. Dissertation, Leiden University 2013) 4.

The remainder of this chapter will discuss two issues that are especially important in asylum applications based on sexual orientation: the personal interview and the burden of proof in combination with the information relied on.

4.2 The asylum seeker's personal interview under EU law

Since in most asylum cases there is little to no documentary evidence available which supports applicants' asylum applications, the main source of information remains the asylum seeker him- or herself.²⁷¹ Therefore, the personal asylum interview is an essential opportunity for asylum seekers to substantiate their well founded fear for persecution and is often the decisive factor in assessing whether or not he or she will receive protection from the host State.²⁷² It provides the applicant with an opportunity to explain directly to the determining authority the reasons for the application and it gives the IND the opportunity to establish, as far as possible, all the relevant facts and to assess the credibility of the oral evidence.²⁷³ A successful personal interview is the basis for reaching an appropriate and legally sound decision and can make a difference between receiving protection from the host State or being sent back to one's country of origin, thereby risking a violation of Article 3 ECHR. So, it is of crucial importance that a asylum applications are examined individually and that the personal interviews are conducted in a impartial, patient and objective manner.²⁷⁴ This is especially relevant, since the recast PD does not offer any specific guarantees for LGBTI asylum seekers to provide their story or any information in the absence of that interview.²⁷⁵ The only provisions on the personal asylum interview are contained in Articles 12 to 16 of the recast PD. These provisions state *inter alia* that asylum seekers should be given a personal interview, which must take place in a confidential setting and must be conducted by a person who is competent to take into account the circumstances surrounding the application, including the asylum seeker's sexual orientation.²⁷⁶

4.2.1 The asylum seeker's personal interview under Dutch law

The Dutch asylum interview is mainly governed by the Aliens Decree 2000. According to its Articles 3.112 and 3.113, only two personal interviews will be conducted by the Dutch Immigration and Naturalisation Service [hereafter: "IND"], both under the regular as well as under the accelerated procedure.²⁷⁷ However, before these interviews are conducted, the asylum seeker is

²⁷¹ N Doornbos, *On being heard in asylum cases: Evidentiary assessment through asylum interviews* in G Noll, *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martinus Nijhoff Publishers, Boston 2005) 103-104; Paragraph 64 of the *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* states that "Where there is a lack of country of origin information, the decision maker will have to rely on the applicant's statements alone".

²⁷² M Griemink, 'Comparing European Union and Dutch asylum law procedures: balancing efficiency and substantive examination in asylum applications' (LL.M. Research paper, Victoria University of Wellington 2014) 6.

²⁷³ UN High Commissioner for Refugees (UNHCR), *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations* (March 2010) 65 <<http://www.refworld.org/docid/4bab55752.html>> accessed 1 August 2016.

²⁷⁴ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60 art 10(3)(a); N Doornbos, *On being heard in asylum cases: Evidentiary assessment through asylum interviews* in G Noll, *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martinus Nijhoff Publishers, Boston 2005) 103-104.

²⁷⁵ M Griemink, 'Comparing European Union and Dutch asylum law procedures: balancing efficiency and substantive examination in asylum applications' (LL.M. Research paper, Victoria University of Wellington 2014) 6.

²⁷⁶ European Agency for Fundamental Rights, *Handbook on European law relating to asylum, borders and immigration* (June 2013) 97 <<http://www.refworld.org/docid/51b6eb394.html>> accessed 1 August 2016.

²⁷⁷ M Griemink, 'Comparing European Union and Dutch asylum law procedures: balancing efficiency and substantive examination in asylum applications' (LL.M. Research paper, Victoria University of Wellington 2014) 7; Aliens Decree 2000 arts

granted a six-day rest and preparation period in order to cope with the stress of fleeing his or her country of origin and the journey to the Netherlands and to prepare for the upcoming interviews.²⁷⁸ At the beginning of this period, the asylum seeker has to lodge an official asylum application by using a form offered to them by the Dutch authorities. This marks the formal start of the asylum procedure.²⁷⁹ After the six-day rest and preparation period has ended, the actual asylum procedure starts and the first interview is undertaken. This interview does not touch upon the reasons for seeking asylum yet. It only serves to ascertain the asylum seeker's identity, nationality and travel route from his/her country of origin to the Netherlands.²⁸⁰ At this moment, a legal representative is also automatically appointed, yet, the representative is rarely present during the first personal interview. The reason of this absence is not clarified, but it might be found in the fact that the representative cannot question the asylum seeker during the first personal interview.²⁸¹ This seems to be contradictory to the importance of the first personal interview. The day after the first interview, the asylum seeker and the appointed legal representative prepare for the second interview that will take place on the third day and review the first interview after which corrections and additions to the first interview may be submitted.²⁸² On the third day, the second and more extensive interview is conducted in which the asylum seeker is questioned about his/her reasons for seeking asylum.²⁸³

During this speedy process of assessing the asylum application, asylum seekers are expected to present a coherent and reliable account of what happened to them, which can be unrealistic in some cases.²⁸⁴ Whereas it is important to have a speedy asylum procedure in place, time-limits must not be so short as to jeopardise an alien's right to seek asylum or other human rights.²⁸⁵ LGBTI asylum seekers are often ashamed, because they have internalised the surrounding homophobia or have suffered trauma. This makes them unable to talk openly about their sexual orientation. As a consequence, the asylum procedure can be obstructed. In this context, a case arose before the German Administrative Court in Augsburg, which illustrates the issue discussed above. In this case,

3.112 and 3.113.

²⁷⁸ Aliens Decree 2000 art 3.109(1); Asylum Information Database, 'Short overview of the asylum procedure: Netherlands' <<http://www.asylumineurope.org/reports/country/netherlands/asylum-procedure/general/short-overview-asylum-procedure>> accessed 25 July 2016..

²⁷⁹ Aliens Decree 2000 art 3.108c; Asylum Information Database, 'Short overview of the asylum procedure: Netherlands' <<http://www.asylumineurope.org/reports/country/netherlands/asylum-procedure/general/short-overview-asylum-procedure>> accessed 25 July 2016.

²⁸⁰ Asylum Information Database, 'Short overview of the asylum procedure: Netherlands' <<http://www.asylumineurope.org/reports/country/netherlands/asylum-procedure/general/short-overview-asylum-procedure>> accessed 25 July 2016.

²⁸¹ Asylum Information Database, 'Short overview of the asylum procedure: Netherlands' <<http://www.asylumineurope.org/reports/country/netherlands/asylum-procedure/general/short-overview-asylum-procedure>> accessed 25 July 2016; M Griemink, 'Comparing European Union and Dutch asylum law procedures: balancing efficiency and substantive examination in asylum applications' (LL.M. Research paper, Victoria University of Wellington 2014) 7; J van Rooij, *Asylum Procedure versus Human Rights* (Vrije Universiteit Amsterdam, Amsterdam, 2004) 3.

²⁸² Aliens Decree 2000 art 3.113(1); Asylum Information Database, 'Short overview of the asylum procedure: Netherlands' <<http://www.asylumineurope.org/reports/country/netherlands/asylum-procedure/general/short-overview-asylum-procedure>> accessed 25 July 2016.

²⁸³ Aliens Decree 2000 art 3.113(2); Asylum Information Database, 'Short overview of the asylum procedure: Netherlands' <<http://www.asylumineurope.org/reports/country/netherlands/asylum-procedure/general/short-overview-asylum-procedure>> accessed 25 July 2016.

²⁸⁴ M Griemink, 'Comparing European Union and Dutch asylum law procedures: balancing efficiency and substantive examination in asylum applications' (LL.M. Research paper, Victoria University of Wellington 2014) 7-8.

²⁸⁵ Commissioner for Human Rights of the Council of Europe, 'Position Paper from the Council of Europe Commissioner for Human Rights' <<https://wcd.coe.int/ViewDoc.jsp?p=&id=1640757&direct=true>> accessed 30 July 2016.

a gay man from Afghanistan fled to the United Kingdom and applied for asylum.²⁸⁶ The asylum seeker did not refer to his sexual orientation during the personal interview, because he was ashamed. A fellow gay asylum seeker, whom he met while in detention, advised him not to touch upon the subject, because he was questioned by a female interviewer and a female interpreter. As a result, his application for asylum was rejected and he was returned to his country of origin. In this context, the case of *Hatami v. Sweden* is also relevant. In this particular case, the ECtHR ruled that the rejection of an asylum application due to inconsistencies in the statements of the applicant resulting from the interview conducted with inadequate interpretation and culminating in a short report without any detail and not explained to the applicant was a breach of Article 3 ECHR as it was an inadequate procedural safeguard.²⁸⁷

With this in mind, conducting only two interviews might be insufficient to draw out the full story if the person is scared, traumatised or ashamed of doing so.²⁸⁸ Especially in cases concerning LGBTI asylum seekers, it can be useful to conduct more than two personal interviews in order to create a relationship of trust, thereby enabling the determination authority to gather relevant information that would normally not be revealed. Furthermore, interviewers are granted a considerable amount of discretion as to how to conduct an interview. This can be traced back to Article 4(3) of the recast PD, which only sets forth that personnel of the determining authority are properly trained.²⁸⁹ Due to a lack of experience and training or a lack of information about the specific circumstances LGBTI asylum seekers often live in, communication problems can arise.

4.3 Evidentiary standards

Besides difficulties as to the personal interview, LGBTI asylum seekers encounter evidentiary obstacles when having their application for asylum assessed. When lodging an application for asylum, the issue at stake is whether an asylum seeker is eligible for asylum. It is on the basis of the declarations made during the personal interview and other evidence available that the personnel of the determining authority shall assess whether the asylum seeker qualifies as a refugee. Hereto, he or she must adduce information or evidence to support the claim for asylum, as the burden of proof lies on the person who makes an assertion. In the context of asylum cases, it is the applicant who has the burden of establishing the veracity of his or her allegations and the accuracy of the facts on which the asylum application is built.²⁹⁰ Evidence in asylum cases can take many forms, *inter alia* testimonies, declarations made during the personal interview, travel documents, identity papers and language analyses.²⁹¹ Yet, often it is very difficult for LGBTI asylum seekers to support their statements with documentary proof or other types of evidence and cases in which an applicant

²⁸⁶ Verwaltungsgericht Augsburg (Administrative Court), 29 July 2013, Au 6 K 13.30158; Sabine Jansen, 'Good practices related to LGBTI asylum applicants in Europe' (ILGA Europe, May 2014) 41-42.

²⁸⁷ *Hatami v. Sweden*, 32448/96, ECHR, 23 January 1997.

²⁸⁸ M Griemink, 'Comparing European Union and Dutch asylum law procedures: balancing efficiency and substantive examination in asylum applications' (LL.M. Research paper, Victoria University of Wellington 2014) 8.

²⁸⁹ Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60 art 4(3).

²⁹⁰ UN High Commissioner for Refugees (UNHCR), *Handbook 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 para 196; H Tran, 'Homoseksuele asielzoekers in de Nederlandse Asielprocedure' (LL.M Thesis, Tilburg University 2012) 30; UN High Commissioner for Refugees (UNHCR), *Note on Burden and Standard of Proof in Refugee Claims*, December 1998 paras 5-6 <<http://www.refworld.org/pdfid/3ae6b3338.pdf>> accessed 30 July 2016.

