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Ghent University

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THE NON-REFOULEMENT PRINCIPLE AND THE POSSIBLE DEVELOPMENT OF A HUMAN RIGHT TO ASYLUM FOR LGBTI

Master’s dissertation to qualify as ‘Master of laws’

Written by

Eva Declerck

(student number 01007600)

Promotor: Prof. dr. Y. Haeck
Commissioner: Dr. S. Nicolosi
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I. INTRODUCTION

While the principle of *non-refoulement* is often referred to as the “corner-stone” of international refugee law, a common definition does not exist. The principle was originally developed in international refugee law, prohibiting States to send refugees back to their country of origin, in which they could be persecuted. However, as its protection is only provided to refugees, its scope remains limited to those individuals who fall under the refugee definition. Through time, the principle has also found its entry into international human rights law. Though only explicitly codified in one human rights treaty, supervising bodies have interpreted several human rights to contain implicit prohibitions of *refoulement*. In the international human rights context, the principle of *non-refoulement* is used to prevent an underlying human right from being violated in the country to which the individual would be returned. By focussing on the human right rather than on the person, the principle of *non-refoulement* has attained a broader scope under international human rights law than under international refugee law.

The ambit of this master’s thesis is to investigate whether this principle of *non-refoulement* can provide protection to LGBTI. It is necessary to point out that ‘LGBTI’, which is short for lesbian, gay, bisexual, transgender and intersex people, will be used in this thesis as an umbrella term for people with a sexual orientation that differs from heterosexuality. Hence, the focus will be on the sexual orientation aspect. The specific problems that transgender and bisexual individuals are confronted with, will not be taken into account. Transgender and bisexual individuals will only be considered in the way that they fall under the categories of lesbian, gay and bisexual persons. ‘Deviating sexual behaviour’ is still criminalised in 78 countries and in many societies, people are being discriminated, harassed, tortured or killed because of their sexual orientation. Therefore, many LGBTI flee their countries and claim the protection of the principle of *non-refoulement*, so they would not be sent back to these countries that have a hostile attitude towards them.

As this principle has been developed in different contexts and through different conventions, the first research question asks what the precise scope of the principle of *non-refoulement* is under each of these legal instruments. This will be investigated in the introductory part of the master’s thesis (Chapter II), through a legal analysis of the views of monitoring and supervising bodies and relevant literature. With regard to international refugee law, this thesis will concentrate on the 1951 Geneva Convention on the Status of Refugees, since its Article 33 contains the most universally accepted conventional obligation of *non-refoulement* in
international refugee law. Under international human rights law, the focus will be on the International Covenant on Civil and Political Rights (ICCPR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), because these have provided the most case law with regard to the applicability of the non-refoulement principle to LGBTI people.

The second part (chapter III) will then provide an answer to the second research question, namely if this principle of non-refoulement is applicable to LGBTI and if so, whether it is in fact applied. Because the prohibition of refoulement under the Refugee Convention is only granted to refugees, it will have to be determined whether LGBTI constitute a particular social group and if their return would cause a real risk of being persecuted. For this, I will turn to documents of the United Nations High Commissioner for Refugees and case law of domestic courts as well as the European Court of Justice. To assess the protection that is offered by the ICCPR and by which human rights specifically, case law of the Human Rights Committee and domestic case law will be consulted. This will accordingly be done for the ECHR, by looking at the judgments of the European Court of Human Rights.

A limitation of this master’s thesis is that the domestic case law that is used, will mainly come from Australia, Canada, the United Kingdom and the United States. This is partly because these countries have shown to be the most progressive and influential when it comes to providing protection to LGBTI. Nevertheless, it needs to be recognised that these countries are also severely overrepresented in the literature. The latter is caused by the fact that one of the prominent authors on sexual orientation-based refugee claims has conducted a research project on these countries, so these data are more easy to access.
II. THE PRINCIPLE OF NON-REFOULEMENT

1. The Definition and Development of the Principle of Non-Refoulement

1. Although the principle of non-refoulement is widely recognised as a core principle of international law, literature mostly agrees that there is no single definition of non-refoulement. Several treaties have enshrined the principle, however, the formulation is never identical. An “overarching principle of non-refoulement” does not exist. In general, the principle refers to the prohibition for states to reject a person from their territory or borders to a place (usually the country of origin) where this person might be exposed to persecution, torture or other ill-treatment. Etymologically, the term stems from the French refouler, which means ‘to drive back’, in the context of an enemy that is trying to breach the defences. It therefore needs to be distinguished from deportation or expulsion, since these processes concern individuals who have legally entered a State’s territory.

2. Non-refoulement is a distinct feature of the phenomenon of migration, which has always existed. It was not until the mid-nineteenth century that the crossing of State boundaries received a negative connotation and became legally regulated. This was a consequence of growing refugee flows caused by political and nationalist revolutions. Sovereigns began to fear anarchy in their own States. While before, most refugees would find a safe haven outside of their country of origin, this now became more difficult. However, the belief that people who flee from their own government should be protected, still remained. It was nevertheless not until after World War I that this concept was internationally codified.

3. The first convention to refer to non-refoulement was the Convention relating to the International Status of Refugees of 1933. Article 3 stipulates:

“Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (refoulement), refugees who have been authorised to reside there regularly, unless the said measures are dictated by reasons of national security or public order.”

4. As will be shown below, this provision only covers a limited facet of the content that is currently attributed to non-refoulement. By contrast, today the principle of non-refoulement is meant to apply to a broad category of persons. Apart from refugees, the principle also applies to asylum-seekers, whose legal status has not been determined yet.

5. The prohibition of refoulement applies both to direct as well as indirect refoulement. The latter exists when an individual is being sent to a third country in which he risks being

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subsequently returned to a territory where he could be persecuted. The third country will have the primary responsibility, but the removing State will be jointly liable. It is therefore necessary for the removing State to properly assess whether the third country is safe or not. The United Nations High Commissioner for Refugees (UNHCR) (see infra n° 11) has identified some factors that should be taken into consideration when assessing both formal aspects as well as the practice of the third State. Amongst others, the UNHCR recommends to consider whether the State has ratified and complies with the international refugee instruments, in particular if the State acts in compliance with the principle of non-refoulement. This indicates that the fact whether the third country has ratified the 1951 Refugee Convention, which will be discussed next, will be highly relevant.

2. The Scope of the Principle of Non-Refoulement

2.1. The Principle of Non-Refoulement under International Refugee Law

2.1.1. The 1951 Geneva Convention on the Status of Refugees

When one mentions the concept of non-refoulement, the most common and evident reaction is to think of the principle in the context of refugee law. This is not illogical, since the first international codification was established through the aforementioned 1933 Convention relating to the International Status of Refugees (see supra n° 3).

7. The main provision on non-refoulement in international refugee law is today Article 33 of the 1951 Convention relating to the Status of Refugees. This convention replaced the previously mentioned Convention relating to the International Status of Refugees of 1933,

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which was signed by only 8 States. By contrast, there are 145 States parties to the Refugee Convention, what makes it one of the most widely accepted treaties. Therefore, this can be considered as the most universally accepted conventional obligation of non-refoulement in refugee law.

8. The Refugee Convention is complemented by the 1967 Protocol, which removed the temporal and geographical limitation, characteristic of the refugee definition originally enshrined in Article 1(A)(2) of the 1951 Refugee Convention. The previous version of that Article referred to “events occurring before 1 January 1951”. Furthermore, the Refugee Convention made it possible for states to make a declaration when becoming party to the Convention that they understood the words ‘events before 1951’ as ‘events occurring in Europe before 1951’. By signing the Protocol, States agree with the abolishment of this option. This does not necessarily apply to those countries that had made such a declaration. For them, the limitation can remain.

22 P. - M. FONTAINE, “The 1951 Convention and the 1967 Protocol Relating to the Status of Refugees: Evolution and Relevance for Today”, 2 Intercultural Hum. Rts. L. Rev. (2007), 154. Article I (2) of the Protocol stipulates: “[t]he term ‘refugee’ shall ... mean any person within the definition of Article 1 of the Convention as if the words 'As a result of events occurring before 1 January 1951 and ... ' and the words ... 'a result of such events', in Article 1 A (2) were omitted." Article 1(3) also states: "[t]he present Protocol shall be applied by the States Parties without any geographical limitation. .... "
23 The old Article 1(A)(2) read as follows: “For the purposes of the present Convention, the term “refugee” shall apply to any person who:
(2) As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is 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;”
24 Article 1(B) of the 1951 Convention stipulated:
“1) For the purposes of this Convention, the words “events occurring before 1 January 1951” in Article 1, section A, shall be understood to mean either:
(a) “events occurring in Europe before 1 January 1951”; or
(b) “events occurring in Europe or elsewhere before 1 January 1951”, and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention.
(2) Any Contracting State which has adopted alternative (a) may at any time extend its obligations by adopting alternative (b) by means of a notification addressed to the Secretary-General of the United Nations.”
25 Article 1(3) of the Protocol states: “The present Protocol shall be applied by the States Parties hereto without any geographic limitation, save that existing declarations made by States already Parties to the Convention in accordance with Article 1 B (1) (a) of the Convention, shall, unless extended under Article 1 B (2) thereof, apply also under the present Protocol.” There are currently 146 States parties to this Protocol, of which 3 have maintained their geographical limitation, being Congo, Monaco and Turkey. Madagascar has such a limitation as well and is not a party to the Protocol. See United Nations Treaty Collection, Status of Treaties, Protocol relating to the Status of Refugees, Declarations and Reservations: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&lang=en (accessed 9 May 2015).
9. The principle of *non-refoulement* is formulated in Article 33 of the Refugee Convention:

*No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.*

10. There are no internationally binding sources for interpreting the Refugee Convention. Nevertheless, one can turn to the documents of the United Nations High Commissioner for Refugees (UNHCR) and the Executive Committee of the High Commissioner’s Programme (EXCOM).

11. The Refugee Convention has conferred a supervising duty upon the UNHCR, which was established by the United Nations General Assembly (UNGA) in 1949. It is a subsidiary organ of the UNGA that replaced the International Refugee Organization of 1946, which only had a limited duration. Its function is to provide international protection to refugees who fall within the scope of the Statute of the Office of the UNHCR and to seek permanent solutions for the problem of refugees. By signing the Refugee Convention, States agree with the supervising authority conferred upon the UNHCR, undertake to facilitate this duty and to cooperate with the UNHCR.

12. The EXCOM, which was established by the United Nations Economic and Social Council in 1958, at the request of the UNGA, is entrusted with the competence to advise the High Commissioner. It can do that at the request of the UNHCR or in the exercise of its own

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26 Article 33(1) Refugee Convention.
28 UNGA Res. 319 (IV), 3 December 1949, para. 1.
30 UNGA Res. 428 (V), 14 December 1950. Paragraph 1 of the Annex, which contains the Statute of the Office of the UNHCR, states: “The United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall assume the function of providing international protection, under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees by assisting Governments and, subject to the approval of the Governments concerned, private organizations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities.”
31 Article 35(1) Refugee Convention.
32 ECOSOC res. 672 (XXV), 30 April 1958.
statutory functions. The EXCOM fulfils its function through publishing, amongst others, conclusions and the Handbook on Procedures.

13. It is important to keep in mind that these bodies have not been conferred upon the competence to bindingly interpret the Convention. This has been emphasised by States as well as national courts. Nonetheless, I will turn to these in order to find the appropriate interpretation of the Refugee Convention, since States parties consider them to be authoritative and to have global scope and accept them as important sources.

14. To rely on the non-refoulement obligation of Article 33 of the Refugee Convention, two components must be present. First of all, the Article refers to a ‘refugee’. Secondly, that person must be at risk of being persecuted when he is returned to his country of origin or another state. It is important to describe these two aspects in detail.

2.1.1.1. The Refugee Definition of the Refugee Convention

15. The first component, i.e. the fact of being a refugee, requires the conditions stipulated in Article 1(A)(2) of the Refugee Convention to be fulfilled. This Article states:

For the purpose of the present Convention, the term refugee shall apply to any person who, [as a result of events occurring before 1 January 1951 and] owing to well-founded fear of persecution 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.

33 UNGA res. 1166 (XII), 26 November 1957, 5 (b).
35 In case of a dispute, the International Court of Justice does have the authority to settle that conflict by bindingly interpreting the Refugee Convention. This is stated by Article 38 of the Convention. As to date, no such case has been brought before the Court. See J. MINK, “EU Asylum Law and Human Rights Protection: Revisiting the Principle of Non-refoulement and the Prohibition of Torture and Other Forms of Ill-treatment”, 14 Eur. J. Migration & L. 2012, 134; C. WOUTERS, International legal standards for the protection from refoulement: a legal analysis of the prohibitions on refoulement contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture, Mortsel, Intersentia, 2009, 37; International Court of Justice, list of contentious cases: http://www.icj-cij.org/docket/index.php?p1=3&p2=2 (accessed 9 May 2015).
38 This section has been taken away by the 1967 Protocol, see supra n° 8.
16. Contrary to the ‘threat for life or freedom’ of Article 33 of the Convention, this Article talks about the ‘well-founded fear of persecution’. While some authors believe Article 33 to be broader than Article 1(A)(2), the majority of commentators agree that there is a close relationship between the two and that the textual difference should not lead to the instalment of a different threshold. Article 33 can accordingly be interpreted in the light of Article 1(A)(2), so that a person who fulfils the conditions to be a refugee, can likewise invoke the prohibition of non-refoulement.

17. It is also important to note that the refugee status is declaratory, so it is independent of recognition. Therefore, a person can appeal to the principle of non-refoulement even though he has not yet been formally recognised as a refugee. This is clear from the travaux préparatoires of the 1951 Convention and has also been confirmed by the UNHCR and the EXCOM.

18. To be a refugee, one must face a risk of being persecuted. However, the Refugee Convention does not contain a definition of the term ‘persecution’. This was a deliberate choice of the drafters of the Convention, because they did not want to exclude future ways of persecution from the scope of non-refoulement. Even in international law, there is no definition that is generally accepted. Unfortunately, because a certain margin of appreciation is left to the states in interpreting this term, this causes inconsistent jurisprudence. Even

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domestic case law can be heterogeneous. In United States jurisprudence for example, persecution has been interpreted by some courts as “the infliction of suffering or harm upon those who differ (in race, religion or political opinion) in a way regarded as offensive”, while others have determined that it should “rise above the level of mere harassment”. Another definition of persecution has been given by the United Kingdom Board of Immigration Appeals, that described it as “the infliction of suffering or harm in order to punish an individual for possessing a particular belief or characteristic the persecutor seeks to overcome”. So contrary to US jurisprudence, in the UK the element is added that the persecutor wants to achieve something with his conduct. At the normativity level, an example of a definition is provided by the Statute of the International Criminal Court. It defines persecution as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”. These examples illustrate how diverse the interpretations of the term ‘persecution’ can be. As a consequence, refugees do not enjoy the same level of protection in every country, although these countries did sign the same convention. And even in the same country, the protection that is awarded, can differ tremendously.

19. The Handbook on procedures and guidelines to determine refugee status attempts to remedy this situation. According to this Handbook, Article 33 of the Refugee Convention leads to the conclusion that persecution is constituted by a threat to life or freedom on account of the five grounds that are listed in that Article.

20. The first ground of persecution is race, which is in the context of the Refugee Convention conceived in its broadest sense, meaning it includes groups that are in common usage referred to as races. All kinds of ethnic groups can thus fall under this definition. In many cases, this term will also cover specific social groups of common descent that form a minority within a larger population. Discrimination for this reason will be qualified as persecution in the sense of the Convention when it affects a person’s human dignity in a way that violates the most elementary and inalienable human rights or leads to serious consequences.

47 BIA, Matter of Acosta, 3 March 1985, A-24159781 (Interim decision), (8).
50 Ibid.,16.
21. Secondly, persecution based on religion can be found in different variations. It can exist when one is prohibited from being part of a religious community or being discriminated for that reason in a way that is exceeding a certain level of severity, when worship in private or in public is forbidden, when a person is discriminated for practising his religion or when the instruction of a religion is inhibited.

22. As the third ground, nationality covers both citizenship and membership of an ethnic or linguistic group. In some instances, this can lead to an overlap with the category of race. There is persecution in case of “adverse attitudes and measures directed against” such groups. Sometimes membership in itself is sufficient. It is a misconception that only minority groups can be persecuted, since the opposite frequently occurs as well. Conflicts between groups of different nationality often go together with clashes between political movements, especially when these identify themselves with a specific nationality. The ethnic cleansing in Rwanda and the former Yugoslavia at the end of the 20th century can serve as an example of nationality-based persecution.

23. The fourth ground for persecution is membership of a particular social group. Being a member of such a group can lead to persecution because there is a belief that the group’s ideas or economic activity are in conflict with the Government’s policy. However, persecution for this reason can also overlap with one of the other categories. The sole fact of being part of a particular social group does not suffice to constitute persecution. Nevertheless, this again depends on the particular circumstances. I will further elaborate on this persecution ground in section III.3.1., where it will be investigated whether LGBTI are considered to constitute a particular social group.

24. Lastly, persecution in the sense of the Refugee Convention can be based on political opinion. In order to qualify as such, a person must prove that his political opinions go against the policies and methods of the authorities and are not tolerated by them. He can have expressed those opinions so the Government knows of them, yet, this is not a necessary condition. In fact, it is enough if the Government attributes certain opinions to someone or if

\[51\] Mere discrimination is not enough to constitute persecution. The discrimination must either have serious consequences (for example serious restrictions on an individual’s right to earn his livelihood or to have access to normally available educational facilities), or, if not so, produce in the mind of the individual a feeling of fear and insecurity about his future existence. To see whether discrimination constitutes persecution, all the circumstances must be taken into account. If the individual has been the victim of several forms of discriminations as mentioned above, this element of cumulation must similarly be considered. See Handbook on Procedures, 14.

\[52\] Handbook on Procedures, 16.

\[53\] Ibid.

\[54\] Ibid., 16-17.

\[55\] Ibid., 17.
it is reasonable to assume that that person is so strongly convinced of his opinions that he will express them eventually and that this will cause a conflict with the authorities. An assessment is also made of the content of the opinions and the status or profession of the person who is associated with them. It is usually difficult to establish the nexus between the persecution and the (alleged) political opinion of the refugee status claimant. Such measures are commonly disguised as convictions or sanctions for criminal offences.  

25. As stated above, Article 33 must be interpreted in the same way as Article 1(A)(2), which means that the ‘threat to life or freedom’ is by most scholars understood as indicating a ‘well-founded fear of persecution’ (see supra n° 16). However, because a threat to life or freedom can be caused by more actions than those listed above, a human-rights based approach has found its entry into the legal doctrine. The Handbook on Procedures itself concludes that other serious human rights violations, for one or more of the five reasons listed in Article 33 Refugee Convention, can constitute persecution.  

Yet the problem here is that this opens the door to subjectivity. To prevent that every State party would give its own interpretation, scholars have developed the ‘technique’ of using human rights law to define ‘persecution’. As a matter of fact, in the Guidelines on International Protection, the UNHCR itself points to international human rights law as an assistance for decision-makers to determine the persecutory nature of a particular act. Likewise, several authors describe persecution as “gross or grave systemic violations of basic human rights”. This interpretation method has also been adopted in domestic legislation. In Canadian law, for example, persecution is conceived as serious and systemic harm and the fundamental denial of human rights. The Qualification Directive of the European Union contains a comparable definition and even

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56 Handbook on Procedures, 17.
57 Ibid., 13.
59 See for example point 9 of the Guidelines on International Protection No. 1: Gender-Related Persecution within the context of Article 1(A)(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, UNHCR (7 May 2002), UN Doc. HCR/GIP/02/01. Available at: http://www.unhcr.org/docid/3d36f23f4.html. See also point 13 of the Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, UNHCR (22 December 2009), UN Doc. HCR/GIP/09/08. Available at: http://www.refworld.org/docid/4b2f4f6d2.html.
gives some examples of actions that can be considered as persecutory. Moreover, other commentators go further and include the aspect of failure or reluctance by the state to protect against the persecution. Hathaway for example, defines the concept of persecution as the “sustained or systemic violation of basic human rights demonstrative of a failure of state protection”. This element can similarly be found in Australian law in which persecution is understood to be a combination of a serious harm that is inflicted upon a person and the failure of the state to protect that person. This shows that referring to human rights to define persecution has become conventional in legal doctrine and that this approach has also been adopted by several domestic jurisdictions and administrative authorities. It is generally agreed upon that the human rights approach is nowadays the dominant view.

26. This human rights-based approach, which strives to integrate human rights into refugee law in order to clarify the notion of persecution, can be criticised for turning it into an even more ambiguous and vague term. Human rights themselves are abstract and their content is

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Article 9 stipulates:
1. In order to be regarded as an act of persecution within the meaning of Article 1(A) of the Geneva 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) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a).
2. Acts of persecution as qualified in paragraph1 can, inter alia, take the form of:
(a) acts of physical or mental violence, including acts of sexual violence;
(b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
(c) prosecution or punishment which is disproportionate or discriminatory;
(d) denial of judicial redress resulting in a disproportionate or discriminatory punishment; (e) prosecution or punishment for refusal to perform military service in a conflict, where performing military service would include
(f) acts of a gender-specific or child-specific nature.”


mainly formed by case law. Although Hathaway is a proponent of using human rights to clarify the concept of persecution, he too recognises that amongst human rights, there are differences in consensus on their binding character as well as variations in their definitions. While some are clearly defined and binding, others are vaguely worded and are formulated in a way that the process is more important than the result. As a solution, one could only use those human rights adopted in the Universal Declaration on Human Rights (UDHR) because a "universal consensus" exists upon these rights, contrary to more recent and more controversial human rights. This perspective was introduced by Jacques Vernant in 1953, who described persecution as "severe measures and sanctions of an arbitrary nature that are incompatible with the principles set forth in the UDHR".68 Another suggestion is to solely rely on non-derogable human rights.69 Although these two options do provide some clarity, besides some other flaws,70 none of them can do away with the problem of ambiguity that is inherent to human rights. Even if an agreement can be found on which human rights could function as interpretation tools for the meaning of persecution, they remain undetermined.71 Perhaps this does not need to be such a big obstacle for using human rights as is purported by some authors. Since the idea of not defining persecution in the Refugee Convention was to not stand in the way of an evolutive interpretation,72 using human rights, which are themselves evolving concepts, improves the flexibility of this concept. Human rights create a common and dynamic understanding of the elements of the refugee definition. They keep the Geneva Convention from becoming anachronous through adapting it to the changing realities of forced migration.73 Feller has however raised the concern that domestic law judges might not be sufficiently acquainted with international human rights law, which can lead to inadequate or incorrect reasoning.74 According to Foster, this is largely remedied by the monitoring bodies that are installed for all the widely ratified UN human rights treaties. She

69 According to Hathaway, Article 9 of the Qualification Directive is an example of this view, see J. C. HATHAWAY and M. FOSTER, The Law of Refugee Status, Cambridge, Cambridge University Press, 2014, 202. However, it needs to be noted that this Article stipulates that persecution can inter alia take the form of the violation of non-derogable rights. It does not limit itself to those rights in interpreting persecution.
70 J. C. HATHAWAY and M. FOSTER, The Law of Refugee Status, Cambridge, Cambridge University Press, 2014, 202. With the second suggestion, the wrong assumption is made that non-derogable rights are the most important and are superior to other human rights, while it just means that the suspension of these rights is irrelevant for legitimately controlling the state in a national emergency.
argues that their documents can provide interpretative guidance. Nevertheless, it needs to be emphasised that these interpretations are not binding. Even more the question is whether these documents can really offer guidance or whether this is just in theory.