²⁹¹ P Boeles, Maarten den Heijer and others, *European Migration Law* (2nd edn Intersentia, Cambridge 2014) 317; H Tran, 'Homoseksuele asielzoekers in de Nederlandse Asielprocedure' (LL.M Thesis, Tilburg University 2012) 30

can provide evidence of all his statements will be the exception rather than the rule.²⁹² In most cases a person fleeing from persecution arrives with little to no personal belongings and very frequently even without personal documents.²⁹³ Nevertheless, asylum seekers have to cooperate as much as possible with the authorities, by telling the truth and provide as much evidence as they can, yet, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner.²⁹⁴

One type of evidence which is often decisive and which determination authorities must procure is so-called country of origin information [hereafter: “COI”].²⁹⁵ COI contains factual information about a country’s record concerning persecution of, discrimination against and protection for LGBTI individuals.²⁹⁶ It enables the determination authorities to relate the fear brought forward by the asylum seeker to the human rights situation of LGBTI individuals in the country of origin concerned. Yet, according to the UNHCR Guidelines, despite the fact that COI can be used as evidence in asylum cases, it is important to point out that this information might be biased and/or incomplete:

“Relevant and specific country of origin information on the situation and treatment of LGBTI individuals is often lacking. This should not automatically lead to the conclusion that the applicant’s claim is unfounded or that there is no persecution of LGBTI individuals in that country. The extent to which international organizations and other groups are able to monitor and document abuses against LGBTI individuals remain limited in many countries. Increased activism has often been met with attacks on human rights defenders, which impede their ability to document violations.”²⁹⁷

To conclude, EU Member States have drawn up a lists with countries of origin that are deemed to be safe. Applications from asylum seekers fleeing from such States are often processed through accelerated procedures or in some cases simply rejected. Yet, even in countries that are considered to be safe, there may very well be situations where not all individuals are safe, for example, LGBTI individuals. This demonstrates once more why it is so important to examine asylum applications on an individual basis, taking into account the applicant’s particular circumstances.

4.4 Conclusive remarks

From the aforementioned, it can be concluded that the Dutch asylum practice is not fully in line with EU asylum law and human right standards. Due to a lack of guidance by the Convention, the Dutch asylum practice has been allowed to diverge. This was demonstrated by means of the

²⁹² 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 para 196.

²⁹³ 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 para 196.

²⁹⁴ UN High Commissioner for Refugees (UNHCR), *Handbook 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 paras 196 and 205.

²⁹⁵ P Boeles, Maarten den Heijer and others, *European Migration Law* (2nd edn Intersentia, Cambridge 2014) 317.

²⁹⁶ G Almeida Ferreira, ‘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’ (LL.M Thesis, Tilburg University 2015) 14.

²⁹⁷ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, October 2012, HCR/GIP/12/09 para 66.

procedure currently in place for asylum interviews. Another issue remains the evidentiary standard. Evidence in asylum cases can take many forms, yet, often it is very difficult for LGBTI asylum seekers to support their statements with documentary proof or other types of evidence and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule.²⁹⁸ In most cases a person fleeing from persecution arrives with little to no personal belongings and very frequently even without personal documents. Furthermore, determination authorities use COI when assessing asylum applications. COI reports provide authorities with relevant information, however, this information might be biased and/or incomplete.

²⁹⁸ 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 para 196; P Boeles, Maarten den Heijer and others, *European Migration Law* (2nd edn Intersentia, Cambridge 2014) 317; H Tran, 'Homoseksuele asielzoekers in de Nederlandse Asielprocedure' (LL.M Thesis, Tilburg University 2012) 30.

5. THE CONTRIBUTION OF THE CJEU IN SHAPING THE DUTCH ASYLUM POLICY AND PRACTICE

5.1 Introduction

Until this point, the analysis of the Dutch asylum policy and practice focused on the substantive requirements LGBTI asylum seekers must meet before being entitled to refugee status, the procedural guarantees they are entitled to and the procedural obstacles they encounter. This chapter will proceed by zooming in on the contribution of the CJEU in shaping the Dutch asylum policy with regard to LGBTI asylum applications, by looking at two issues that frequently arise in asylum applications based on sexual orientation: the so-called discretion requirement and the criminalisation of same-sex sexual acts. These two contentious issues led until quite recently to the rejection of various LGBTI asylum applications. The upcoming analysis is performed by means of a case study of the joined cases *X, Y and Z v Minister voor Immigratie, Integratie en Asiel*.²⁹⁹ These cases, referred to the CJEU for a preliminary ruling, highlight the struggle faced by EU Member States that grant refugee status to asylum seekers fleeing persecution on account of their sexual orientation.³⁰⁰ It offered an important opportunity to deepen the understanding of claims to refugee status from those with a minority sexual orientation and the related challenges of decision makers in applying the Convention and EU asylum legislation to such claims. Whereas the Convention did not specifically identify persecuted LGBTI individuals as being eligible for refugee status, the EU issued the 2004 QD, which affords refugee status to individuals persecuted for reasons of their membership within a particular social group based on their sexual orientation. As EU Member States began hearing claims from LGBTI asylum seekers, struggles arose as to how to deal with such claims.

This chapter contains an in-depth assessment of the long-awaited judgment, which was the first opportunity for the CJEU to shed a light on the relationship between EU asylum legislation and LGBTI asylum seekers. The ruling arose from the asylum applications lodged in the Netherlands by three asylum seekers claiming to have a well-founded fear of being persecuted for reasons of their sexual orientation in their countries of origin where same-sex sexual conduct was and remains criminalised. Despite it being a positive development for LGBTI asylum seekers fleeing persecution in their countries of origin, the decision sends mixed messages and the implications of this ruling are a matter of considerable dispute.³⁰¹ On the one hand, the Court unequivocally rejects the contentious ‘discretion requirement’ in LGBTI-related asylum cases, thereby expanding the “discretion-reasoning-free zone” to all EU Member States, which is a welcome step forward, however, on the other hand, the Court missed a key opportunity to state clearly that laws

²⁹⁹ Case C-199/12, C200/12 and C201/12 *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* (CJEU 7 November 2013).

³⁰⁰ Case C-199/12, C200/12 and C201/12 *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* (CJEU 7 November 2013); Erin Gomez, ‘The post-ABC situation of LGB refugees in Europe’ (2016) 30 *Emory International Law Review* <<http://law.emory.edu/eilr/content/volume-30/issue-3/comments/post-abc-lgb-refugees-europe.html>> accessed 1 May 2016.

³⁰¹ —, ‘The Court of Justice of the European Union delivers judgment in the joined cases of C-199/12, C-200/12 and C-201/12, *X, Y and Z v Minister voor Immigratie en Asiel*’ (2013) <<http://www.asylumlawdatabase.eu/en/content/court-justice-european-union-delivers-judgment-joined-cases-c-19912-c-20012-and-c-20112-x-y>> accessed 1 May 2016.

criminalising same-sex sexual conduct amount to persecution *per se*, as they criminalise an essential characteristic of one's identity, regardless of how often these laws are enforced.³⁰²

The remainder of this chapter will analyse the Court's main findings in order to find out about the significance of this case. The objective of this analysis is to come up with an answer to the following sub-question:

“In what respect did the Court of Justice of the European Union shape the Dutch asylum policy with regard to asylum applications based on sexual orientation in the joined cases of X, Y and Z v Minister voor Immigratie, Integratie en Asiel?”

5.2 Facts of the case and procedural history

The names of the applicants in the case under discussion were anonymised, as per Article 95(2) of the Rules of Procedure of the Court of Justice, and referred to as X, Y and Z, of respectively Sierra Leone, Uganda and Senegal.³⁰³ They fled their countries of origin and applied for international protection in the Netherlands between 2009 and 2011, stating that they faced a well-founded fear of being persecuted in their home countries on account of their same-sex sexual orientation, relying, *inter alia*, on the fact that homosexuality is punished with imprisonment in these three countries, even with life imprisonment in the case of Uganda.³⁰⁴ They also claimed to have been subjected to violent reactions by their families and communities, as well as acts of repression by the authorities.³⁰⁵

By decree, the Dutch Minister refused to grant refugee status to X, Y and Z. In all three cases, the sexual orientation of the applicants was not in dispute, however, their applications for asylum were rejected, because the Dutch court was unsure as to whether their fear of suffering persecution by reason of their membership of a particular social group was well-founded.³⁰⁶ Following the rejection of their applications for asylum, X and Z appealed the rejection before the District Court 's-Gravenhage. Y lodged an application for interim measures before the same court. The District Court 's-Gravenhage upheld X's appeal and Y's application, but dismissed Z's appeal.³⁰⁷ After lodging this series of appeals, the cases were brought before the Administrative Jurisdiction Division of the Dutch Council of State [hereafter: Council of State], which was hearing the cases at final instance. The Council of State sought clarification from the CJEU and requested for a preliminary ruling on three questions concerning the interpretation of Articles 9(1)(a), 9(1)(c) and 10(1)(d) of Directive 2004/83/EU [hereafter: QD] in the context of asylum applicants fleeing

³⁰² G Ku Wei Bin, 'No Freedom in a Closet: The Persistence of Discretion Reasoning in the Refugee Status Determination Process for Lesbian, Gay, and Bisexual Asylum Applications to the European Union' (LL.M. Thesis, Lund University 2014).

³⁰³ Rules of Procedure of the Court of Justice of the European Union of 29 September 2012 [2012] OJ L 265/1 art 95; M den Heijer, 'Persecution for reason of sexual orientation: X, Y and Z' (2014) 1219 <<http://dare.uva.nl/document/2/152759>> accessed 1 May 2016.

³⁰⁴ Case C-199/12, C200/12 and C201/12 *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* (CJEU 7 November 2013) paras 23-26.

³⁰⁵ Case C-199/12, C200/12 and C201/12 *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* (CJEU 7 November 2013) para 25.

³⁰⁶ Case C-199/12, C200/12 and C201/12 *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* (CJEU 7 November 2013) para 28.

³⁰⁷ Case C-199/12, C200/12 and C201/12 *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* (CJEU 7 November 2013) paras 30-33; G Ku Wei Bin, 'No Freedom in a Closet: The Persistence of Discretion Reasoning in the Refugee Status Determination Process for Lesbian, Gay, and Bisexual Asylum Applications to the European Union' (LL.M Thesis, Lund University 2014); G Almeida Ferreira, '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' (LL.M. Thesis, Tilburg University 2015) 28-31.

persecution on the basis of their sexual orientation, based on Article 267 of the Treaty on the Functioning of the EU.³⁰⁸

The CJEU was basically asked as to whether foreign nationals who are homosexuals may be regarded as forming a ‘particular social group’ within the meaning of the QD. Furthermore, it wants to know how national authorities should determine what constitutes an act of persecution against same-sex sexual activities and whether the criminalisation of those activities in the applicants’ countries of origin by itself amounts to persecution.³⁰⁹ The domestic court phrased its questions as follows:

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 sub-questions:
 - 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?”³¹⁰

In its judgment, the CJEU made three key points: Firstly, persecution for reasons of one’s sexual orientation can be brought within the scope of the refugee definition; Secondly, LGBTI asylum seekers cannot reasonably be expected to conceal their sexual orientation in their country of origin in order to avoid the risk of persecution and; Thirdly, the Court stated that criminalisation of homosexual activity does not amount to persecution. However, when a term of imprisonment

³⁰⁸ European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 26 October 2012, OJ L 326/47 <<http://www.refworld.org/docid/52303e8d4.html>> accessed 11 May 2016; Council Directive (EC) 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12.

³⁰⁹ Athanassios Thakis, *Refugee Claims Based on Persecution Due to Sexual Orientation before the Court of Justice of the European Union* in Christina Akrivopoulou, *Protecting the Genetic Self from Biometric Threats* (Patra, Hellenic Open University and IGI Global 2015).

³¹⁰ Case C-199/12, C200/12 and C201/12 X, Y and Z v Minister voor Immigratie, Integratie en Asiel (CJEU 7 November 2013) para 37.

accompanies such a legislative provision, it may constitute an act of persecution *per se*, provided that it is actually applied.³¹¹ These points will be critically assessed in the order followed by the Court in the following paragraphs.