27. Another critique could be that integrating human rights into the interpretation of persecution disturbs the division that is commonly made between non-refoulement in a refugee context and in a human rights context (see infra, section II.2.2). The question must however be posed if this distinction is still opportune. The substance of the principle of non-refoulement is identical in both contexts. Moreover, these two branches of law have the same finality, being the effective respect for human rights. This is illustrated by the first paragraph of the preamble of the Geneva Convention, in which the contracting parties recognise the principle that human beings shall enjoy fundamental rights and freedoms without discrimination and thereby refer to the UN Charter and the UDHR. According to von Sternberg, this “indicates a desire for the refugee definition to evolve in tandem with human rights principles”. An additional argument against the division, is the fact that the starting point for the Refugee Convention were the human rights principles of the UDHR, the International Covenant on Civil and Political Rights (ICCPR) and the draft Covenant on Human Rights, which was the former version of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The UNHCR acknowledges this human rights base of the Refugee Convention and considers it to be part of a broader human rights framework. The UNHCR has even gone further by stating that the relationship between refugee law and human rights is a matter of law and not just a convenience for the decision-maker in a

80 “The human rights base of the Convention roots it quite directly in the broader framework of human rights instruments of which it is an integral part, albeit with a very particular focus. The various human rights treaty monitoring bodies and the jurisprudence developed by regional bodies such as the European Court of Human Rights and the Inter-American Court of Human Rights are an important complement in this regard, not least since they recognize that refugees and asylum-seekers benefit both from specific Convention-based protection and from the range of general human rights protections as they apply to all people, regardless of status.” See Note on International Protection, UNHCR (13 September 2001), UN Doc. A/AC.96/951 (2001), para. 4.
particular case.\textsuperscript{81} These authors therefore consider it more appropriate to interpret the Refugee Convention as a \textit{lex specialis} and international human rights law as the \textit{lex generalis} that can be used to construe terms in the refugee context.

28. Regardless of which interpretative method is used to define ‘persecution’, it remains a complex concept that consists of different factors. In each case, the specific circumstances must be taken into account. And in the end, it is a matter of degree and proportion.\textsuperscript{82}

\textbf{2.1.1.2. The Risk of Being Persecuted}

29. As the correlation between Article 33 and Article 1(A)(2) Refugee Convention plays for the component of risk too (see \textit{supra} n° 16), it has the same meaning as the ‘well-founded fear’ from that last Article.\textsuperscript{83}

30. The concept of ‘well-founded fear’ is composed of two opposites. First there is the aspect of fear, which refers to an emotion. This is obviously something subjective. According to the Handbook on Procedures, this indicates that for determining whether someone can claim refugee status, in first order, an evaluation must be made of the statements of that person. It goes without saying that a person’s story will strongly be coloured by his personality. Therefore, it must be kept in mind that different people may have diverse reactions to the same circumstances.\textsuperscript{84}

31. The second component imposes a condition of objectivity, since the fear experienced by the person relying on \textit{non-refoulement} must be justified. This requirement can again be subdivided. Firstly, an assessment must be made of the general situation in the country in which the claimant fears persecution.\textsuperscript{85} This contains facts on laws and regulations and whether they are applied or not and facts on the political, social, human rights and security situation.\textsuperscript{86} Secondly, an investigation is necessary of the personal situation of the applicant.

\textsuperscript{84} Handbook on Procedures, 11.
\textsuperscript{85} Ibid, 12.
Membership of a racial, religious, national, social or political group can be relevant. Previous experiences of the claimant, whether he has been persecuted before, what his family situation is or how he interprets his own situation, are also important.\(^87\)

32. In essence, the UNHCR states that a well-founded fear exists when it is established, to a reasonable degree, that for the applicant being returned to his country of origin or being expelled to another country would be intolerable for the reasons specified in the definition of Article 1(A)(2) Refugee Convention.\(^88\) Lauterpacht and Bethlehem interpret this as requiring more than a mere conjecture of a threat, but less than proof to a level of probability or certainty.\(^89\) For Wouters this closely corresponds to the ‘serious possibility test’ that requires refugee claimants to establish that there is a reasonable chance of becoming a victim of persecution. This test is less strict than the ‘balance of probabilities test’. To pass the latter, one must show that persecution will probably take place, is reasonably likely or more likely than not to occur.\(^90\) Amongst developed states, the test of Lauterpacht and Bethlehem is the one that is mostly applied. When we follow the reasoning of Wouters, this seems to be in correspondence with the direction of the UNHCR regarding this concept. However, it is again an aspect of the refugee definition and the provision on non-refoulement that is not clearly defined or uniformly interpreted, so here too, there is a margin of appreciation for those making an assessment of the claim for refugee status.

2.1.2. Regional Refugee Treaties and Other Instruments

33. Several regional refugee instruments also contain a provision on non-refoulement. Largely inspired by Article 33 of the Refugee Convention, some of these regional instruments go further, by expanding the scope of the principle of non-refoulement to a broader category of beneficiaries.\(^91\) This expansion is commonly a consequence of a broader definition of ‘refugee’, codified by these regional instruments. As a result, the limitation ratione personae of the prohibition of refoulement under the Refugee Convention is partly reduced.

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\(^{87}\) Handbook on Procedures, 12.

\(^{88}\) Ibid., 12.


34. The Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted in 1969 by the Organisation of African Unity, is a valuable reference of this expansion of the scope of non-refoulement.\textsuperscript{92} The principle is codified in Article 2.3 of the Convention:

\begin{quote}
No person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened for the reasons set out in Article I, paragraphs 1 and 2.
\end{quote}

35. Although this Article claims that “no person” should be rejected, returned or expelled, the prohibition of refoulement under Article 2.3 relates to persons who fall under the refugee definition of the African Convention.\textsuperscript{93} This refugee definition is broader than the one of the Refugee Convention because it includes people fleeing from generalised violence.\textsuperscript{94} Furthermore, this provision adds the element of rejection at the frontier.\textsuperscript{95} By doing that, Member States are forced to provide at least temporary refuge while searching another country that is willing to grant permanent asylum.\textsuperscript{96}

36. In Latin-America, the most significant instrument on non-refoulement,\textsuperscript{97} is the Cartagena Declaration on Refugees,\textsuperscript{98} adopted on November 22 of 1984.\textsuperscript{99} Conclusion 5 of the Declaration reads as follows:

\begin{quote}
In Latin-America, the most significant instrument on non-refoulement, is the Cartagena Declaration on Refugees, adopted on November 22 of 1984. Conclusion 5 of the Declaration reads as follows:
\end{quote}

\textsuperscript{92} Convention Governing the Specific Aspects of Refugee Problems in Africa 10 September 1969, (1974) 100 UNTS 45. The Convention is an important contribution to refugee protection because it reafirms the refugee definition of the 1951 Convention as well as expands it to a larger category of persons, including persons fleeing from partial or full-scale invasion and freedom fighters. Another significant attribution, are the elaborate provisions on voluntary repatriation. See M. RWELAMIRA, “Two Decades of the 1969 OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa”, 1 Int’l J. Refugee L. 1989, 558-560.


\textsuperscript{94} E. LAUTERPACHT and D. BEITHELHEIM, “The scope and content of the principle of non-refoulement: Opinion” in E. FELLER, V. TORK, and F. NICHOLSON (eds.), Refugee protection in international law: UNHCR’s Global Consultations on International Protection, Cambridge, Cambridge University Press, 2003, (87) 125. Article 1.2. of the African Convention states: “The term “refugee” shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.”


\textsuperscript{97} While the Declaration is non-binding, it is recognised and supported by many international fora, such as the Organisation of American States General Assembly and the General Assembly of the UN. See E. ARBOLEDA, “Refugee Definition in Africa and Latin America: The Lessons of Pragmatism”, 3 Int’l J. Refugee L. 1991, 190.


\textsuperscript{99} The Declaration was established by an ad hoc group of experts and representatives from ten governments in Central America (Belize, Colombia, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama and Venezuela). They met together in a colloquium in Colombia that was sponsored by the University of
To reiterate the importance and meaning of the principle of non-refoulement (including the prohibition of rejection at the frontier) as a corner-stone of the international protection of refugees. This principle is imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of jus cogens.

37. Analogous to the OAU Convention, the Cartagena Declaration has broadened the scope of the principle of non-refoulement to rejection at the frontier and eliminates the possibility of exceptions. In comparison to its example, the Declaration has also given a broader personal scope to the principle of non-refoulement. It has expanded the refugee definition to people fleeing internal conflicts or massive violations of human rights.

38. For the Asian Region, there are the Bangkok Principles on Status and Treatment of Refugees of 1966, which where revised and consolidated in 2001 by the Asian-African Legal Consultative Organization (AALCO). The provision on non-refoulement is expressed in Article 3:

1. No one seeking asylum in accordance with these Principles shall be subjected to measures such as rejection at the frontier, return or expulsion which would result in his life or freedom being threatened on account of his race, religion, nationality, ethnic origin, membership of a particular social group or political opinion. The provision as outlined above may not however be claimed by a person when there are reasonable grounds to believe the person’s presence is a danger to the national security or public order of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

Cartagena, the Regional Centre for Third World Studies and UNHCR. It was entitled 'Coloquio Sobre la Protección Internacional de los Refugiados en América Central, México y Panamá: Problemas Jurídicos y Humanitarios' and was held under the auspices of the Colombian government. The Declaration has kept its significance until today because every ten years, Latin-American countries gather together to celebrate its anniversary. At the end of those meetings, new declarations are formulated, recognising the developments that have been made and providing the necessary steps to improve the refugee system in those countries. In 1994, there was the San José Declaration, in 2004 the Mexico Declaration and the most recent one is the Brazil Declaration of 2014. See E. Arboleda, “Refugee Definition in Africa and Latin America: The Lessons of Pragmatism”, 3 Int'l J. Refugee L.1991, 202; G. Goodwin-Gill and J. McAdam, The Refugee in International Law, Oxford, Oxford University Press, 2007, 38.


103 The AALCO was originally the Asian Legal Consultative Committee (ALCC), which was constituted on 15 November 1950 out of seven Asian States (the former Burma (now Myanmar), the former Ceylon (now Sri Lanka), India, Indonesia, Iraq, Japan and the United Arab Republic (now Arab Republic of Egypt and Syrian Arab Republic). It was followed by the Asian-African Legal Consultative Committee (AALCC). The name was changed in 1958 so countries of the African continent could participate. Its name was again altered in 2001 to AALCO to reflect the growing status of the Organization. The Organization serves as an advisory body to its Member States in the field of international law and it makes recommendations when necessary. Besides that, it is also a forum for the participating States to discuss Asian-African co-operation in legal matters of common concern. For more information, see the website of the AALCO: http://www.aalco.int/scripts/view-posting.asp?recordid=1. (accessed 9 May 2015)
2. In cases where a State decides to apply any of the abovementioned measures to a person seeking asylum, it should grant provisional asylum under such conditions as it may deem appropriate, to enable the person thus endangered to seek asylum in another country.

39. As is clear from the text, the Article of the Bangkok Principles is closer related to Article 33 of the Refugee Convention than the previous provisions on non-refoulement. Nevertheless, States are obliged to provide temporary asylum, which does resemble the approach of the African Convention of 1969 and the Cartagena Declaration.

40. In Europe, the principle of non-refoulement is also considered to be of high importance. The European Union has adopted two important measures in this context: the Temporary Protection Directive and the Qualification Directive. The first directive recognises the Member States’ duty to respect the principle of non-refoulement in Articles 3(2) and 6(2). The Qualification Directive is even more significant because it incorporates and interprets the refugee definition of the Refugee Convention (see infra n° 121) and 1967 Protocol and has a specific provision on non-refoulement in Article 21.

104 An example of this is ECJ, N.S. and others v. Secretary of State for the Home Department, 21 December 2011, C-411/10 and C-493/10. In paragraph 75, the European Court of Justice states: “The Common European Asylum System is based on the full and inclusive application of the Geneva Convention and the guarantee that nobody will be sent back to a place where they again risk being persecuted.” This leads the Court to conclude in paragraph 106 that: “Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the ‘Member State responsible’ within the meaning of Regulation No. 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.”


107 Article 3(2) of the Temporary Protection Directive states: “Member States shall apply temporary protection with due respect for human rights and fundamental freedoms and their obligations regarding non-refoulement.” Article 6(2) stipulates: “The Council Decision shall be based on the establishment of the fact that the situation in the country of origin is such as to permit the safe and durable return of those granted temporary protection with due respect for human rights and fundamental freedoms and Member States' obligations regarding non-refoulement.”

108 The Article stipulates:
1. Member States shall respect the principle of non-refoulement in accordance with their international obligations.
2. Where not prohibited by the international obligations mentioned in paragraph 1, Member States may refoul a refugee, whether formally recognised or not, when:
   (a) there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or
   (b) he or she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State.”
2.2. The Principle of Non-Refoulement under Human Rights Treaties and Other Human Rights Instruments

41. Outside the context of international refugee law, the principle of non-refoulement is also present in human rights law. Instead of being formulated as a principle on its own, non-refoulement is in that context used as an enforcement mechanism.\textsuperscript{109} It is an instrument that serves to protect an underlying human right from being violated. For example: by keeping a person from being returned to his home country because there is a risk that he could be tortured, the human right of prohibition on torture can be respected.\textsuperscript{110}

42. Human rights law thus provides complementary protection. As the concept of non-refoulement in refugee law is strongly connected with the refugee definition, it has a limited scope \textit{ratione personae}. For those who are for this reason excluded from the protection offered by refugee law, human rights law can possibly function as a ‘safety net’.\textsuperscript{111} It is an alternative for Article 33 of the Refugee Convention or other regional provisions.

43. Seen from the point of view that was explained above, refugee law should be considered as a specialised branch of human rights protection (see supra n° 27).\textsuperscript{112} According to that perspective, refugee law is perceived as a part of the wider body of international human rights law.\textsuperscript{113} This section will show that human rights law offers more protection than refugee law.\textsuperscript{114} It allows refugees to invoke norms whose scope of application is wider than those in the refugee regime.\textsuperscript{115}

44. Of the key international human rights treaties, the Convention against Torture\textsuperscript{116} is the only one that contains an explicit provision on non-refoulement. For the other treaties, the concept was principally developed through the interpretation of the prohibition on torture.\textsuperscript{117}

\textsuperscript{110} Ibid.
\textsuperscript{116} UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (1987) 1465 UNTS 85, hereinafter referred to as Convention against torture or CAT.
Since I will zoom in on the principle of non-refoulement for LGBTI in chapter III, only the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms will be discussed in detail. These two treaties have provided the most case law on the matter. Nonetheless, in order to be complete, other human rights instruments will also be briefly mentioned.

2.2.1. Non-Refoulement in the Main UN Human Rights Treaties

2.2.1.1. The International Covenant on Civil and Political Rights

45. The International Covenant on Civil and Political Rights (ICCPR) was adopted in 1966, came into force on 23 March 1976\(^\text{118}\) and currently has 168 States parties.\(^\text{119}\) The ICCPR does not contain a specific Article on non-refoulement. Nevertheless, the Human Rights Committee (HRC) has interpreted its Article 6, the right to life and Article 7, the prohibition of torture, cruel, inhuman or degrading treatment or punishment, as implicit prohibitions on refoulement.\(^\text{120}\)

46. As non-refoulement has primarily been developed through the prohibition on torture, it is appropriate to first look at Article 7. This reads as follows:

\[\text{No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.}\]

47. That Article 7 ICCPR implicitly contains a prohibition on refoulement, was stated by the HRC in its General Comment No. 20. Paragraph 9 stipulates that States parties must not expose individuals to the danger of conduct contrary to Article 7 and that they should indicate in their reports what measures they have adopted to that end.\(^\text{121}\)


\(^{120}\) C. Wouters, International legal standards for the protection from refoulement: a legal analysis of the prohibitions on refoulement contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture, Mortsel, Intersentia, 2009, 359.

\(^{121}\) General Comment No. 20, HRC (10 March 1992), para. 9.
48. The other Article that serves as the basis for non-refoulement under the ICCPR, is Article 6:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgment rendered by a competent court.

3. When deprivation of life constitutes the crime of genocide, it is understood that nothing in this Article shall authorize any State Party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide.

4. Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.

5. Sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

6. Nothing in this Article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant.

49. From Article 6(2) to 6(6) ICCPR it is clear that it is not obligatory for States parties to abolish the death penalty. Nevertheless, the Committee has found that States that have themselves abolished it, cannot deport or extradite an individual from their territory if it is reasonable to believe that he/she will be sentenced to death, without having been ensured that the penalty would not be carried out. The HRC considers this a part of their obligation under Article 6(1) to protect the right to life in all circumstances.122

50. Despite the fact that the biggest part of the claims that have been brought before the Committee fell under Article 6 and 7 of the ICCPR, the HRC appears to have recognised that the other provisions of the Convention can also serve as a basis for the principle of non-refoulement. With regard to LGBTI, claims have accordingly been based on Article 17, and

Articles 2, paragraph 1 and 26 (see infra section III.4.1.). Article 17 ICCPR contains the right to privacy and states:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks.

51. Article 2, paragraph 1 ICCPR comprises a general non-discrimination obligation for the States parties when ensuring the rights enshrined in the Covenant:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

52. By contrast, the non-discrimination principle of Article 26 is more precise and contains the obligation for States to protect all persons equally:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2.2.1.2. *The Convention against Torture*

53. The Convention against Torture (CAT) must be mentioned, as it was the first human rights instrument to have an express provision on the prohibition of *refoulement*, which is encapsulated in Article 3 CAT:

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.
Since the convention currently has 158 States parties, this provision is an important source to rely on when invoking the principle of non-refoulement. In order for the provision to be applicable, it must be established that the individual could be subjected to torture upon return. To know whether this would be the case, one must look at the definition of torture of Article 1 CAT and the interpretation thereof.

2.2.2. Non-Refoulement under Regional Human Rights Treaties and Other Instruments

2.2.2.1. The European Convention for the Protection of Human Rights and Fundamental Freedoms

55. The European Convention on Human Rights (ECHR) was adopted by the Council of Europe on 1 November 1950 and entered into force on 3 September 1953. The ECHR has been ratified by the 47 members States of the Council, the European Union and the European Council. The Convention does not contain an express provision on non-refoulement, but the principle has been developed through case law of the former Commission on Human Rights and the current European Court on Human Rights (ECtHR). The main provision that served as the basis for this evolution, was Article 3 ECHR, the prohibition on torture and inhuman or degrading treatment:

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124 Article 1 CAT stipulates:
“1. For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.
2. This Article is without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.”
128 The ECtHR recognised the prohibition on refoulement for the first time in Soering v. UK, a case concerning the extradition of a German national by the United Kingdom to the United States, where he would be put in ‘death row’. The Court conceived that as inhuman treatment and concluded that the extradition by the United Kingdom would lead to a violation of the principle of non-refoulement.
No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

56. The ECtHR has recognised that other provisions of the Convention can contain a prohibition on non-refoulement as well (see infra section III.4.2.). This is the case for Article 2, the right to life:

1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
   (a) in defence of any person from unlawful violence;
   (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
   (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

57. This Article must be read in combination with Article 1 of Protocol No. 6129 and Article 1 Protocol No. 13.130 The first one abolishes the death penalty in peacetime, while the other completely prohibits it. Protocol No.13 has however not been signed by all member States,131 so there is no complete ban on the death penalty.132 An individual can therefor not prevent being refouled solely because of the risk of being subjected to the death penalty.

58. The Court also seems to have recognised that Article 8 ECHR could similarly serve as an implicit prohibition of refoulement.133 Article 8 contains the right to private life and stipulates:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security,

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129 Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty as amended by Protocol No. 11.
130 Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances.
133 ECtHR, F. v. United Kingdom, 22 June 2004, No. 17341/03, para. 3.
public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health

2.2.2.2. Other Regional Human Rights Instruments

59. Just as there is the ECHR for the European continent, other regions have human rights instruments that can prevent refoulement. I will however not discuss them in great detail, as they have not provided many case law concerning LGBTI.

60. In America, an explicit provision on non-refoulement\(^\text{134}\) was inserted in the American Convention on Human rights (ACHR) of 1969.\(^\text{135}\) For Africa, there is the African Charter on Human and People’s Rights (ACHPR) of 1981, also known as the Banjul Charter.\(^\text{136}\) The principle of non-refoulement does not have its own provision in the Charter, nevertheless, mass expulsion of non-nationals is prohibited\(^\text{137}\) and it goes even further by granting people the right to asylum in case of persecution.\(^\text{138}\) The African Commission on Human and Peoples’ Rights has used these provisions to protect people from being refouled.\(^\text{139}\) Quite recently, a human rights instrument was adopted for the Asian region as well. The ten Member States of the Association of Southeast Asian Nations (ASEAN)\(^\text{140}\) have in 2012 adopted the ASEAN Human Rights Declaration (ADHR). It does not contain an explicit provision on non-refoulement. However, respect for the principle of non-refoulement could be

\(^\text{134}\) Article 22(8) states: “In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions.”

\(^\text{135}\) The ACHR was concluded by the Organisation of American States (OAS)\(^\text{135}\) and is signed by 25 of them. The OAS was founded in 1948 through the Charter of the OAS in Bogotá, Colombia. It is an organisation that consists of all the 35 independent States of the Americas. Its main goal is to strengthen peace and security on the continent and to seek solutions for political, judicial and economic problems. For more information, see Organization for American States, Who we are: http://www.oas.org/en/about/who_we_are.asp (accessed 9 May 2015).


\(^\text{137}\) Article 12.5 ACHPR.

\(^\text{138}\) Article 12.3 stipulates: “Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions.”