5.3 Analysis of the CJEU's judgment

Before the Court starts with its assessment of the questions referred to it, the CJEU affirmed that the Convention constitutes “the cornerstone of the international legal regime for the protection of refugees”. The Court also confirmed that the provisions of the 2004 QD are to guide the authorities of the Member States in the application of the Convention, stating that “[t]he Directive must, for that reason, be interpreted in the light of its general scheme and purpose, and in a manner consistent with the Geneva [Refugee] Convention [...]”³¹²

5.3.1 Question 1: ‘Membership of a particular social group’

By its first question, the Council of State asked essentially whether Article 10(1)(d) QD must be interpreted as meaning that, for the assessment of the grounds of persecution which are relied on in support of an application for refugee status, homosexuals may be regarded as being members of a particular social group.³¹³ The Court answered this question in the affirmative.³¹⁴ In order to come to this conclusion, the CJEU stuck with the wording of Article 10(1)(d), hence endorsed the cumulative approach taken by this provision, understood that both conditions, an innate or fundamental characteristic and the perception of being different by the surrounding society, are required for establishing the existence of a particular social group, despite the fact that the UNHCR's authoritative interpretation of the Convention does not support such a reading.³¹⁵ According to the UNHCR,

“a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society.

³¹¹ Case C-199/12, C200/12 and C201/12 *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* (CJEU 7 November 2013); M den Heijer, ‘Persecution for reason of sexual orientation: X, Y and Z’ (2014) 1217 <<http://dare.uva.nl/document/2/152759>> accessed 1 May 2016; Athanassios Thakis, *Refugee Claims Based on Persecution Due to Sexual Orientation before the Court of Justice of the European Union* in Christina Akrivopoulou, *Protecting the Genetic Self from Biometric Threats* (Patra, Hellenic Open University and IGI Global 2015).

³¹² Case C-199/12, C200/12 and C201/12 *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* (CJEU 7 November 2013) paras 39 and 40; ICJ, *X, Y and Z: a glass half full for “rainbow refugees”? The International Commission of Jurists’ observations on the judgment of the Court of Justice of the European Union in X, Y and Z v. Minister voor Immigratie en Asiel* (case note) [2014] <<http://www.refworld.org/pdfid/538dca6f0.pdf>> accessed 25 April 2016 10-11; —, ‘Case Law: Minister voor Immigratie en Asiel v X (C-199/12), Y (C-200/12), and Z v Minister voor Immigratie en Asiel (C-201/12)’ (2014) 25 IJRL 779,793 <<http://ijrl.oxfordjournals.org/content/25/4/779.full.pdf>> accessed 1 May 2016; Athanassios Thakis, *Refugee Claims Based on Persecution Due to Sexual Orientation before the Court of Justice of the European Union* in Christina Akrivopoulou, *Protecting the Genetic Self from Biometric Threats* (Patra, Hellenic Open University and IGI Global 2015).

³¹³ —, ‘Case Law: Minister voor Immigratie en Asiel v X (C-199/12), Y (C-200/12), and Z v Minister voor Immigratie en Asiel (C-201/12)’ (2014) 25 IJRL 787 <<http://ijrl.oxfordjournals.org/content/25/4/779.full.pdf>> accessed 1 May 2016.

³¹⁴ Case C-199/12, C200/12 and C201/12 *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* (CJEU 7 November 2013) paras 46 and 48; G Almeida Ferreira, ‘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’ (LL.M. Thesis, Tilburg University 2015) 28-31.

³¹⁵ Case C-199/12, C200/12 and C201/12 *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* (CJEU 7 November 2013) paras 45-46; ICJ, *X, Y and Z: a glass half full for “rainbow refugees”? The International Commission of Jurists’ observations on the judgment of the Court of Justice of the European Union in X, Y and Z v. Minister voor Immigratie en Asiel* (case note) [2014] <<http://www.refworld.org/pdfid/538dca6f0.pdf>> accessed 25 April 2016 10-11; UN High Commissioner for Refugees (UNHCR), *The ‘Ground with the Least Clarity’: A Comparative Study of Jurisprudential Developments relating to ‘Membership of a Particular Social Group*, August 2012, PPLA/2012/02 16-17.

The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.”³¹⁶

Moreover, this cumulative approach appears to be inconsistent with the Court's own preliminary observations, where it had correctly identified that “[t]he Directive must [...] be interpreted [...] in a manner consistent with the Geneva [Refugee] Convention” and with the rights recognised in the Charter.³¹⁷ In practice, the cumulative approach adhered to by the Court in this case did not create a problem, as it came to the conclusion that homosexuals constitute a particular social group. Yet, the CJEU acknowledged that “[...] the existence of criminal laws [...] supports [the] finding that homosexuals form a separate group, thereby drawing a link between the existence of a particular social group and legislation criminalising same-sex sexual conduct.”³¹⁸ This relationship should be strictly read as illustrative, not mandatory.³¹⁹ Otherwise, LGBTI asylum seekers fleeing for persecution in countries where homosexuality is not explicitly criminalised, would not be considered as members of a particular social group and, as a consequence, be denied refugee status.

As to the first part of the cumulative test, *i.e.* that members of a group share an innate characteristic or a characteristic that is so fundamental to one's identity that a person should not be forced to renounce it, the Court came to the conclusion that this condition was satisfied, because it is common ground that sexual orientation is such a fundamental characteristic.³²⁰ Whether or not the second condition is satisfied, is dependent on the situation in the country of origin. This condition is more problematic to demonstrate, for it renders the existence of a particular social group contingent on its external visibility in the country of origin. Such visibility can be difficult to establish for sexual minorities who feel compelled to hide their sexual orientation from the public.³²¹ Nevertheless, the Court noted, by stating that “[...] the existence of criminal laws [...] supports a finding that homosexuals form a separate group which is perceived by the surrounding society in the country origin as being different”, that the second element is also met.³²² So, the status of the group as distinctive from the majority can be traced to laws specifically applied to this group.³²³ Criminalisation serves, thus, not only as a means for evaluating the existence of a particular social group but also for measuring the severity of the act of persecution.³²⁴ Hereby, the CJEU confirms that LGBTI individuals are within the scope of Article 1A (2) of the Convention,

³¹⁶ UN High Commissioner for Refugees (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 para 11.

³¹⁷ ICJ, *X, Y and Z: a glass half full for "rainbow refugees"?* *The International Commission of Jurists' observations on the judgment of the Court of Justice of the European Union in X, Y and Z v. Minister voor Immigratie en Asiel* (case note) [2014] <<http://www.refworld.org/pdfid/538dca6f0.pdf>> accessed 25 April 2016 10-11.

³¹⁸ Case C-199/12, C200/12 and C201/12 *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* (CJEU 7 November 2013) paras 47-48.

³¹⁹ G Almeida Ferreira, '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* (LL.M. Thesis, Tilburg University 2015) 57-58.

³²⁰ Case C-199/12, C200/12 and C201/12 *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* (CJEU 7 November 2013) para 46.

³²¹ Minos Mouzourakis, 'Case comment: Joined cases C-199/12, C200/12 and C201/12 *X, Y and Z v Minister voor Immigratie en Asiel*' <<http://rightsindex.tumblr.com/post/68661003172/case-comment-joined-cases-c-19912-c-20012-and>> accessed 1 May 2016.

³²² Case C-199/12, C200/12 and C201/12 *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* (CJEU 7 November 2013) paras 47-48.

³²³ Athanassios Thakis, *Refugee Claims Based on Persecution Due to Sexual Orientation before the Court of Justice of the European Union* in Christina Akrivopoulou, *Protecting the Genetic Self from Biometric Threats* (Patra, Hellenic Open University and IGI Global 2015).

³²⁴ Athanassios Thakis, *Refugee Claims Based on Persecution Due to Sexual Orientation before the Court of Justice of the European Union* in Christina Akrivopoulou, *Protecting the Genetic Self from Biometric Threats* (Patra, Hellenic Open University and IGI Global 2015).

however, this also follows from the wording contained in Article 10(1)(d) QD which explicitly refers to sexual orientation and gender identity as grounds for identifying a particular social group.³²⁵ So, after applying the two-limb test cumulatively, the Court concludes that the existence of criminal laws that prohibit certain sexual acts, specifically targeting homosexuals, supports the finding that those persons must be regarded as forming a particular social group.

Although the Court's reaffirmation that LGBTI individuals are within the protected grounds of the Convention is welcome, its answer to the first question leaves a lot to be desired. Firstly, the CJEU does not give guidance as to how to examine the second element of the cumulative approach, when there are no laws in place that (explicitly) criminalise homosexuality. In that case, how can or should one determine if the second condition is satisfied? And, if the second condition is not met, is it still possible to form a particular social group? The Court's judgment does not contain a clear-cut answer to these questions, however, as the CJEU adheres to the cumulative approach taken by Article 10(1)(d) of the QD for recognising the existence of a particular social group, the answer to the latter question appears to be negative.³²⁶ Yet, it is questionable whether this is correct, considering that the UNHCR in its Guidance Note has only supported the application of one of elements: sharing a fundamental characteristic or the perception within society.³²⁷ According to the UNHCR, the European Council on Refugees and Exiles (ECRE) and various legal scholars, both conditions are correct for identifying a particular social group, however, a cumulation of these conditions will lead to protection gaps if applicants are only able to satisfy one of the elements.³²⁸

In the cases *SSHD v K* and *Fornah v SSHD*, Lord Bingham agreed with the approach taken by the UNHCR. He held that Article 10(1)(d) of the Directive contains two tests: if the members of a particular social group do not share a fundamental characteristic, one must determine whether the society perceives the group as being different.³²⁹ If Article 10(1)(d) QD would be interpreted as

³²⁵ Council Directive (EC) 2004/83 of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12 <<http://www.refworld.org/docid/4157e75e4.html>> accessed 25 April 2016; G Almeida Ferreira, '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' (LL.M. Thesis, Tilburg University 2015) 28-31; I Ricci, 'European Asylum Policy and Sexual Orientation: Interpretive and applicative issues' <<https://citizenrights.euroalter.com/wp-content/uploads/2015/11/I.-Ricci-European-Asylum-Policy-And-Sexual-Orientation-2015.pdf>> accessed 25 April 2016 6-7.

³²⁶ 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; UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, October 2012, HCR/GIP/12/09 paras 44-49; Hemme Battjes, 'Asielverzoeken van homoseksuelen: X, Y en Z tegen de Minister voor immigratie en asiel' (2013) 10 A&MR 505 <http://www.asielenmigrantenrecht.nl/a_mr/ve13002557.pdf> accessed 1 May 2016.

³²⁷ Hemme Battjes, 'Asielverzoeken van homoseksuelen: X, Y en Z tegen de Minister voor immigratie en asiel' (2013) 10 A&MR 505 <http://www.asielenmigrantenrecht.nl/a_mr/ve13002557.pdf> accessed 1 May 2016; 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* (28 September 2012) 8 <<http://www.refworld.org/docid/5065c0bd2.html>> accessed 1 May 2016.

³²⁸ —, 'The Court of Justice of the European Union delivers judgment in the joined cases of C-199/12, C-200/12 and C-201/12, X, Y and Z v Minister voor Immigratie en Asiel' (2013) <<http://www.asylumlawdatabase.eu/en/content/court-justice-european-union-delivers-judgment-joined-cases-c-19912-c-20012-and-c-20112-x-y>> accessed 1 May 2016; ECRE, *ECRE Information Note on the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)* (2013) 8-9 <http://www.ecre.org/index.php?option=com_downloads&id=805> accessed 1 May 2016.

³²⁹ Hemme Battjes, 'Asielverzoeken van homoseksuelen: X, Y en Z tegen de Minister voor immigratie en asiel' (2013) 10 A&MR 505 <http://www.asielenmigrantenrecht.nl/a_mr/ve13002557.pdf> accessed 1 May 2016; Council Directive (EC) 2004/83 of

meaning that a particular social group should only be recognised as such if it satisfies both criteria, this test would be more stringent than is warranted by international refugee law.³³⁰ According to Article 78(1) TFEU, national authorities and the Court itself must interpret EU asylum legislation consistently with the Convention and the Protocol, so, if the approach taken by the QD is more stringent, this instrument cannot be applied. Yet, by virtue of Article 3 of the QD, Member States are allowed to introduce or retain more favourable standards for determining who is eligible for refugee status.³³¹

A second point of critique is that the CJEU, in its judgment, solely focused on persecution as originating from the national authorities of the country of origin, as, according to its findings, persecution requires the existence of penal provisions and demands the actual application of these provisions, both competences of the state.³³² However, as expressed in the UNHCR Guidelines, acts of persecution can also be committed by non-State actors, such as family members, neighbours, work colleagues or extreme political parties.³³³ They can be either directly involved in persecutory acts, through abuse or forced marriage, or indirectly involved by exposing the LGBTI individual concerned to harm, *e.g.* by informing national authorities.³³⁴ The Court does not address this issue and, therefore, fails to include individuals to actors of persecution, despite non-State actors being explicitly mentioned in Article 6 QD.³³⁵

5.3.2 Question 3: ‘Acts of persecution’

Concerning the question what acts amount to acts of persecution, the Dutch Council of State asks whether criminalisation of homosexual activities and a term of imprisonment in relation thereto is sufficiently serious to constitute an act of persecution.³³⁶ In answering this question, the Court divides its analysis into two parts: the first part concerns whether criminalisation is sufficient for

29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12 <<http://www.refworld.org/docid/4157e75e4.html>> accessed 25 April 2016; UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, October 2012, HCR/GIP/12/09 paras 44-49; *SSH D v K* [2006] UKHL 46 para 16; *Formab v SSH D* [2006] UKHL 46 para 16.

³³⁰ *SSH D v K* [2006] UKHL 46 para. 16; *Formab v SSH D* [2006] UKHL 46 para 16.

³³¹ Hemme Battjes, ‘Asielverzoeken van homoseksuelen: X, Y en Z tegen de Minister voor immigratie en asiel’ (2013) 10 A&MR 505 <http://www.asielenmigrantenrecht.nl/a_mr/ve13002557.pdf> accessed 1 May 2016

³³² Athanassios Thakis, *Refugee Claims Based on Persecution Due to Sexual Orientation before the Court of Justice of the European Union* in Christina Akrivopoulou, *Protecting the Genetic Self from Biometric Threats* (Patra, Hellenic Open University and IGI Global 2015); UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, October 2012, HCR/GIP/12/01 para 5 <<http://www.refworld.org/docid/50348afe2.html>> accessed 22 May 2016.

³³³ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, October 2012, HCR/GIP/12/01 para. 35 <<http://www.refworld.org/docid/50348afe2.html>> accessed 22 May 2016.

³³⁴ Athanassios Thakis, *Refugee Claims Based on Persecution Due to Sexual Orientation before the Court of Justice of the European Union* in Christina Akrivopoulou, *Protecting the Genetic Self from Biometric Threats* (Patra, Hellenic Open University and IGI Global 2015).

³³⁵ Athanassios Thakis, *Refugee Claims Based on Persecution Due to Sexual Orientation before the Court of Justice of the European Union* in Christina Akrivopoulou, *Protecting the Genetic Self from Biometric Threats* (Patra, Hellenic Open University and IGI Global 2015); Sabine Jansen en Thomas Spijkerboer, ‘Fleeing homophobia: Asylum claims related to sexual orientation and gender identity in Europe’ (September 2011) 34-35 <<http://www.europarl.europa.eu/document/activities/cont/201110/20111014ATT29326/20111014ATT29326EN.pdf>> accessed 10 March 2016; Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9.

³³⁶ Case C-199/12, C200/12 and C201/12 *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* (CJEU 7 November 2013) para 50.

amounting to persecution, whereas the second stage is about the actual criminalisation. As to the first part, the Court started its reasoning by making a reference to Article 9(1)(a) QD, thereby affirming that an act must be sufficiently serious by its nature or repetition as to constitute persecution and that “not all violations of fundamental rights suffered by a homosexual asylum seeker will necessarily reach that level of seriousness”.³³⁷ The CJEU continued its analysis of the third question by acknowledging that the fundamental rights, especially linked to the sexuality of the applicants, such as the right to respect one’s private and family life as contained in Article 7 of the Charter (Article 8 ECHR) and Article 21(1) of the Charter (Article 14 ECHR) are considered to be derogable rights, thus a violation of these rights is not serious enough to be considered an act of persecution.³³⁸ This aspect of the Court’s reasoning is problematic and displays a clear schism between its own case law and the case law from the ECtHR.

Article 9(1)(a) of the QD articulates that acts of persecution must be

“sufficiently serious by their 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 [...] [**emphasis added**].”³³⁹

The phrase ‘in particular’ indicates that the EU legislator meant to provide examples of rights that, if being violated, will amount to persecution.³⁴⁰ Still, the CJEU interpreted this phrase narrowly, as if only violations of the non-derogable rights contained in Article 15(2) ECHR can amount to persecution. Such a reading is not supported by the Convention.³⁴¹ The consideration also does not echo the ECtHR’s case law. In the case *Dudgeon v the United Kingdom* the Strasbourg Court ruled that the mere criminalisation of same-sex sexual acts by a State party to the European Convention, entails a violation of Article 8 ECHR.³⁴² In *Toonen v Australia*, the Human Rights Committee came to a similar conclusion.³⁴³ Additionally, in the case *Norris v Ireland*, the Court concluded that “a law [...], even though it is not enforced in a particular class of cases or a considerable time, may be applied again”, consequently finding a violation of the derogable Article 8 ECHR.³⁴⁴ In this respect, it should also be highlighted that the CJEU mentions “fundamental rights specifically linked to sexual orientation”, but fails to define the content of those rights. It merely identifies the right to respect for private and family life, however, as a facet of one’s identity, sexual orientation is linked with many other human rights.³⁴⁵

³³⁷ Case C-199/12, C200/12 and C201/12 *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* (CJEU 7 November 2013) paras 51-53; G Almeida Ferreira, ‘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’ (LL.M. Thesis, Tilburg University 2015) 28-31.

³³⁸ Case C-199/12, C200/12 and C201/12 *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* (CJEU 7 November 2013) paras 54-55.

³³⁹ Council Directive (EC) 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted [2004] OJ L304/12 art 9(1)(a).

³⁴⁰ G Almeida Ferreira, ‘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’ (LL.M Thesis, Tilburg University 2015) 56.

³⁴¹ G Almeida Ferreira, ‘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’ (LL.M Thesis, Tilburg University 2015) 56.

³⁴² *Dudgeon v. United Kingdom* (App No. 7525/76) 22 October 1981 para 56.

³⁴³ Human Rights Committee, *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

³⁴⁴ *Norris v Ireland* (App no 10581/83) (1988) para 33.

³⁴⁵ ICJ, *X, Y and Z: a glass half full for “rainbow refugees”?* *The International Commission of Jurists’ observations on the judgment of the*

For coming to the conclusion that criminalisation of homosexual acts amounts to an act of persecution, it is required that there are well-founded reasons to assume that the sentence will be applied. Thus, “[t]he mere existence of legislation criminalising homosexual acts cannot be regarded as [...] persecution within the meaning of Article 9(1) of the Directive”.³⁴⁶ However, the Court concludes that a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin constitutes punishment which is disproportionate or discriminatory and thus amounts to an act of persecution.³⁴⁷ Despite the fact that the CJEU’s acknowledgment that criminal laws with a term of imprisonment for same-sex sexual conduct constitutes persecution when being enforced is a step forward, the Court did not use this opportunity to tackle two important issues.³⁴⁸

Firstly, the Court merely identified legislation criminalising same-sex sexual activity, however, it abstained from looking at other laws with a discriminatory character, thereby leaving it open to EU Member States to determine if such acts are ‘sufficiently serious’ to amount to persecution. The CJEU set the threshold of seriousness by requiring a term of imprisonment. Yet, confiscations of property and coerce to undergo medical experimentation and forced psychiatric treatment should also be listed among the provisions which, even though they do not provide for a term of imprisonment, equal to acts of persecution.³⁴⁹ Only when imprisonment accompanies a legislative provision which punishes same-sex sexual activity, punishment is found to be sufficiently serious in order to constitute an act of persecution, however, what kind of prison sentence amounts to ‘sufficiently serious’ remains to be clarified.³⁵⁰ As a consequence, Member States retained their discretion to decide whether ‘lesser forms’ of punishment, such as community service or a fine, would be sufficiently serious in order to amount to an act of persecution. There remains a risk that national authorities will have too much discretion to interpret a country of origin’s criminalisation of homosexual activity as ‘insufficiently serious’, merely because it does not go as far as imprisoning LGBTI individuals.³⁵¹ In this way, asylum seekers that are being persecuted in practice and are entitled to refugee status, will not be deemed deserving international protection as offered by the QD.

Secondly, the Court denied the possibility of unenforced legislation still having persecutory effect without necessarily leading to court cases and convictions that are recorded, and which,

Court of Justice of the European Union in X, Y and Z v. Minister voor Immigratie en Asiel (case note) [2014] <<http://www.refworld.org/pdfid/538dca6f0.pdf>> accessed 25 April 2016 13-14.

³⁴⁶ Case C-199/12, C200/12 and C201/12 *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* (CJEU 7 November 2013) para 55.

³⁴⁷ Case C-199/12, C200/12 and C201/12 *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* (CJEU 7 November 2013) para 61; Athanassios Thakis, *Refugee Claims Based on Persecution Due to Sexual Orientation before the Court of Justice of the European Union* in Christina Akrivopoulou, *Protecting the Genetic Self from Biometric Threats* (Patra, Hellenic Open University and IGI Global 2015).

³⁴⁸ —, ‘The Court of Justice of the European Union delivers judgment in the joined cases of C-199/12, C-200/12 and C-201/12, *X, Y and Z v Minister voor Immigratie en Asiel*’ (2013) <<http://www.asylumlawdatabase.eu/en/content/court-justice-european-union-delivers-judgment-joined-cases-c-19912-c-20012-and-c-20112-x-y>> accessed 1 May 2016.

³⁴⁹ James Wilets, ‘International human rights law and sexual orientation’ (1994) 18 *Hastings International and Comparative Law Review*; Amnesty International, ‘The crimes of hate, conspiracy of silence: Torture and ill-treatment based on sexual identity’ (Report) (21 June 2001) AI-Index ACT 40/016/2001; Ryan Goodman, ‘Incorporation of international human rights standards into sexual orientation asylum claims: Cases of involuntary medical intervention’ 105 *The Yale Law Journal* 255-289.

³⁵⁰ Athanassios Thakis, *Refugee Claims Based on Persecution Due to Sexual Orientation before the Court of Justice of the European Union* in Christina Akrivopoulou, *Protecting the Genetic Self from Biometric Threats* (Patra, Hellenic Open University and IGI Global 2015).