\(^\text{140}\) These Member States are Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People’s Democratic Republic, Malaysia, the Republic of the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Viet Nam. ASEAN is, like the AU, a regional organisation which aims are inter alia to promote active collaboration and mutual assistance on matters of common interest in the economic, social, cultural, technical, scientific and administrative fields and to promote regional peace and stability. See Association of Southeast Asian Nations, Overview: http://www.asean.org/asean/about-asean (accessed 9 May 2015).
deduced from the right to seek asylum in accordance with applicable international agreements of Article 16,141 were it not for the fact that only two Member States have ratified the Refugee Convention.142 Hopefully, the ASEAN Intergovernmental Commission on Human Rights will in the future interpret the right to life and the prohibition of torture of the Declaration143 as implicit prohibitions on non-refoulement.144

2.3. The Possibility to Deviate from the Principle of Non-Refoulement

2.3.1. The Legal Status of Non-Refoulement

61. There is no consensus in international law on the status of non-refoulement. Although the customary nature of this principle is widely accepted in the legal scholarship, its nature as a rule of jus cogens is supported only by a few scholars. A large problem with determining its status is the fact that there is no single definition of the concept (see supra n° 1). The situation presented hereafter will therefore be a simplified representation. I will only look at the prohibition of rejecting an individual to a territory where he risks being persecuted or tortured, since there is far from an accord on non-refoulement in case of cruel, inhuman or degrading treatment.145

2.3.1.1. Non-Refoulement as Customary International Law

62. According to Article 38(1)(b) of the Statute of the International Court of Justice (ICJ), an international custom is the manifestation of a general practice that is accepted as law.146 For a

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141 Article 16 reads as follows: “Every person has the right to seek and receive asylum in another State in accordance with the laws of such State and applicable international agreements.”
143 Article 11 and 14 ADHR respectively.
146 Article 38(1) stipulates:
1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
rule to become customary international law, two components must be present. First, there needs to be a general practice. This means that States have started to act in a similar way, although there is no legal rule that obliges them to do so. Secondly, States must be convinced that it is a rule to act in that way and that this rule is binding. This is called *opinio juris* and can be derived from evidence of a general practice or is proven when there is a consensus in the literature.  

If the principle of *non-refoulement* would be a rule of customary international law, this would mean that every State is prohibited to *refoule* a person, regardless of whether or not he is a party to one of the conventions in the refugee context or a human rights treaty that contains the principle of *non-refoulement*.

63. There are three arguments that are used to demonstrate an existing *opinio juris* on the customary international law status of the principle of *non-refoulement*. The first is that there is a practice of *non-refoulement* that is widespread and representative. More than 90% of all States of the UN have ratified one or more treaties containing a prohibition on *non-refoulement*. The UNHCR as well, has used this to justify its opinion that *non-refoulement* is a rule of customary international law. Scholars also mention the practice of international organisations such as the UNGA and the UNHCR. In the UNGA, resolutions on the annual report of the High Commissioner, consistently confirming the principle of *non-refoulement*, are adopted by consensus and no opposing views to the principle have been communicated by the states. Usually the composition of the EXCOM is also pointed out to support the widespread practice of *non-refoulement*. Decisions within the EXCOM are taken by representatives of the most affected states, some of which are not a party to the Refugee

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a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.


Convention. This shows that even States not party to the Refugee Convention endorse the principle.

64. Secondly, UNHCR as well as legal doctrine refer to the Nicaragua Case of the ICJ to explain deviating conduct of States that are not a party to the Geneva Convention. In that case, the Court stipulated that when States derogate from a certain general practice and thereby justify their behaviour, they in fact recognise the existence of a rule. When derogating from the principle of non-refoulement, States either claim that the returnees are not refugees or they rely on exceptions to the principle of non-refoulement. Applying the reasoning of the Nicaragua Case, this thus confirms the principle and reinforces its customary international law status.

65. Lastly, proponents of non-refoulement as a rule of customary international law argue that there is a lot of national legislation, case law and resolutions of international and regional organisations in which the customary character of non-refoulement is proclaimed. As an important example of this, they invoke the declaration made by the States parties to the Refugee Convention and the 1967 Protocol that non-refoulement is in fact customary international law.

157 Nicaragua Case, para. 186: “It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie inconsistent with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.”
159 Ibid., 77.
66. Although the majority of authors believes non-refoulement to be a rule of customary international law,\textsuperscript{161} not everyone is convinced by these arguments and a minority still denies that the principle has that status.\textsuperscript{162} Nevertheless, this quasi-consensus leads to the conclusion that the non-refoulement principle should have the effect of a rule of customary international law, meaning that it is even binding upon states that have not ratified legal instruments in which this prohibition is codified.\textsuperscript{163}

2.3.1.2. Non-Refoulement as Part of Jus Cogens

67. The definition of \textit{jus cogens} can be found in Article 53 of the Vienna Convention:\textsuperscript{164}

\begin{quote}
For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.
\end{quote}

68. The main condition for a rule to be \textit{jus cogens} is that the entire international community believes it is. In 1982, the UNHCR declared that the principle of non-refoulement was “progressively acquiring the character of a peremptory norm of international law”\textsuperscript{165} and in an advisory opinion it concluded that, since the prohibition on torture is a rule of \textit{jus cogens}, so is the prohibition to refoule an individual towards a country where he is at risk of being tortured.\textsuperscript{166} It can thus be presumed that the UNHCR considers the principle of non-refoulement to be \textit{jus cogens}. Conclusion 5 of the Cartagena Declaration of 1984 also


\textsuperscript{165} General Conclusion on International Protection No. 25 (XXXIII), EXCOM (19 October 1982).


stipulates that **non-refoulement** should be acknowledged and observed as a rule of **jus cogens** (see *supra* n° 36) and this view is shared by some authors.\(^{167}\)

69. However, there is still a lack of unanimous practice\(^{168}\) and in the literature there is no consensus at all on the **jus cogens** character of the principle.\(^{169}\) Again, it largely depends on the definition that is given to **non-refoulement**. However, even when **non-refoulement** is conceived as an element of the prohibition on torture, which has acquired **jus cogens** status, there is no consensus either.

### 2.3.2. Possible Exceptions to the Principle of Non-Refoulement

70. Under the 1951 Refugee Convention, the principle of **non-refoulement** is non-derogable,\(^{170}\) nonetheless, it is not absolute.\(^{171}\) Article 33(2) has provided the opportunity for States to deny an individual the protection of the principle when he/she is conceived to be a threat to the national security or public order:

*The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.*

71. Because this provision allows States to deny an individual some human rights guarantees and the possibility exists that he/she will be subjected to persecution upon return, it must be

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\(^{170}\) General Conclusion on International Protection No. 79 (XLVII), EXCOM (11 October 1996), *UN Doc. A51/12/Add.1*, (i).

interpreted restrictively.\textsuperscript{172} Important also, is that this exception does not take away one’s refugee status. It only makes it possible to \textit{refoul\'{e}} refugees. However, as a condition for relying upon Article 33(1) is that the claimant must be a refugee, excluding someone from the refugee status will have as a consequence that he cannot claim the protection of \textit{non-refoulement} under the Refugee Convention.\textsuperscript{173} This is, however, not an exception to that principle.

72. By contrast, the principle of \textit{non-refoulement} that has been developed in international human rights law, under Article 7 ICCPR, Article 3 CAT and Article 3 ECHR, is absolute. No derogations are possible.\textsuperscript{174} The reason for this is, however, that the principle has been developed precisely to protect people from being returned to a country in which they risk being tortured. The absolute character of the prohibition to \textit{refoul\'{e}}, stems directly from the absolute prohibition on torture.\textsuperscript{175} This is a result of the fact that \textit{non-refoulement} is in international human rights law used as an enforcement mechanism (see \textit{supra} n° 41). Yet, supervising bodies have also accepted that other human rights can be interpreted to contain an


The absolute character of the prohibition of torture of Article 3 ECHR has been confirmed by the ECHR in paragraph 88 of \textit{Soering v. UK}, 7 July 1989, No. 25803/94 and is also a result of Article 15(2) ECHR in which it is explicitly stipulated that derogation from Article 3 ECHR is not even possible in times of war.
implicit prohibition on *refoulement* and LGBTI have therefore invoked the right to privacy and the principle of non-discrimination to prevent being returned (see *infra* III.4). This leads to the question whether, if accepted, these prohibitions would be absolute too. Case law appears to answer this question in the negative (see *infra* n° 149). Hence, it must be held that the principle of *non-refoulement* in international human rights law can have an absolute character, though only under the precondition that the human right that is invoked, is absolute.
III. THE APPLICABILITY OF THE PRINCIPLE OF NON-REFOULEMENT FOR LGBTI PEOPLE

1. The Definition of LGBTI

73. The term ‘LGBTI’ is an abbreviation of ‘lesbian, gay, bisexual, transgender and intersex’, the definitions of which will now be set out.

1.1. Sexual Orientation

74. Lesbian, gay and bisexual are variations of sexual orientation. According to the Yogyakarta Principles, which apply human rights standards to issues of sexual orientation and gender identity, one’s sexual orientation describes his “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”.

75. A lesbian is a woman who is physically, romantically and/or emotionally attracted to other women. Gay can be used to describe both lesbians as well as gay men, however, it mostly refers to men who experience physical, romantic and/or emotional attraction to other men. When one is called bisexual, it means that he/she feels attraction towards both men and woman. It is not necessary that this person is attracted to both sexes at the same time or that he/she is equally attracted to them. The number of relationships with people from both sexes is irrelevant as well.


177 The Yogyakarta principles were adopted by a group of 29 human rights experts, which, amongst others, consisted out of academics, judges, members of treaty bodies, NGOs and a former UN High Commissioner for Human Rights. The Principles are named after the seminar that was held in Yogyakarta in 2006. They were ultimately published in March 2007. The goal of these Principles is to confirm the human rights obligations that States have and to make sure that they also respect them with regard to issues of sexual orientation or gender identity. See The Yogyakarta Principles, About the principles: http://www.yogyakartaprinciples.org/principles_en.htm (accessed 9 May 2015).


179 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, UNHCR (23 October 2012), UN Doc. HCR/GIP/12/01, para. 10. Available at: http://www.refworld.org/docid/50348af62.html (accessed 9 May 2015).

180 Ibid.

181 Ibid.
1.2. Gender Identity

76. Transgender and intersex fall under the category of gender identity. This is defined by the Yogyakarta Principles as “each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex that was assigned at birth. This includes the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms”.182

77. Being transgender indicates that someone’s gender identity does not correspond with the sex that he/she was assigned at birth. A transgender person can be heterosexual, lesbian, gay or intersex, the term itself does not correlate with some kind of sexual orientation. A consequence of being transgender can be that that person does not express him-/herself as is expected by society from people with that sex. He/she could for instance dress differently than other men or women. It is also possible that the transgender individual only acts in this ‘deviating’ way in situations in which he/she feels comfortable expressing the chosen gender. Furthermore, it is important to note that not all transgenders have the desire to alter their birth sex judicially or to undergo some sort of medical treatment.183

78. An intersex person is born with sexual or reproductive anatomy and/or chromosome patterns that are not in conformity with the biological notions of men and women. These conditions may be discovered at birth. However, they can also appear during puberty or a medical examination. An intersex individual used to be called a ‘hermaphrodite’, but this terminology is no longer used. As with transgenders, intersex people can be bisexual, gay or lesbian.184

79. Since transgender and intersex people can be placed in the three categories of sexual orientation, I will use the umbrella term of LGBTI through the following elaboration. It will however only concern them in so far as they are identified as gay, lesbian or bisexual.185 The specific problems concerning their gender identity will not be discussed, since that would lead

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182 Yogyakarta Principles, 8.
183 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, UNHCR (23 October 2012), UN Doc. HCR/GIP/12/01, para. 10. Available at: http://www.refworld.org/docid/50348afcf2.html (accessed 9 May 2015).
184 Ibid.
too far. Issues that bisexuals are confronted with, will not be dealt with either, as only a very small number of refugee decisions concerning bisexuals are reported.\textsuperscript{186}