³⁵¹ —, ‘The Court of Justice of the European Union delivers judgment in the joined cases of C-199/12, C-200/12 and C-201/12, *X, Y and Z v Minister voor Immigratie en Asiel*’ (2013) <<http://www.asylumlawdatabase.eu/en/content/court-justice-european-union-delivers-judgment-joined-cases-c-19912-c-20012-and-c-20112-x-y>> accessed 1 May 2016.

incidentally, will only then be part of the COI adduced in asylum cases.³⁵² With this, the CJEU presumes the existence of ‘benign’ criminalisation, which is not in line with the factual and documented consequences of discriminatory legislation, as it puts LGBTI individuals at risk of various forms of persecution, such as torture, extortion, and mental or psychological harm.³⁵³ In this respect, the Court’s ruling creates a gap in protection for asylum seekers fleeing countries where national authorities use criminal laws to extort, detain or torture LGBTI individuals without necessarily resorting to due process of law and prosecution. Although such persons would have no less founded fear of persecution than an applicant who fears persecution, they would be denied protection on the sole basis that the relevant laws are not ‘actually applied’ in the country of origin.³⁵⁴ The Court did not clarify what is meant with the phrase ‘actually applied’, thereby neglecting the UNHCR’s Guidelines, which clearly state that criminal laws prohibiting same-sex sexual relations do not need to be regularly applied in the country of origin, for “even if irregularly, rarely or ever enforced, [...] [they] could lead to an intolerable predicament for an LGB[TI] person rising to the level of persecution.”³⁵⁵ Thus, the mere fact that a discriminatory law is not, or partially, enforced, cannot lead to the conclusion that LGBTI asylum seekers do not possess a well-founded fear of being persecuted, as there can be a constant risk that such laws will start being applied systematically.³⁵⁶ For that reason, the focus should be on the nature of such acts and not on their frequency.³⁵⁷ If ‘actually applied’ is equivalent to ‘once since the law being in force’ or ‘once in five years’, it has the ability to protect asylum seekers who flee from rarely enforced legislation criminalising homosexuality. Yet, if ‘actually applied’ is interpreted as ‘frequently or regularly applied’, it might create gaps in protection.³⁵⁸ The way EU Member States interpret this particular phrase, will result in a diverging level of protection of LGBTI asylum seekers.

³⁵² Case C-199/12, C200/12 and C201/12 *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* (CJEU 7 November 2013) paras 56-61; 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* (28 September 2012) 17-18 <<http://www.refworld.org/docid/5065c0bd2.html>> accessed 1 May 2016; —, ‘The Court of Justice of the European Union delivers judgment in the joined cases of C-199/12, C-200/12 and C-201/12, X, Y and Z v Minister voor Immigratie en Asiel’ (2013) <<http://www.asylumlawdatabase.eu/en/content/court-justice-european-union-delivers-judgment-joined-cases-c-19912-c-20012-and-c-20112-x-y>> accessed 1 May 2016; ICJ, *X, Y and Z: a glass half full for “rainbow refugees”?* *The International Commission of Jurists’ observations on the judgment of the Court of Justice of the European Union in X, Y and Z v. Minister voor Immigratie en Asiel* (case note) [2014] paras. 62-64 <<http://www.refworld.org/pdfid/538dca6f0.pdf>> accessed 25 April 2016; *Norris v Ireland* (App no 10581/83) (1988) para 33.

³⁵³ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, October 2012, HCR/GIP/12/09 paras 26-27; G Almeida Ferreira, ‘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’ (LL.M. Thesis, Tilburg University 2015) 54-56.

³⁵⁴ Minos Mouzourakis, ‘Case comment: Joined cases C-199/12, C200/12 and C201/12 X, Y and Z v Minister voor Immigratie en Asiel’ <<http://rightsine exile.tumblr.com/post/68661003172/case-comment-joined-cases-c-19912-c-20012-and>> accessed 1 May 2016; S Chelvan, ‘Case comment: Joined cases C-199/12, C-200/12, C-201/12 - X, Y and Z v Minister voor Immigratie en Asiel’ <<https://www.scribd.com/doc/182631663/XYZ-v-Minister-voor-Immigratie-en-Asiel-Case-Comment-S-Chelvan-8-November-2013-pdf>> accessed 1 May 2016; 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* (28 September 2012) 17-18 <<http://www.refworld.org/docid/5065c0bd2.html>> accessed 1 May 2016.

³⁵⁵ UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, October 2012, HCR/GIP/12/09 para 27.

³⁵⁶ G Almeida Ferreira, ‘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’ (LL.M. Thesis, Tilburg University 2015) 40-41; *Norris v Ireland* (App no 10581/83) (1988) para 33.

³⁵⁷ J Hathaway and M Foster, *The Law of Refugee Status* (2nd edn, Cambridge University Press 2014) 3-12; G Almeida Ferreira, ‘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’ (LL.M. Thesis, Tilburg University 2015) 40-41.

³⁵⁸ —, ‘The Court of Justice of the European Union delivers judgment in the joined cases of C-199/12, C-200/12 and C-201/12, X, Y and Z v Minister voor Immigratie en Asiel’ (2013) <<http://www.asylumlawdatabase.eu/en/content/court->

5.3.3 Question 2: ‘The discretion requirement and exercising restraint’

The last question tackled by the CJEU concerns a crucial point in asylum applications lodged by LGBTI individuals, namely whether or not an individual can be compelled to conceal his or her sexual orientation or to exercise restraint in order to avoid persecution in the country of origin with respect to Article 10(1)(d) QD.³⁵⁹ Furthermore, the domestic court wishes to know, where appropriate, whether such restraint must be greater than that of a heterosexual person. Thus, the question covers the situation in which the applicant acted with discretion in the past when expressing his sexual orientation.³⁶⁰ Although this question had already been discussed in other cases, the rejection of the so-called ‘discretion requirement’ with regard to one’s sexual orientation remained a contentious issue.³⁶¹

By answering this question, the Court makes a distinction between on the one hand concealing one’s sexual orientation, and on the other hand, to exercise restraint.³⁶² As to the former, the Court provided unequivocal clarification and acknowledged that “an applicant for asylum cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution” for sexual orientation is found to be a fundamental aspect of a person’s identity that the person concerned cannot be forced to renounce it.³⁶³ In short, LGBTI individuals should not be asked to hide their sexual orientation in their countries of origin, as this is in contradiction to the wording of the Directive.³⁶⁴ The Court proceeded its analysis of the second question by putting the possibility of exercising restraint into the context of the assessment of having a well-founded fear of being persecuted.³⁶⁵ It came to the conclusion that, in order to avoid the fear of being persecuted, LGBTI asylum seekers should not be asked to act with restraint when expressing their sexual orientation.³⁶⁶ By doing so, the CJEU struck an analogy between its approach as regards sexual orientation and its approach towards religion by making a reference to the case *Y and Z v the German Republic*, in which the Court rejected the possibility of avoiding the risk of being persecuted by

justice-european-union-delivers-judgment-joined-cases-c-19912-c-20012-and-c-20112-x-y> accessed 1 May 2016; 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* (28 September 2012) 17-18 <<http://www.refworld.org/docid/5065c0bd2.html>> accessed 1 May 2016; ICJ, *X, Y and Z: a glass half full for “rainbow refugees”?* *The International Commission of Jurists’ observations on the judgment of the Court of Justice of the European Union in X, Y and Z v. Minister voor Immigratie en Asiel* (case note) [2014] paras 62-64 <<http://www.refworld.org/pdfid/538dca6f0.pdf>> accessed 25 April 2016.

³⁵⁹ Case C-199/12, C200/12 and C201/12 *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* (CJEU 7 November 2013) paras 37, 70-72.

³⁶⁰ Case C-199/12, C200/12 and C201/12 *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* (CJEU 7 November 2013) paras 37, 70-72; Hemme Battjes, ‘Asielverzoeken van homoseksuelen: X, Y en Z tegen de Minister voor immigratie en asiel’ (2013) 10 A&MR 508-511 <http://www.asielenmigrantenrecht.nl/a_mr/ve13002557.pdf> accessed 1 May 2016.

³⁶¹ Ryan Goodman, ‘Asylum and the concealment of sexual orientation: Where not to draw the line?’ (2012) *Journal of International Law and Politics* 407, 408 <<http://nyujilp.org/wp-content/uploads/2010/06/44.2-Goodman.pdf>> accessed 1 May 2016; *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31 <<http://www.refworld.org/docid/4c3456752.html>> accessed 1 May 2016; *Appellant S395/2002 v Minister for Immigration & Multicultural Affairs (S395)* (2003) 216 CLR 473; Minos Mouzourakis, ‘Case comment: Joined cases C-199/12, C200/12 and C201/12 *X, Y and Z v Minister voor Immigratie en Asiel*’ <<http://rightsine exile.tumblr.com/post/68661003172/case-comment-joined-cases-c-19912-c-20012-and>> accessed 1 May 2016.

³⁶² Case C-199/12, C200/12 and C201/12 *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* (CJEU 7 November 2013) paras 37, 70-72; Hemme Battjes, ‘Asielverzoeken van homoseksuelen: X, Y en Z tegen de Minister voor immigratie en asiel’ (2013) 10 A&MR 508-511 <http://www.asielenmigrantenrecht.nl/a_mr/ve13002557.pdf> accessed 1 May 2016.

³⁶³ Case C-199/12, C200/12 and C201/12 *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* (CJEU 7 November 2013) para 71.

³⁶⁴ ABRvS 18 April 2012, jv 2012/259, para. 2.10.1, ve12000976 *X, Y en Z*, para. 71, ve13002178; Hemme Battjes, ‘Asielverzoeken van homoseksuelen: X, Y en Z tegen de Minister voor immigratie en asiel’ (2013) 10 A&MR 509 <http://www.asielenmigrantenrecht.nl/a_mr/ve13002557.pdf> accessed 1 May 2016.

³⁶⁵ Case C-199/12, C200/12 and C201/12 *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* (CJEU 7 November 2013) para 72; Case C-71/11 and C99/11 *Y and Z v Bundesrepublik Deutschland* (CJEU 5 September 2012) paras. 76-77.

³⁶⁶ Case C-199/12, C200/12 and C201/12 *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* (CJEU 7 November 2013) para 76.

abstaining from the religious practice in question.³⁶⁷ The Court considered that, as with the concept of religion, the concept of sexual orientation applies to acts in an individual's public life as well as his or her private life.³⁶⁸ The only acts excluded from falling within the scope of sexual orientation are those considered to be criminal in accordance with the national law of EU Member States.³⁶⁹

As a final observation, the CJEU noted that it would not make a distinction between 'core' in the detriment of 'other' areas of the expression of sexual orientation.³⁷⁰ Therefore, Member States 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.³⁷¹ In short, the Court ruled that LGBTI asylum seekers cannot be expected to conceal their sexual orientation in order to avoid persecution, nor should they act with restraint. The fact that the risk of being persecuted could be averted by exercising greater restraint than a heterosexual in expressing his sexual orientation is not to be taken into account in that respect. This judgment therefore unequivocally affirms the principle of non-discrimination, according to which LGBTI asylum seekers are not asked to hide their sexual orientation or exercise greater restraint than heterosexual asylum seekers. Homosexuals can expect to be treated in the same manner as heterosexuals, no more, but certainly no less.³⁷²

5.4 The Dutch response: Application of the Court's judgment

In response to the Court's ruling, the Judicial Department of the Dutch Council of State applied the decision on the preliminary references to the cases of X, Y and Z. Yet, instead of following the Court's approach, the Council of State referred to case law from the British Supreme Court and the German Bundesverwaltungsgericht, thereby supplementing the Court's reasoning on two aspects: the criminalisation of same-sex sexual activity and the discretion requirement. Accordingly, it came up with its own interpretation, which is still 'soaked with the concept of discretion'.³⁷³

As to first issue, the criminalisation of same-sex sexual activity, the Council of State considered that, if homosexuality is a criminal offence in the respective country of origin, the analysis conducted by the State Secretary should not be limited to whether or not a penalty is actually being imposed, but should also have regard to how criminal legislation is applied and works out in practice other consequences arising from the criminalisation, such as the position of LGBTI individuals within society.³⁷⁴ This observation is in line with the Court's reasoning and somewhat satisfies the critics of the Court's judgment who stated that the outcome should be seen as a

³⁶⁷ Case C-199/12, C200/12 and C201/12 X, Y and Z v Minister voor Immigratie, Integratie en Asiel (CJEU 7 November 2013) paras 74-75; Case C-71/11 and C99/11 Y and Z v Bundesrepublik Deutschland (CJEU 5 September 2012).

³⁶⁸ Case C-199/12, C200/12 and C201/12 X, Y and Z v Minister voor Immigratie, Integratie en Asiel (CJEU 7 November 2013) para 69.

³⁶⁹ Case C-199/12, C200/12 and C201/12 X, Y and Z v Minister voor Immigratie, Integratie en Asiel (CJEU 7 November 2013) para 66.

³⁷⁰ Case C-199/12, C200/12 and C201/12 X, Y and Z v Minister voor Immigratie, Integratie en Asiel (CJEU 7 November 2013) para 78; G Almeida Ferreira, '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' (LL.M. Thesis, Tilburg University 2015) 28-31.

³⁷¹ G Almeida Ferreira, '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' (LL.M. Thesis, Tilburg University 2015) 28-31; Case C-199/12, C200/12 and C201/12 X, Y and Z v Minister voor Immigratie, Integratie en Asiel (CJEU 7 November 2013) para 70.

³⁷² ICJ, X, Y and Z: a glass half full for "rainbow refugees"? *The International Commission of Jurists' observations on the judgment of the Court of Justice of the European Union in X, Y and Z v. Minister voor Immigratie en Asiel* (case note) [2014] <<http://www.refworld.org/pdfid/538dca6f0.pdf>> accessed 25 April 2016 19.

³⁷³ Sabine Jansen, 'Good practices related to LGBTI asylum applicants in Europe' (ILGA Europe, May 2014) 18.

³⁷⁴ ABRvS 18 December 2013, ECLI:NL:RVS:2013:2423 Para. 8.2; Martijn den Heijer, 'ABRvS 18 december 2013, nrs. 201012342/1/v2, 201109928/1/v2 en 201106615/1/v2; Asiel en seksuele gerichtheid: beïnvloedende continuïteit' (2014) 1 A&MR 31 <http://www.asielenmigrantenrecht.nl/a_mr/ve140003832.pdf> accessed 1 May 2016; Sabine Jansen, 'Good practices related to LGBTI asylum applicants in Europe' (ILGA Europe, May 2014) 18.

‘setback for refugees.’³⁷⁵

With the second supplementation, the Council of State considers that an unreliable account is not sufficient for rejecting an application for asylum and that an objective examination must be made of what an LGBTI asylum seeker will do upon returning to his or her country of origin: if he or she has the intention to live openly and therefore at risk of being persecuted, or to live discreetly in order to avoid persecution due to social pressures or for cultural and religious reasons.³⁷⁶ The Council of State hereby refers to Paragraph 82 of the British Supreme Court’s judgment in the *case of HJ and HT v Secretary of State for the Home Department*, which might imply that the Council of State is in the opinion that the evaluation system employed in this case is the correct test to be applied to verify that a LGBTI asylum seeker is entitled to be granted refugee status.³⁷⁷ According to this procedure, the competent authority has to ascertain first whether or not an asylum seeker is indeed homosexual or could be perceived as a member of the particular social group by potential prosecution in his or her country of origin.³⁷⁸ Consequently, the respective authority should prove that in case of a return to his or her country of origin, the LGBTI individual would be able to enjoy his or her sexual orientation without the risk of being persecuted.³⁷⁹

The Council of State continues by mentioning that, when assessing the reliability of an LGBTI asylum seeker’s statements about his or her intended behaviour if being returned to the country of origin, these statements must be compared to the behaviour before fleeing to the Netherlands.³⁸⁰ It is important to stress that this interpretation does not explicitly require a continuity between behaviour in the country of origin and behaviour in the country of refuge.³⁸¹ To support its observation, the Council of State refers to the cases of Y and Z before the German Bundesverwaltungsgericht, in the context of LGBTI asylum applications. The German court decided that neglecting religious acts within the public sphere, for reasons of fear of being

³⁷⁵ Case C-199/12, C200/12 and C201/12 *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* (CJEU 7 November 2013) paras. 58-59; Martijn den Heijer, ‘ABRvS 18 december 2013, nrs. 201012342/1/v2, 201109928/1/v2 en 201106615/1/v2; Asiel en seksuele gerichtheid: beïnvloedende continuïteit’ (2014) 1 A&MR 31

<http://www.asielenmigrantenrecht.nl/a_mr/ve140003832.pdf> accessed 1 May 2016; Critics such as Amnesty International and the International Commission of Jurists; 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 2 June 2016; G Almeida Ferreira, ‘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’ (LL.M. Thesis, Tilburg University 2015) 56.

³⁷⁶ ABRvS 18 December 2013, ECLI:NL:RVS:2013:2423 Para 8.1; Martijn den Heijer, ‘ABRvS 18 december 2013, nrs 201012342/1/v2, 201109928/1/v2 en 201106615/1/v2; Asiel en seksuele gerichtheid: beïnvloedende continuïteit’ (2014) 1 A&MR 31-32 <http://www.asielenmigrantenrecht.nl/a_mr/ve140003832.pdf> accessed 1 May 2016; *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31 para 82 <<http://www.refworld.org/docid/4c3456752.html>> accessed 1 May 2016; Pitsou Anastasia, *Domination, Asylum, and Sexual Orientation* in Christina Akrivopoulou, *Protecting the Genetic Self from Biometric Threats* (Patra, Hellenic Open University and IGI Global 2015).

³⁷⁷ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31 Para 82 <<http://www.refworld.org/docid/4c3456752.html>> accessed 1 May 2016.

³⁷⁸ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31 Para 35 <<http://www.refworld.org/docid/4c3456752.html>> accessed 1 May 2016; Pitsou Anastasia, *Domination, Asylum, and Sexual Orientation* in Christina Akrivopoulou, *Protecting the Genetic Self from Biometric Threats* (Patra, Hellenic Open University and IGI Global 2015).

³⁷⁹ *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31 Para 35 <<http://www.refworld.org/docid/4c3456752.html>> accessed 1 May 2016.

³⁸⁰ ABRvS 18 December 2013, ECLI:NL:RVS:2013:2423 Para 8.1; Martijn den Heijer, ‘ABRvS 18 december 2013, nrs. 201012342/1/v2, 201109928/1/v2 en 201106615/1/v2; Asiel en seksuele gerichtheid: beïnvloedende continuïteit’ (2014) 1 A&MR 32-33 <http://www.asielenmigrantenrecht.nl/a_mr/ve140003832.pdf> accessed 1 May 2016.

³⁸¹ Martijn den Heijer, ‘ABRvS 18 december 2013, nrs 201012342/1/v2, 201109928/1/v2 en 201106615/1/v2; Asiel en seksuele gerichtheid: beïnvloedende continuïteit’ (2014) 1 A&MR 33 <http://www.asielenmigrantenrecht.nl/a_mr/ve140003832.pdf> accessed 1 May 2016; ABRvS 18 December 2013, ECLI:NL:RVS:2013:2423 Para 8.1.

persecuted, can be a ground for acquiring refugee status. Hereto, the essentiality of carrying out religious practices in public needs to be determined by means of the asylum seeker's past behaviour.³⁸² Analogously, LGBTI asylum seekers would be asked about the expression of their sexual orientation in the past, present and future.³⁸³

The Council of State's approach raises two important questions. Firstly, the CJEU unequivocally rejected the contentious 'discretion-requirement' by stating that LGBTI asylum seekers can neither be asked to conceal their sexual orientation, nor can they be asked to act with restraint.³⁸⁴ Additionally, the Court acknowledged that the fact that one can avoid the risk of being persecuted by exercising greater restraint than a heterosexual individual in expressing his or her sexual orientation is not to be taken into account.³⁸⁵ On the contrary, the Council of State put forward that, when assessing LGBTI-related asylum applications, declarations about the intended behaviour, also those about living discretely, should be reviewed.³⁸⁶ With this, the Dutch court seems to assume that the answer to the question whether or not an LGBTI asylum seeker should have a fear of being persecuted can be derived from his or her intended behaviour. This approach makes it look like the asylum seeker himself provokes being persecuted by expressing his sexual orientation, whereas the reason for being persecuted can be found in the agents of persecution mind-set and not with the victim.³⁸⁷ In my opinion, this interpretation is contrary to the Court's judgment, due to the fact that emphasis is still on asylum seekers being questioned about 'going into the closet', whereas the Court clearly ruled that this cannot play a part in the determination process anymore.³⁸⁸ Secondly, the Council of State has not provided clarification on how the State Secretary is expected to act. As the Council referred to case law originating from the British Supreme Court and the German Bundesverwaltungsgericht, it is likely to assume that forced concealment of one's sexual orientation due to a fear of being persecuted can also be a reason for being granted refugee status in the Netherlands.³⁸⁹ Yet, the Council consequently states that it should be determined if an LGBTI asylum seeker will express his or her sexual orientation in a way which exposes him/her to persecution upon return. From this observation, it seems to follow that acting discretely cannot lead to refugee status. So, despite supplementing the Court's reasoning,

³⁸² Case C-71/11 and C99/11 *Y and Z v Bundesrepublik Deutschland* (CJEU 5 September 2012) paras 38-39; ABRvS 18 December 2013, ECLI:NL:RVS:2013:2423 Para 8.1.

³⁸³ Sabine Jansen, 'Good practices related to LGBTI asylum applicants in Europe' (ILGA Europe, May 2014) 18.

³⁸⁴ Case C-199/12, C200/12 and C201/12 *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* (CJEU 7 November 2013) paras 70-76; Sabine Jansen, 'Over de gevolgen van het XYZ-arrest voor LHBT-asielzoekers in Nederland Out & Proud?' (2015) 3 100-101 AM&R <http://www.asielenmigrantenrecht.nl/a_mr/A&MR,%20nr%203%20Artikel%20Out%20en%20Proud.pdf> accessed 10 March 2016.

³⁸⁵ Case C-199/12, C200/12 and C201/12 *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* (CJEU 7 November 2013) para 75; Sabine Jansen, 'Over de gevolgen van het XYZ-arrest voor LHBT-asielzoekers in Nederland Out & Proud?' (2015) 3 101-102 AM&R <http://www.asielenmigrantenrecht.nl/a_mr/A&MR,%20nr%203%20Artikel%20Out%20en%20Proud.pdf> accessed 10 March 2016.

³⁸⁶ Martijn den Heijer, 'ABRvS 18 december 2013, nrs 201012342/1/v2, 201109928/1/v2 en 201106615/1/v2; Asiel en seksuele gerichtheid: beïnvloedende continuïteit' (2014) 1 A&MR 33 <http://www.asielenmigrantenrecht.nl/a_mr/ve140003832.pdf> accessed 1 May 2016.

³⁸⁷ Opinion of Advocate-General Sharpston in the joined Cases C-199/12 to C-201/1: *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* (11 July 2013) para 56.

³⁸⁸ T Spijkerboer, *De Nederlandse rechter in het vreemdelingenrecht* (The Hague, SDU Publishers 2014) 138-145; Sabine Jansen, 'Over de gevolgen van het XYZ-arrest voor LHBT-asielzoekers in Nederland Out & Proud?' (2015) 3 101-102 AM&R <http://www.asielenmigrantenrecht.nl/a_mr/A&MR,%20nr%203%20Artikel%20Out%20en%20Proud.pdf> accessed 10 March 2016.

³⁸⁹ Martijn den Heijer, 'ABRvS 18 december 2013, nrs 201012342/1/v2, 201109928/1/v2 en 201106615/1/v2; Asiel en seksuele gerichtheid: beïnvloedende continuïteit' (2014) 1 A&MR 33 <http://www.asielenmigrantenrecht.nl/a_mr/ve140003832.pdf> accessed 1 May 2016.

the Council of State's interpretation leaves room for questions.