2. The Circumstances that LGBTI Flee from

80. Currently, there are still 78 countries in the world that criminalise same-sex conduct.\textsuperscript{187} Considering that homosexuality\textsuperscript{188} is legal in 113 States and the situation for LGBTI is insecure in Iraq\textsuperscript{189} this means that it is illegal in almost 41\% of all countries. The most hostile regions for LGBTI are Africa and Asia. In approximately three out of four African countries, homosexual activities are illegal.\textsuperscript{190} In Asia, one out of two countries criminalises same-sex conduct.\textsuperscript{191} It is not always explicitly stated that a sexual orientation, which is perceived as deviating, is illegal. There are many variations in the ways homosexuality is conceptualised in legislation. In some countries the crime of same-sex conduct is encompassed by “acts against nature”\textsuperscript{192} or “violations of morality”.\textsuperscript{193} Other countries criminalise ‘sodomy’. The concrete definition of this term depends on the particular provision. In Liberian law, for example, it indicates “deviate sexual intercourse between human beings who are not (living as) husband and wife, that consists of contact between penis and anus, mouth and penis, or mouth and vulva”.\textsuperscript{194} In Sudanese legislation, on the other hand, ‘sodomy’ is understood as anal sexual intercourse.\textsuperscript{195} This is the same for Swaziland, however, the criminalisation is limited to such

\begin{flushleft}
\textsuperscript{187} As there is no source that provides more recent data, this number is based on a report of May 2014, namely L. PAOLI ITABORAHY and J. ZHU, State-sponsored homophobia. A world survey of laws: Criminalisation, protection and recognition of same-sex love, ILGA, 2014. Available at: http://www.refworld.org/docid/519b6c2f4.html (accessed 14 May 2015).
\textsuperscript{188} Homosexuality will be used in this context as an overarching term that applies to the sexual orientation of lesbian, gay and bisexual individuals.
\textsuperscript{189} Ibid, 16 and 18. Since the publishing of the ILGA report, the situation for LGBTI in Iraq has deteriorated tremendously with the emergence of Islamic State. According to its published interpretation of Islamic law, sodomy needs to be punished with the death sentence. For more information, see X, When coming out is a death sentence. Persecution of LGBT in Iraq, International Gay and Lesbian Human Rights Commission (IGLHRHC), New York, 2014, 19 p. Available at: http://iglhrc.org/files/ComingOutDeathSentence_Iraq_0.pdf (accessed 14 May 2015).
\textsuperscript{191} This is the case in for instance Angola, Botswana, Malawi and Mozambique. See the ILGA report.
\textsuperscript{192} Articles 14.74, 14.79 and 50.7 of the New Penal Law, Volume IV, Title 26, Liberian Code of Laws Revised, Approved in 1976 and Published in 1978.
\textsuperscript{193} Section 148 of the Sudanese Penal Code of 1991 stipulates: “(1) Any man who inserts his penis or its equivalent into a woman’s or a man’s anus or permitted another man to insert his penis or its equivalent in his anus is said to have committed Sodomy.”
\end{flushleft}
conduct between men. Regardless of how these laws are formulated, it is clear that LGBTI are either deliberately targeted by them or that they are affected the most by them because of their sexual behaviour, which is perceived by society as immoral.

81. As with the formulations of the criminal act, large differences also exist in the punishments that are imposed. They vary from fines or imprisonment, to corporal punishments, such as lash strokes. In some countries, ‘security measures’ can be taken. In Mozambique, this means that one can be prohibited from practising a particular profession or be put in an insane asylum. In Somalia, someone can be put under police surveillance or be deported. Five countries even punish same-sex conduct with the death penalty.

82. A consequence of this societal perception of LGBTI is also that they are in many countries discriminated against and harassed by state and/or non-state actors. Although this happens irrespective of whether there is legislation in place that criminalises homosexuality, it can be assumed that criminalisation reinforces these already existing prejudices and increases the stigmatisation. This subsequently makes LGBTI more vulnerable to violence and human rights abuses. Furthermore, it creates the idea that police brutality and community violence against LGBTI are justified.

83. The harassment against LGBTI takes many forms and varies with regard to severance. In general, two types of beaguering can be distinguished: discrimination and pure violence. Discrimination can either be a direct result of government policies or the lack thereof can facilitate private actors in discriminating LGBTI. Discrimination has for one been

199 Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, on its Fourteenth Session (27 April 2010), UN Doc. A/HRC/14/20 (2010), para 20.
201 Ibid.
202 Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover, on its Fourteenth Session (27 April 2010), UN Doc. A/HRC/14/20 (2010), para 20.
Sexual orientation and gender identity are often a reason for employees not to hire or to fire a person or to deny him/her benefits that have been provided to heterosexual employees. Concerning health care, criminalisation has the effect of keeping individuals from seeking health services because they fear that their ‘criminal conduct’ will be revealed. Even when there are no such laws, homo- and transphobic behaviour of the personnel of health care institutions scares LGBTI away, because they are afraid that the confidentiality will not be respected and that going there could cause violent reprisals or add to the stigma they already experience. A hostile society thus discriminates homosexuals in terms of their access to health care. Places of education frequently constitute trans- or homophobic situations as well. On numerous occasions, LGBTI students have been bullied by students or teachers. They can even be at risk of being expelled or are at times not admitted just because of their sexual orientation. In many countries, sexual education in itself is discriminatory since it does not offer the information needed by LGBTI in order to protect themselves and others from sexually transmitted diseases, to make informed choices and to be healthy. LGBTI and organisations that fight for their rights often endorse problems with freedom of expression, association and assembly too. This happens amongst others by denying a permit for meetings, cultural events and marches or by not providing police protection for such events. Governments of some countries also tend to restrict advocacy that is addressed to sexuality and gender issues. The situation in a State can in fact be that bad that staff and volunteers for LGBTI organisations are arrested or harassed. LGBTI can even be the victims of discrimination in their own homes, families and communities. They can be kept from going to school, be put in psychiatric institutions, be


forced to marry, … 213 Many States additionally discriminate lesbian and gay couples by not ensuring them the same benefits as heterosexual couples. 214

84. The second category of harassment is violence. This can consist of physical as well as psychological violence. 215 In many countries, LGBTI are at risk of being killed for no other reason than their sexual orientation or gender identity. 216 Sometimes, these murders are even committed by members of their own family or community because they feel like the individual has brought dishonour or shame upon them. 217 LGBTI are also being raped and sexually abused 218 and when they are a woman, they are sometimes forcibly impregnated. 219 Furthermore, LGBTI are frequently submitted to other forms of torture or cruel, inhuman or degrading treatment as well, either by state actors or non-state actors. 220

85. These situations have caused LGBTI to flee their home countries to places where they hope not to experience this kind of hostile behaviour. Since the beginning of the 1990s, they have sought to obtain asylum based on sexual orientation. 221 There is however no consensus amongst countries on how to deal with these applicants. The question that I will be asking is if States must abstain from sending these people back to their home countries, regardless of whether there is an obligation for states to grant asylum or not. So I will be discussing the principle of non-refoulement in relation to LGBTI.

214 Ibid., 69.

86. As was stated in the introductory part (see supra section II.2.1.1.), in order to rely on the principle of non-refoulement under the Refugee Convention, one must be able to prove two things: that he/she falls under the definition of refugee of Article 1(A)(2) of the Convention and that he/she has a well-founded fear of being persecuted upon return to his/her country of origin or a third country.

87. With regard to the aspect of being a refugee, it needs to be established that there is a “well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion”. It is this requirement that leads to problems in cases concerning LGBTI, since for this precondition to be met, it needs to be established that there is persecution and that this persecution is based on one of the five grounds that are mentioned. The latter is commonly referred to as the ‘nexus requirement’ and will be dealt with first.

3.1. Membership of a Particular Social Group

88. In the early days, LGBTI generally based their refugee claims on political opinion or religion. However, this has now changed, since there is a growing consensus about the fact that LGBTI can be considered as a particular social group.

89. The persecution ground of ‘membership of a particular social group’ was adopted in the draft Refugee Convention near the end of the negotiations. This is why the travaux

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222 Article 1(A)(2) Refugee Convention.
préparatoires are not a big help for interpreting this term. The only thing that is known from them is the observation that was made by the Swedish delegate, stating that past experience had made it clear that certain refugees had been persecuted for belonging to particular social groups and that a provision to cover such cases needed to be included in the draft convention. What is therefore assumed, is that it was intended to include those groups that were at that time recognised and to protect them from harm. Amongst these groups were landowners, capitalist class members, independent business people and others that were persecuted by the authorities in the former Communist Soviet Union. It is also relevant that this Convention was adopted not long after World War II, in which genocide and persecution for the only reason of belonging to a particular group, had taken place. The international community wanted to prevent these atrocities of happening again.

90. Nevertheless, it is clear that the use of ‘particular social group’ as a ground for refugee status should not be limited to groups that were recognised by the international community at the time of the adoption of the Refugee Convention. The Convention ground has been relied on by many refugee claimants, which led to the necessity of interpreting it. Practitioners and scholars have turned to different strategies for this. In general, they have tried to interpret it in the way that the other persecution grounds of race, nationality, religion and political opinion are interpreted. These grounds all have in common that the characteristic which has led to persecution, is immutable or is so fundamental to someone’s identity that he/she cannot be expected to forsake it. Therefore, most scholars have incorporated a


232 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, UNHCR (7 May 2002), UN Doc. HCR/GIP/02/02. Available at: http://www.refworld.org/docid/3d36f23f4.html (accessed 14 April 2015), hereinafter Guidelines No. 2. Paragraph 3 states: “There is no “closed list” of what groups may constitute a “particular social group” within the meaning of Article 1A(2). The Convention includes no specific list of social groups, nor does the ratifying history reflect a view that there is a set of identified groups that might qualify under this ground. Rather, the term membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms.”

requirement of immutability or fundamentality in their interpretation of particular social group. Others have used the principle of *ejusdem generis* as guidance. It is, however, not so clear what is meant with this term, since legal scholars often have a different opinion of what this interpretation technique consists of. Hathaway and Pobjoy, for example, believe that this principle captures the content of Article 31 of the Vienna Convention on the Law of Treaties, which requires decision-makers to interpret a treaty in good faith, in accordance with the ordinary meaning that needs to be given to the terms of the treaty in their context and in light of its object and purpose. According to Ankar and Ardalan it means that specific words in a statute should be construed consistent with the general words. Tis largely accords with the interpretation of Foster, who believes that *ejusdem generis* indicates that general words that are used in an enumeration with specific words should be construed in a manner consistent with the specific words. Another interpretation technique is to regard anti-discrimination or human rights violations as the underlying norm of the Refugee Convention.

### 3.1.1. The ‘Protected Characteristics Approach’

91. Although there is no consensus on which interpretation technique needs to be used, two main interpretations can be distinguished. First there is the ‘protected characteristics approach’, which defines a particular social group as a group of people that is united by a common characteristic. It was established with the case of *Canada v. Ward*, in which

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236 Article 31 stipulates: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”


241 Ibid.


three categories of social groups were listed. To begin with, there are groups that are defined by an innate, unchangeable characteristic, for example gender, the linguistic background of the individuals or their sexual orientation. Secondly, there are groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association, for instance human rights activists. And third, groups can be associated by a former voluntary status that is unalterable due to its historical permanence. Ward can be considered a landmark decision, since the UNHCR still refers to its reasoning when describing the protected characteristics approach. It thereby points to human rights norms to help decision-makers identify those characteristics that are so fundamental that it would be against human dignity to expect a person to forsake them.