5.5 Discretion: Adaptation of the Dutch asylum policy and its application in practice

Following the Council of State's judgment, the Dutch government adapted its policy on asylum applications based on sexual orientation, thereby no longer requiring LGBTI asylum seekers to conceal their sexual orientation in order to avert the threat of being persecuted.³⁹⁰ This revised policy is laid down in paragraph C2/3.2 of the Dutch Aliens Circular 2000 and reads as follows:

"The IND will assess whether the manifestations of the alien's sexual orientation that are considered plausible, will lead to persecution in the country of origin. To this end, the IND assesses whether **the manner in which the alien plans to express his sexual orientation after returning to the country of origin is considered plausible**. If a part of the alien's statements should be regarded as implausible, for example, because they are not consistent with his manifestations in the Netherlands or elsewhere prior to his departure to the Netherlands, the alleged manifestations will not be included in the assessment. The IND will assess the manifestations it considered plausible against the situation in the country of origin. **The IND does not require the alien to exercise restraint when manifesting his sexual orientation**, and, for that reason, always applies a certain 'minimum standard' when assessing the risk of being persecuted. The general assumption is that someone will express his sexual orientation and will engage in relationships in a manner that is not fundamentally different from what is accepted from heterosexual individuals in the country of origin. Furthermore, **the IND assumes that, when assessing the risk of being persecuted, the alien's close circle is aware or could be informed of his sexual orientation**. In its assessment, the IND takes into consideration whether in the country of origin there is discriminatory treatment for reasons of sexual orientation, *i.e.* the applicable standards and morals for heterosexual and homosexual individuals there."³⁹¹

Until the CJEU's ruling arrived, the Dutch government expected LGBTI asylum seekers to exercise restraint when expressing their sexual orientation in their respective countries of origin, in other words they were forced back into the closet in order to avoid homophobic violence.³⁹² This policy could be seen as a 'toned down version' of the so-called discretion requirement.³⁹³ Already in 1999, a proposal was presented which urged for a solution for this issue and in the years to come, the Dutch asylum policy was altered various times in this respect. Even though the Netherlands had

³⁹⁰ WBV 2014/3, *Staatscourant* 21 February 2014, nr 5333; Alfred van der Helm and Pieter Brouwer, *Annual policy report 2014: Migration and Asylum in the Netherlands* (European Migration Network 2015) 29-30 <<http://www.emn.at/en/publications/annual-policy-reports>> accessed 1 May 2016.

³⁹¹ Aliens Circular 2000 C2/3.2; *Staatscourant* 18 juli 2014, nr. 20899; It is important to acknowledge that this is not an officially approved translation of the original Dutch policy text contained in paragraph C2/3.2 of the Dutch Aliens Circular 2000. It concerns an interpretation by the author of this thesis.

³⁹² Sabine Jansen, 'Over de gevolgen van het XYZ-arrest voor LHBT-asielzoekers in Nederland Out & Proud?' (2015) 3 100 AM&R <http://www.asielenmigrantenrecht.nl/a_mr/A&MR,%20nr%203%20Artikel%20Out%20en%20Proud.pdf> accessed 10 July 2016; see for example the case ABRvS 11 May 2011, jv 2011/307, with an annotation by T. spijkerboer, ve11001135; District Court The Hague z.p. Arnhem 25 October 2011, jv 2011/513, ve11002644; ABRvS 17 August 2011, jv 2011/424, with an annotation by T. spijkerboer, ve11001968; Sabine Jansen and Thomas Spijkerboer, 'De draaideurkast' (2012) 7 A&MR 321 <<http://thomasspijkerboer.eu/wp-content/uploads/2014/12/2012-09-29-AMR-2012-7-De-draaideurkast-T.P.-Spijkerboer-en-S.-Jansen-ve12001997.pdf>> accessed 10 July 2016.

³⁹³ Martijn den Heijer, 'ABRvS 18 december 2013, nrs. 201012342/1/v2, 201109928/1/v2 en 201106615/1/v2; Asiel en seksuele gerichtheid: beïnvloedende continuïteit' (2014) 1 A&MR 31 <http://www.asielenmigrantenrecht.nl/a_mr/ve140003832.pdf> accessed 1 May 2016.

scrapped this approach on paper in 2007, practice showed a different story.³⁹⁴ LGBTI asylum seekers were officially no longer forced to hide their sexuality, and then they were forced to hide again, and then a little or not.³⁹⁵ To make a long story short, the way the Dutch government dealt with the ‘discretion-requirement’, *i.e.* the expectation that LGBTI asylum seekers could hide their sexual orientation or gender identity in order to avert persecution, over the last fifteen years can be depicted as a ‘revolving door’ policy.³⁹⁶ So, with this in mind, it is important to find out about the current condition of the Dutch policy and how it is applied in practice.

Despite the fact that the Dutch asylum policy was adapted after the Council of State’s ruling in the cases of X, Y and Z, some questionable issues remained. One of these issues is that the Dutch policy is still torn between two ideas. On the one hand, the State Secretary aims at examining the way the asylum seeker manifested his or her sexual orientation in the past, present and future, yet, on the other hand, the policy assumes that the applicant’s sexual orientation will come to light, so it should be irrelevant to know how the asylum seeker plans to express his/her sexual orientation in the future.³⁹⁷ Another issue is that courts sometimes still employ the old criterion; before the revised policy came into force, the intended way to express one’s sexual orientation needed to be ‘meaningful’, rather than ‘plausible’, which is the norm in the adapted policy.³⁹⁸ This can be demonstrated by means of a case concerning a Gambian gay man whose asylum application was rejected, due to the fact that he was able to carry out his sexual orientation in his country of origin, despite there being rumours about his sexual orientation.³⁹⁹ The State Secretary argued that the asylum seeker could continue to manifest his sexual orientation the way he did before fleeing to the Netherlands, however, the district court in Rotterdam did not agree with the State Secretary and ruled that it would be in violation with national policy to adhere to the situation as it was before the applicant left his country of origin, as he stated that he would like to express his feelings in similar manner like he used to do in the Netherlands.⁴⁰⁰ From this case, it is obvious that both parties do not share the same view as regards ‘being closeted’, as the mere existence of rumours does not amount to a full coming-out. Moreover, a person’s coming-out cannot be described as a linear process and having sex with a person of the same sex is not the same as officially coming-

³⁹⁴ Sabine Jansen and Thomas Spijkerboer, ‘De draaideurkast’ (2012) 7 A&MR 321 <<http://thomasspijkerboer.eu/wp-content/uploads/2014/12/2012-09-29-AMR-2012-7-De-draaideurkast-T.P.-Spijkerboer-en-S.-Jansen-ve12001997.pdf>> accessed 10 July 2016.

³⁹⁵ Sabine Jansen, ‘Good practices related to LGBTI asylum applicants in Europe’ (ILGA Europe, May 2014) 18; The discretion requirement was scrapped in 2007, when the policy guidelines stated: “People with a homosexual preference are not required to hide this preference upon return to the country of origin.” However, in 2012 a new text was added, namely that a “certain amount of restraint” could be required from these applicants, thereby reintroducing a discretion requirement.

³⁹⁶ Sabine Jansen and Thomas Spijkerboer, ‘De draaideurkast’ (2012) 7 A&MR 321 <<http://thomasspijkerboer.eu/wp-content/uploads/2014/12/2012-09-29-AMR-2012-7-De-draaideurkast-T.P.-Spijkerboer-en-S.-Jansen-ve12001997.pdf>> accessed 10 July 2016; Sabine Jansen, ‘Over de gevolgen van het XYZ-arrest voor LHBT-asielzoekers in Nederland Out & Proud?’ (2015) 3 100 AM&R <http://www.asielenmigrantenrecht.nl/a_mr/A&MR,%20nr%203%20Artikel%20Out%20en%20Proud.pdf> accessed 10 July 2016.

³⁹⁷ Sabine Jansen, ‘Over de gevolgen van het XYZ-arrest voor LHBT-asielzoekers in Nederland Out & Proud?’ (2015) 3 102 AM&R <http://www.asielenmigrantenrecht.nl/a_mr/A&MR,%20nr%203%20Artikel%20Out%20en%20Proud.pdf> accessed 10 July 2016.

³⁹⁸ WBV 2014/22, *Staatscourant* 18 July 2014, nr. 20899; Aliens Circular 2013 C2/3.2.

³⁹⁹ District Court Rotterdam, 27 August 2014, Awb 12/26965.

⁴⁰⁰ District Court Rotterdam, 27 August 2014, Awb 12/26965; Sabine Jansen, ‘Over de gevolgen van het XYZ-arrest voor LHBT-asielzoekers in Nederland Out & Proud?’ (2015) 3 102 AM&R <http://www.asielenmigrantenrecht.nl/a_mr/A&MR,%20nr%203%20Artikel%20Out%20en%20Proud.pdf> accessed 10 July 2016.

out.⁴⁰¹ This observation played a part in a case, concerning a young gay man from Guinea.⁴⁰² He made clear that he preferred to express his sexual orientation in a modest and cautious manner, both in Guinea as well as in the Netherlands. According to the district court in The Hague, the asylum seeker would encounter a certain impediment when expressing his sexual orientation in Guinea, yet, it is likely that he can continue his life as a homosexual the way he did before, without there being a risk of being persecuted. Before fleeing to the Netherlands the applicant was able to engage in a same-sex relationship, so, following the State Secretary's view, from the applicant's statements it does not follow that it is impossible to carry out his sexual orientation in Guinea the way he did in the Netherlands. Phrased differently, if he behaved modestly and with caution, he had nothing to fear for. The district court agreed with the State Secretary.⁴⁰³ Looking at these cases, it seems like the discretion reasoning has not vanished completely from the Dutch asylum practice, even though the CJEU unequivocally rejected this principle, as asylum applications lodged by LGBTI asylum seekers who declared to act 'discretely', 'modestly' or 'cautiously' upon return, were rejected, because they had no fear of being persecuted.

5.6 'Criminalisation in the country of origin' applied in practice

As to the issue of criminalisation of same-sex sexual acts in an asylum seeker's respective country of origin, the CJEU decided that criminalisation of same-sex sexual conduct *ipso facto* does not amount to an act of persecution.⁴⁰⁴ However, if a law is accompanied by a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin constitutes punishment which is disproportionate or discriminatory and, thus, amounts to an act of persecution.⁴⁰⁵ The term 'actually enforced' can also be found in the revised Dutch policy, yet the Dutch asylum practice highlights the fact that there is no uniform approach as to determining the specific situation of LGBTI asylum seekers and the actual enforcement of prison sentences regarding same-sex sexual acts in their respective countries of origin. This is demonstrated by means of two cases concerning Moroccan LGBTI asylum seekers, that were adjudicated by Dutch district courts.⁴⁰⁶ These cases revolved around the question whether or not the Moroccan government actually enforced legislation criminalising same-sex sexual acts. In these cases, which will be discussed hereafter, the applicants' sexual orientation was deemed to be credible, yet, the persons accredited with the task of determining refugee status were not convinced of the specific problems flowing from their sexual orientation they encountered.

In the first case, before the district court in Amsterdam, the applicant provided the court with a news article concerning homosexuality in Morocco.⁴⁰⁷ This news article, published in the Washington Post, stated that 81 cases concerning homosexuality appeared before Moroccan courts in 2011. Yet the article did not mention anything about the actual number of convictions, and

⁴⁰¹ Sabine Jansen and Thomas Spijkerboer, 'De draaideurkast' (2012) 7 A&MR 322.

⁴⁰² District Court The Hague, 21 October 2014, Awb 13/4835.

⁴⁰³ District Court The Hague, 21 October 2014, Awb 13/4835; Sabine Jansen, 'Over de gevolgen van het XYZ-arrest voor LHBT-asielzoekers in Nederland Out & Proud?' (2015) 3 103 AM&R
<http://www.asielenmigrantenrecht.nl/a_mr/A&MR,%20nr%203%20Artikel%20Out%20en%20Proud.pdf> accessed 10 July 2016.

⁴⁰⁴ Case C-199/12, C200/12 and C201/12 X, Y and Z v Minister voor Immigratie, Integratie en Asiel (CJEU 7 November 2013) para 61.

⁴⁰⁵ Case C-199/12, C200/12 and C201/12 X, Y and Z v Minister voor Immigratie, Integratie en Asiel (CJEU 7 November 2013) para 61; Athanasios Thakis, *Refugee Claims Based on Persecution Due to Sexual Orientation before the Court of Justice of the European Union* in Christina Akrivopoulou, *Protecting the Genetic Self from Biometric Threats* (Patra, Hellenic Open University and IGI Global 2015).

⁴⁰⁶ District court Amsterdam, 20 June 2014, Awb 12/11911.

⁴⁰⁷ District court Amsterdam, 20 June 2014, Awb 12/11911.

therefore the claim was dismissed. In the second case, which is similar to the case mentioned above, the applicant, a Moroccan gay asylum seeker, submitted a journal article according to which six men were convicted on account of their sexual orientation to imprisonment for a term between one and three years, after which they would be banned from the city they lived in, without a possibility of returning.⁴⁰⁸ In this case, the court ruled that, from this message it stems that individuals in Morocco are actually persecuted for reasons of their sexual orientation.

5.7 Concluding remarks

All in all, the CJEU's judgment in the case under discussion dealt with important problems concerning LGBTI asylum seekers in the EU. The reasoning provides Member States with guidance on how to deal with LGBTI-based asylum applications and addresses various issues. The main importance of this judgment lies in the fact that the CJEU unequivocally confirmed that persecution for reasons of one's sexual orientation is a ground for refugee status and that it may not simply be assumed that LGBTI individuals can avoid persecution by concealing their sexual identity or by acting with restraint.⁴⁰⁹ Thereby it expanded the "discretion-reasoning-free zone to all Member States in the EU. Likewise, it is positive that the Court recognised that LGBTI asylum seekers from countries where same-sex sexual conduct is criminalised form a particular social group.⁴¹⁰ However, with regard to three aspects the decision leaves much to be desired. Firstly, the Court failed to clarify that the cumulative approach taken by the QD to assess the membership of a particular social group is not in line with the UNHCR's interpretation of the Convention. Moreover, this approach appears to be inconsistent with the Court's own preliminary observations.⁴¹¹ The fact that the Court took a different approach from its own reasoning in relation to religious persecution is problematic, since one would expect, in the absence of good reasons, that like cases are treated alike, especially as the Court acknowledged in this judgment that sexual orientation is a characteristic fundamental to one's identity.⁴¹² Secondly, the CJEU concluded that only violations of the non-derogable rights contained in Article 15(2) ECHR can amount to persecution. Such a reading is not supported by the Convention and is not in line with case law from the Human Rights Committee and the ECtHR.⁴¹³ And thirdly, the Court's decision that the criminalisation of homosexual acts per se does not amount to persecution, leaves protection lacunae in states which use criminal laws to blackmail, detain or torture, rather than prosecute, LGBTI populations, thereby leaving them virtually unprotected. This is especially the case, for instance, when the ruling would become applicable to claimants fleeing countries that do not

⁴⁰⁸ District court Middelburg, 13 November 2014, Awb 14/12205.

⁴⁰⁹ M den Heijer, 'Persecution for reason of sexual orientation: X, Y and Z' (2014) 1233-1234 <<http://dare.uva.nl/document/2/152759>> accessed 1 May 2016.

⁴¹⁰ ICJ, X, Y and Z: a glass half full for "rainbow refugees"? *The International Commission of Jurists' observations on the judgment of the Court of Justice of the European Union in X, Y and Z v. Minister voor Immigratie en Asiel* (case note) [2014] 19-20 <<http://www.refworld.org/pdfid/538dca6f0.pdf>> accessed 25 April 2016 19.

⁴¹¹ ICJ, X, Y and Z: a glass half full for "rainbow refugees"? *The International Commission of Jurists' observations on the judgment of the Court of Justice of the European Union in X, Y and Z v. Minister voor Immigratie en Asiel* (case note) [2014] <<http://www.refworld.org/pdfid/538dca6f0.pdf>> accessed 25 April 2016 10-20.

⁴¹² M den Heijer, 'Persecution for reason of sexual orientation: X, Y and Z' (2014) 1229-1234 <<http://dare.uva.nl/document/2/152759>> accessed 1 May 2016. ICJ, X, Y and Z: a glass half full for "rainbow refugees"? *The International Commission of Jurists' observations on the judgment of the Court of Justice of the European Union in X, Y and Z v. Minister voor Immigratie en Asiel* (case note) [2014] <<http://www.refworld.org/pdfid/538dca6f0.pdf>> accessed 25 April 2016 19-20.

⁴¹³ G Almeida Ferreira, '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' (LL.M. Thesis, Tilburg University 2015) 56; Human Rights Committee, *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

formally criminalise homosexuality.⁴¹⁴ Nevertheless, every step forward is a welcome one, however slight it might be.

With regard to the implications of the Court's judgment on the Dutch asylum policy and practice, especially regarding the discretion reasoning and the criminalisation of same-sex sexual activity, it is important to have a look at the revised asylum policy. Despite the fact that the Dutch asylum policy was adapted after the Council of State's ruling in the cases of X, Y and Z, some questionable issues remained. The first issue relates to the fact that questions concerning 'discretion' and 'the closet' are still being asked by the Dutch authorities, even though not as explicit as they were before the Council of State's judgment. Therefore, it looks like the discretion reasoning has not completely left the Dutch asylum practice, even though the CJEU unequivocally rejected this principle. As to the second issue, the criminalisation of same-sex sexual acts, the 'actually applied' requirement, which is laid down in the revised Dutch policy, has not led to a uniform line of reasoning among Dutch courts.

Now that the substantive requirements LGBTI asylum seekers must meet and the procedural guarantees and obstacles have been identified (Chapters 3 and 4) and the landmark decision of the CJEU in *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* has been analysed into detail with regard to the discretion requirement and the criminalisation of same-sex sexual acts (Chapter 5), this thesis can proceed to the next chapter, which provides the answer to the central research question.

⁴¹⁴ ICJ, *X, Y and Z*: a glass half full for "rainbow refugees"? *The International Commission of Jurists' observations on the judgment of the Court of Justice of the European Union in X, Y and Z v. Minister voor Immigratie en Asiel* (case note) [2014] <<http://www.refworld.org/pdfid/538dca6f0.pdf>> accessed 25 April 2016 20; M den Heijer, 'Persecution for reason of sexual orientation: X, Y and Z' (2014) 1229-1234 <<http://dare.uva.nl/document/2/152759>> accessed 1 May 2016.

6. CONCLUSION

The objective of this thesis was to critically analyse the Dutch policy and practice as regards asylum applications based on sexual orientation. By doing so, I wanted to find out if the Dutch asylum policy and practice are as ‘gay-friendly’ as they are often portrayed. For that reason, the conditions laid down in the Convention, EU asylum legislation and human rights instruments were reviewed and compared to the Dutch asylum policy and practice in order to find out if they are in compliance with these higher norms.

This thesis was structured around the following research question:

“To what extent are the Dutch asylum policy and practice with regard to asylum applications based on sexual orientation in compliance with international refugee law, the Common European Asylum System and human rights standards?”

Whereas Article 18 of the Charter sets forth that asylum seekers have a right to asylum in the EU, without discrimination due to their sexual orientation or gender identity, as long as they meet the requirements established by EU law, LGBTI asylum seekers still face various obstacles to have this right recognised.⁴¹⁵ Whereas the Dutch asylum policy with regard to asylum applications based on sexual orientation largely follows the approach taken by the EU when it comes to the substantive requirements LGBTI asylum seekers have to meet in order to be eligible for asylum, the Dutch policy diverges from the stance taken by the Convention and the UNHCR Handbook and Guidelines, despite the fact that the Convention is the foundation for asylum legislation in the EU and its Member States. The most important points of discord between the Dutch policy and the Convention concern the way the Dutch policy determines the existence of a particular social group and the fact that Dutch authorities expect asylum seekers to demonstrate not only that persecution is perpetrated on account of the criminalisation of homosexuality, but also that this policy is actively enforced, whereas the UNHCR Handbook and Guidelines and the recast QD do not require asylum seekers to provide such evidence.

Furthermore, the Dutch asylum practice on LGBTI-related asylum applications is not fully in line with EU asylum legislation and human rights standards. This is demonstrated by means of the procedure in place for conducting the personal interview and the evidentiary standards. During the speedy process of assessing asylum applications, asylum seekers are expected to present a coherent and reliable account of what happened to them, which can be unrealistic in some cases. Whereas it is important to have a speedy asylum procedure in place, time-limits should not be so short as to jeopardise an alien’s right to seek asylum or other human rights. LGBTI asylum seekers are often ashamed, because they have internalised the surrounding homophobia or have suffered trauma. This makes them unable to talk openly about their sexual orientation. As a consequence, the asylum procedure can be obstructed, which might lead to a rejection of the asylum application and a deportation to the country of origin, possibly in violation with Article 3 ECHR.

⁴¹⁵ G Almeida Ferreira, ‘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’ (LL.M Thesis, Tilburg University 2015) 11.

Lastly, the Dutch asylum policy and practice do not fully adhere to the Court's judgment in the joined cases of *X, Y and Z v Minister voor Immigratie, Integratie en Asiel*. Despite revising the Dutch asylum policy regarding asylum applications based on sexual orientation, asylum seekers are still questioned about their intended behaviour upon return to their respective countries of origin, whereas the CJEU unequivocally rejected this possibility.

So, all in all, it is fair to say that the Dutch policy and practice with regard to asylum applications based on sexual orientation are not fully in compliance with international refugee law, the CEAS and human rights standards. While the current situation in the Netherlands regarding the protection of, *inter alios*, LGBTI asylum seekers, can be described as an area in which much advances have been made, there are still various obstacles for it to be considered complete. It remains to be seen how this subject will develop in the upcoming years.

Based on the content of this thesis, the following recommendations can be made:

1. The Dutch authorities should review their obligations under the Convention. Whereas the Dutch asylum policy largely meets the requirements set by EU asylum legislation, the Dutch policy maintains stricter standards than those in the Convention.
2. The asylum practice needs to strictly adhere to international standards of fairness. Asylum applications are to be assessed individually, whereby determining authorities should take into account the particular circumstances of each applicant. Special attention should be paid to LGBTI asylum seekers' specific situation and their vulnerability, especially with regard to providing evidence of persecution. It is difficult for LGBTI individuals to produce evidence of their sexual orientation, for they try to hide it as good as they can. Furthermore, even in countries that are assumed to be (generally) safe for LGBTI asylum seekers, according to COI, there may very well be situations where this is not the case. As long as there is little or no reliable COI available on the human rights situation of LGBTI individuals, this should not be interpreted as meaning that human rights violations against these individuals do not occur, which would lead to a denial of protection for LGBTI asylum seekers. Acknowledging these issues might lead to a better understanding of the problems faced by LGBTI asylum seekers and, as a result, more balanced decisions.
3. Whereas the CJEU unequivocally rejected the contentious 'discretion-requirement' by stating that LGBTI asylum seekers can neither be asked to conceal their sexual orientation, nor can they be asked to act with restraint, the Council of State put forward that, when assessing LGBTI-related asylum applications, declarations about the asylum seeker's intended behaviour, also those about living discretely, should be reviewed. In my opinion, this interpretation is contrary to the Court's judgment, due to the fact that emphasis is still on asylum seekers being questioned about 'going into the closet', whereas the Court clearly ruled that this cannot play a part in the determination process anymore. The IND should respect this decision and stop asking questions that touch upon discretion.

7. BIBLIOGRAPHY

This bibliography contains a list of all relevant sources that were used for writing this thesis. For the purpose of providing a complete and clear overview, a division is made between primary sources and secondary sources. The primary sources that were used, include legislation from the international, EU and national level as well as case law from the CJEU, the ECtHR, the HRC and national courts. Secondary sources include articles, (study) books, comments, policy papers, reports, theses and dissertations and other official documents.

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