92. The test that was set out in Ward is sometimes referred to as the ‘immutability’ test. However, this name does not cover all the groups that could pass this test. As the last two categories deal with voluntary association and association based on a former voluntary status, they don’t describe characteristics that are unalterable. The term ‘protected characteristics’ approach is therefore more fitting, since it indicates that the analysis primarily focuses on internal factors and not, as the second test that will be explained next, at how the group is perceived in society.

3.1.2. The ‘Social/Sociological Perception Approach’

93. The second approach is called the ‘social’ or ‘sociological perception’ approach and talks of a particular social group when society or the authorities identify a group of people as such. The approach was established in Applicant A. v. Minster for Immigration and Ethnic

Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture, Mortsel, Intersentia, 2009, 72.


245 Ibid.

246 Guidelines No. 2, para. 6.

247 Ibid.


In order to be qualified as a particular social group, it requires from a collection of persons that they share some common element and that this element unites them in a way. It needs to make those who share it a cognisable group within society. Contrary to the previous approach, it thus focuses on external factors, rather than an internal common characteristic. This approach has also been mentioned by the UNHCR in its Guidelines on a particular social group.

3.1.3. The ‘UNHCR Approach’

Although the protected characteristic approach and the social perception approach will mostly lead to the same results, there is a possibility for protection gaps to emerge. As a remedy, the UNHCR has introduced its own definition of a particular social group, which combines both approaches. It describes a particular social group as “a group of persons who share a common characteristic, or who are perceived as a group by society.” According to the UNHCR, the characteristic will often be one which is innate or unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights. It needs to be stressed that this test does not require both approaches to be cumulatively applied. It still suffices if one of the tests, being the protected characteristic approach or the sociological approach, is met.

3.1.4. Elements Common to All Approaches

Whatever approach is used, it is clear that a first requirement of the common characteristic or the external factor that leads society to regard a collection of persons as a distinguished group, is that it must be innate, unchangeable or otherwise fundamental. The question for LGBTI is thus whether sexual orientation can be considered to be so.

High Court of Australia, Applicant A. and Another v. Minister for Immigration and Ethnic Affairs and Another, 24 February 1997, 190 CLR 225; 142 ALR 331. Available at: http://www.refworld.org/docid/3ae6b7180.html (accessed 15 April 2015), hereinafter Applicant A.

Guidelines No. 2, para. 7.

Guidelines No. 2, para. 9.

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, UNHCR (23 October 2012), UN Doc. HCR/GIP/12/01, para. 45 (accessed 16 April 2015).

Guidelines No. 2, para. 11.
there is no real consensus on the inalterability of sexual orientation,
most social and behavioural scientists are convinced that it is a characteristic that is “highly resistant to change”. The UNHCR has similarly stated that it is regarded as an innate and immutable characteristic or one that is so fundamental to human dignity that a person should not be compelled to forsake it. Several national courts have judged in the same way. The European Court of Justice considers it an immutable characteristic as well, although it did not have many margin of appreciation, since sexual orientation is explicitly listed in Article 10(1)(d) of the Qualification Directive as a possible common characteristic upon which a particular social group can be based. When judging a claim for non-refoulement based on sexual orientation, to come to its decision, the European Court of Human Rights relied on the case in which the ECJ considered sexual orientation a possible characteristic of a particular social group and on the Guidelines No. 9 of the UNHCR. It therefore seems to be considered common knowledge that sexual orientation is, if not an immutable characteristic, definitely a fundamental one upon which a particular social group can be founded.

96. A second common precondition is that this characteristic cannot be the element of persecution itself. A particular social group cannot be defined solely by the fact of being persecuted or the fear thereof. Nevertheless, the persecution of a group may serve as a relevant factor in determining its visibility in a particular society. This is recognised in both


262 Guidelines No. 9, para. 47.


264 ECJ, Minister voor Immigratie en Asiel v. X and Y and Z v. Minister voor Immigratie en Asiel, 7 November 2013, joined cases C-199/12 to C-201/12, para. 11.

"a group shall be considered to form a particular social group where in particular: 
- members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and
- that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society; 
depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States: Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article"

266 ECtHR, M.E. v. Sweden, 26 June 2014, No. 71398/12.

267 To allow otherwise would lead to a tautological reasoning: the collection of people would be persecuted for being a member of a particular social group and they would constitute a particular social group because they are all being persecuted. This was for the first time pointed out in Applicant A., on page 11. See M. FOSTER, International Refugee Law and Socio-Economic Rights, Cambridge, Cambridge University Press, 2007, 293.

268 Applicant A., 11; Guidelines No. 2, para. 2 and 14.

Applicant A. and the UNHCR Guidelines No.2. To illustrate this reasoning, the UNHCR uses the following example of left-handed persons, which was mentioned by judge McHugh in Applicant A.\textsuperscript{270} Persecution alone cannot create a particular social group, but were left-handed persons to be persecuted for being left-handed, this would make them recognisable in their society and create the perception that they are a particular social group. However, they would be identified because of being left-handed and not because of the persecutory acts.\textsuperscript{271}

97. Another thing that is common to the protected characteristic approach, the sociological perception approach and the approach proposed by the UNHCR, is that they try to find a way to limit the Convention ground of particular social group so that is does not become a catch-all provision. Despite a minority of authors who, mostly inspired by humanitarian motives,\textsuperscript{272} claim the opposite,\textsuperscript{273} there is now a quasi-consensus on the fact that it was not the intention of the drafters of the Refugee Convention to install a safety net.\textsuperscript{274} This has accordingly been confirmed by the UNHCR. The Convention ground of membership of a particular social group cannot have the effect of rendering the other four grounds superfluous.\textsuperscript{275} Moreover, with asylum law, it must always be kept in mind that States are sovereign entities. It belongs to their sovereignty to decide whether to grant asylum or not. A right to asylum does not exist.\textsuperscript{276} A majority of legal scholars, including Fontaine, believe that the non-refoulement principle was developed to compensate this lacking right to asylum.\textsuperscript{277} Nevertheless, not all authors agree with this perspective.\textsuperscript{278} Chetail for instance, rejects this majority position because he believes it is better to see the concept of non-refoulement as a compromise. He regards it as a way to respect the sovereign right of states to control the access to their

\textsuperscript{270} Guidelines No.2, para. 14; C. WOUTERS, International legal standards for the protection from refoulement: a legal analysis of the prohibitions on refoulement contained in the Refugee Convention, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture, Mortsel, Intersentia, 2009, 73.

\textsuperscript{271} Applicant A., 28.


\textsuperscript{275} Guidelines No. 2, para. 2.

\textsuperscript{276} G. GIATI, “Blocking Asylum: The Status of Access to International Protection in Greece”, 4 Inter-Am. & Eur. Hum. Rts. J. 2011, 86. Article 14 of the Universal Declaration on Human Rights states that everyone has the right to seek and to enjoy in other countries asylum from persecution, however, this is only a declaration and therefore, this instrument does not contain an obligation for states to grant asylum.


This appears to be a more correct and nuanced vision and should be taken into account when interpreting the persecution ground of membership of a particular social group. The convention ground can therefore not be defined too broadly, as that could disturb the delicate balance between protection and limited implicit State obligations.

98. This may nevertheless not have the effect of interpreting a particular social group too narrow. Therefore, it is not required that the members of the group know each other. This requirement of cohesiveness, which was installed by the case of Sanchez-Rujillo, has not been followed by the majority of adjudicators. In case of LGBTI, this has been made specifically clear, as in Islam and Shah gay people were explicitly used as an example to reject this cohesiveness standard. It is likewise not necessary for all the members of the group to be at risk of being persecuted. In Applicant S395/2002, this was implicitly confirmed for LGBTI by the High Court of Australia. In this case, a lower court made a distinction between homosexuals living discreetly and those living openly, presuming that only the latter suffered persecution. This line of thought was struck down by the High Court, for the previously-mentioned reason. I will further elaborate on this case in section 3.2.2.2. Furthermore, size is not relevant to constitute a particular social group. And lastly, it is not obligatory for the claimant to effectively own the characteristic that is attributed to him. From


282. United States Court of Appeals for the Ninth Circuit, Sanchez-Trujillo, et al., v. Immigration and Naturalization Service, 15 October 1986, 801 F.2d 1571, para. 27. Available at: http://www.refworld.org/docid/4a3a3af50.html (accessed 7 May 2015). “The statutory words "particular" and "social" which modify "group," indicate that the term does not encompass every broadly defined segment of a population, even if a certain demographic division does have some statistical relevance. Instead, the phrase "particular social group" implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.”


287. Ibid., para. 18.
Amanfi v. Attorney General follows that refugee status can even be provided when someone is perceived to be, but is not actually, a homosexual. 288

99. Although it has been shown that homosexuals meet every requirement to constitute a particular social group, jurisprudence was often confused on the matter. 289 This was recognised by the US Court of Appeals in Karouni v. Attorney General, which stated that all alien homosexuals are members of a particular social group. 290 With this statement, which provides clear guidance, the discretion of decision-makers has been tremendously reduced. 291 Whether LGBTI constitute a particular social group should thus no longer be considered as open for debate.

100. As for the actual nexus, meaning that the persecution is ‘for reasons of’ being a member of a particular social group, problems could emerge in cases where the persecutor is a non-state actor. Under these circumstances, it must be proven that there is in fact persecution and that the State fails to protect the claimant from it. 292 The question that has risen is whether it is necessary in such cases that the conduct of both the perpetrator and the State are motivated by that Convention ground. The UNHCR has answered this question in the negative. When it cannot be proven that the persecutor has acted for reasons of the Convention ground, refugee status can still be provided when it is shown that the State refuses to afford protection because the claimant is a member of a particular social group. 293 For LGBTI it is thus enough to provide evidence that the acts of either the private persecutor or the state are driven by the claimant’s sexual orientation. The case of Hernandez-Montiel has affirmed this. 294

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288 United States Court of Appeals for the Third Circuit, Kwasi Amanfi v. John Ashcroft, Attorney General, 16 May 2003, Nos. 01-4477 and 02-1541, 14-17.
292 Article 1(A)(2) Refugee Definition.
3.2. A Well-founded Fear of Persecution

101. The condition that leads to the most problems in cases built on sexual orientation, is the requirement of persecution. In section 2.1.1.2 was explained how difficult it is to define this concept, so I will not go into this any further and presume that the violence and discrimination conflicted upon LGBTI is recognised as persecution.

3.2.1. Problems LGBTI Face when Claiming Refugee Status

102. That there is no persecution in cases of sexual orientation has been asserted for many reasons. For one, it is often said that LGBTI have an internal flight alternative. When there is an internal flight alternative or an internal protection alternative, this means that there is a specific geographical area in the applicant’s country of origin where he can receive effective protection, which cannot be provided in other parts of the country. It has however been rejected by the UNHCR that LGBTI have an internal flight alternative. It reasons that if the country in question has criminal laws on same-sex relations and enforces them, these are enforced in the entire territory. To say that internal flight alternatives are available for LGBTI is therefore not realistic. In case the persecution is performed by non-state actors, the UNHCR assumes that an intolerance towards LGBTI will exist in the whole country. To settle in another region of the same country, will therefore not be a solution.

103. Another argument that is invoked, is that in case of non-state persecutors, LGBTI have the possibility of asking for state protection. Again, this has been dealt with by the UNHCR in its Guidelines. It reasons that when same-sex relations are criminalised, it would be irrational to ask from LGBTI to turn to the authorities with a claim of harm which is in their eyes based on a criminal act. The UNHCR will therefore presume that the country will be unwilling or unable to provide state protection, unless there is evidence to the contrary. When there is no criminalisation, it is sufficient for the claimant to establish that state protection was

298 Guidelines No. 9, para. 53.
unavailable or ineffective at the moment of return. It does not need to be shown that he/she approached the authorities for protection before flight.\textsuperscript{301}

104. One of the biggest issues with sexual orientation-based refugee claims is the credibility of the applicants. Although the reliability of refugee testimonies is always difficult to ascertain, sexual orientation in particular is problematic when it comes to providing evidence, since it is not something that is externally visible.\textsuperscript{302} In addition, decision-makers tend to be influenced by heterosexist biases\textsuperscript{303} and homophobic prejudice.\textsuperscript{304} They have an idea of how LGBTI behave and how their sexual orientation manifests itself in public.\textsuperscript{305} As a consequence, testimonies of gay or lesbian refugee claimants are weighed against unrealistic standards, which causes many of them to be denied protection.\textsuperscript{306} Moreover, LGBTI refugees are often ashamed and embarrassed because they have internalised the surrounding homophobia or have suffered trauma.\textsuperscript{307} This makes them unable to talk openly about their sexual orientation. The asylum procedure can subsequently be obstructed by that timid attitude.\textsuperscript{308} More importantly, this can take away their credibility. When someone did not express his/her fear of being persecuted for reasons of sexual orientation during the first interview, decision-makers, tend to find that a similar statement at a later stage lacks credibility. The UNHCR Guidelines have a section on this subject too. To remedy the above, the UNHCR has provided measures that need to be born in mind during the refugee status determination process. First, there needs to be an open and reassuring environment that will encourage the applicant to share his stories. Second, decision-makers need to maintain an objective approach, not guided by stereotypes or biases. Their choice of words and body language should express a positive attitude towards diversity. This can be reached through training, in which the specificities of sexual orientation-based refugee claims will be made

\textsuperscript{301} Guidelines No. 9, para 36.  
\textsuperscript{306} F. HANNA, “Punishing Masculinity in Gay Asylum Claims”, 114 Yale L.J. 2005, 913; K. SOUTHAM, “Who am I and Who do You want Me to be? Effectively defining a Lesbian, Gay, Bisexual and Transgender Social Group in Asylum Applications”, 86 Chi.-Kent L. Rev. 2011, 1372. Decision-makers for instance assume that homosexual individuals go to gay bars. Upon arrival in the country of refugee, gay refugee applicants will therefore be asked where gay bars are located in their former living area and what names they have. Decision-makers thereby lose sight of the fact that many of these claimants did not attend such bars in order to escape persecution or they do not have the desire to go to such places. A particular sexual orientation is not experienced and lived by everyone in the same way.  
\textsuperscript{307} Guidelines No. 9, para. 59.  
\textsuperscript{308} J. WEBELS, Sexual Orientation in Refugee Status Determination, Oxford, Oxford Department of International Development Refugee Studies Centre, April 2011, 37.
clear. Nevertheless, despite the efforts of UNHCR, credibility still remains a big problem for LGBTI refugee claimants.

105. Another tremendous problem for LGBTI when it comes to fulfilling the precondition of persecution, however, is the idea that sexual orientation can be concealed or repressed. This will now be elucidated in detail.

3.2.2. The Perception that One’s Sexual Orientation Can Be Concealed

3.2.2.1. Definition

106. As is stated in Article 33 Refugee Convention, to rely on non-refoulement, one must have a well-founded fear of being persecuted. Many adjudicators have nevertheless put forward that this fear can never be well-founded in case of LGBTI. They are convinced that LGBTI are able to conceal their sexual orientation and, by doing that, prevent their own persecution. Therefore, they believe that a real risk of being persecuted does not exist, as LGBTI have the possibility to prevent that from happening. Consequently, they hold that the claim made by LGBTI that they should not be refouled, based on the fact that they have a fear of being persecuted, is ill-founded. In other words, these adjudicators consider it reasonable to expect someone, to the extent that it is possible, to co-operate in his/her own protection. They reason that, since sexual orientation is a characteristic that can be concealed, contrary to race and nationality, LGBTI have a ‘duty’ to do that. This reasoning can be referred to as the ‘discretion or concealment argument’.

107. In its Guidelines, the UNHCR has disapproved of this reasoning. That it is possible for an applicant to avoid persecution by being discreet or concealing his/her sexual orientation cannot be a valid reason to deny them the refugee status. The UNHCR thereby points at the

309 Guidelines No. 9, para 60.
310 For more information, see T. Spiikeroer (ed.), Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum, Abingdon, Routledge, 2013, xvii + 264 p.
315 These are presumed to be visible, and thus cannot, at least to a lesser extent, be kept discrete.
317 Guidelines No. 9, para 31.
fact that this has been affirmed in many jurisdictions. I will give some examples of the case law that the UNHCR may be referring to.

3.2.2.2. Case law Rejecting the Discretion Reasoning

108. In Canada, in the vast majority\textsuperscript{318} of cases, the discretion reasoning was rejected. An example of this is \textit{Re XMU}, a case of 1995.\textsuperscript{319} The Immigration and Refugee Board asserted that it is the intention of the Refugee definition that an individual should not face a reasonable chance of persecution because of, amongst others, membership of a particular social group. If someone who cannot or will not conceal this immutable or fundamental attribute, would be denied refugee status on the grounds that concealing his/her sexual orientation could remove the fear of persecution, this would make a mockery of the Refugee Convention.

109. The Australian High court provided a similar judgment in \textit{S395/2002}. Judges Kirby and McHugh of the majority opinion stated that: “persecution does not cease to be persecution for the purpose of the Convention because those persecuted can eliminate the harm by taking avoiding action within the country of nationality.”\textsuperscript{320} They too made a comparison with the other persecution grounds and reminded that the intention of the Refugee Convention was to protect people holding particular religious beliefs or political opinions, members of a particular social group and people of all races and nationalities. To expect individuals to conceal these characteristics, and amongst those one’s sexual orientation, would undermine this objective.\textsuperscript{321}

110. This was affirmed in \textit{Appeal No. 74665/03},\textsuperscript{322} in which the New Zealand Refugee Status Appeals Authority was of the opinion that the refugee definition needs to be approached from the perspective of the “fundamental human right in jeopardy and the resulting harm”, but not from the point of view of what the refugee claimant is able to do in order to avoid persecution.\textsuperscript{323} The Appeals Authority went even further by saying that to require a refugee applicant to forsake a fundamental human right by acting “submissive and compliant”, amounts to the same denial of a fundamental human right that is imposed by the country of

\textsuperscript{318} Despite the strong message expressed in \textit{Re XMU}, in some later cases, the concealment argument was applied. See J. Millbank, “Gender, sex and visibility in refugee claims on the basis of sexual orientation”, 8 Geo. Immigr. L.J. 2003-2004, 99, footnote 126.


\textsuperscript{320} S395/2002, para. 40.

\textsuperscript{321} Ibid., para. 41.

\textsuperscript{322} RSAA, D. Mansouri-Rad, 7 July 2004, No. 74665/03, hereinafter Refugee Appeal No. 74665/03.

\textsuperscript{323} Refugee Appeal No. 74665/03, para. 114.
origin through its persecutory conduct. This position is often referred to as ‘a hidden right is not a right’ and was reiterated in a judgment from the South African Constitutional Court.

111. It has also been held that sending an individual claiming refugee status (back) to a country and ‘ordering’ him to conceal his sexual orientation can in itself constitute persecution. This was stated in the Australian case of Win v. Minister for Immigration and Cultural Affairs and has in the meantime been affirmed by the UNHCR in its Guidelines. The UNHCR points at the psychological and other harms that LGBTI may undergo by ‘being discrete’. This situation can become intolerable for the individual and therefore amount to persecution. The case of Win is also known for the comparison that was made by Judge Madgwick with Anne Frank. During World War II, this Jewish girl lived in an attic in Nazi-occupied Holland in order to escape being sent to a concentration camp. Judge Madgwick considered that, would the discretion reasoning be applied to Anne Frank if she had fled to another country, she would be sent back to live in the attic as it would be found reasonable for her to prevent her own persecution and therefore granting her refugee status would be deemed unnecessary.

3.2.2.3. Criticism on the Discretion Reasoning by Legal Scholars

112. The concealment reasoning has been criticised by legal scholars as well. For one, the discretion argument is considered as flawed because it assumes that whether the sexual orientation of the refugee applicant is known only depends on the conduct of the individual. However, there is always a risk of being outed against your will, through rumour or growing suspicion, or being discovered by accident. Living a life that is not in

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324 Refugee Appeal No. 74665/03, para. 114.
325 J. WEBELS, Sexual Orientation in Refugee Status Determination, Oxford, Oxford Department of International Development Refugee Studies Centre, April 2011, 22. This statement was first used in Canada Immigration and Refugee Board, X (Re), 17 February 2007, VA5-02751.
326 Judge Sachs of the Constitutional Court of South Africa expressed an analogous point of view in South African Constitutional Court, National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others, 9 October 1998, CCT 11/98, para. 16, by saying that the right to privacy implies a responsibility for the state to promote conditions in which personal self-realisation can take place.
327 Australia Federal Court, Win v. Minister for Immigration & Multicultural Affairs, 23 February 2001, FCA 132, hereinafter Win. To be complete, it is necessary to point out that in this case, sexual orientation was still considered as a political opinion, rather than a characteristic which of members of a particular social group.
328 Guidelines No. 9, para. 32.
329 Win, para. 18.
330 This analogy has been used in the case of HJ and HT, which will later be discussed.
conformity with what is expected from heterosexuals, may already be enough to induce suspicion that ultimately results in the disclosure of one’s sexual orientation. As was said by Millbank and Dauvergne: “The question of being 'out' is never answered once and for all, it is a decision made over and over, each day and in each new social situation.” This means that it can never be said with certainty that living discreetly will abolish the risk of being discovered and subsequently persecuted.

113. Another problem with the discretion argument is the sexualisation of refugee claims based on sexual orientation. This means that decision-makers put a disproportionately big focus on sexual conduct, rather than on the sexual identity of the claimant. This is problematic in two ways. First, it reduces sexual orientation to sexual conduct, thereby losing sight of all the other aspects that are expressions of being gay or lesbian. In reality, asking someone to behave in a way that cannot expose one’s sexual orientation, goes further than only denying him/her sexual gestures in public. Sexual orientation also manifests itself through small things, such as wedding rings, a double bed or even someone’s language, for instance “my husband”. The discretion reasoning can maybe work in theory because sexual identity is reduced to sexual conduct. Nevertheless, in reality it will not succeed. To be successful in practice, every single aspect of one’s sexual identity would have to be hidden and that is not achievable.

114. Secondly, sexualisation can lead to the rationalisation of possible prosecution by the state or harm inflicted by members of the community. This is because the idea that sexual orientation can be reduced to sexual conduct is partly caused by heterosexist discourses on deviant behaviour. LGBTI are seen as flamboyant and displaying their sexual orientation in public. This point of view is clearly visible in Amare v Secretary of State for the Home Department. In that case, a decision of the United Kingdom Immigration Appeal Tribunal

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341 United Kingdom Court of Appeal (England and Wales), Amare v. Secretary of State for the Home Department, 20 December 2005, EWCA Civ. 1600, hereinafter Amare.
(UKIAT) was upheld, therefore implicitly confirming the biases on which the UKIAT based its conclusion. The case concerned an Ethiopian woman who had fled to the United Kingdom because homosexuality is criminalised in Ethiopia with imprisonment of between ten years and three years. Although the risk of being prosecuted is small, since it will only happen when someone is denounced, the public opinion is heavily opposed to homosexuality. The UKIAT recognised that the appellant would not be able to form and develop a homosexual relation in Ethiopia as in the UK, but did not consider that as a problem. Before she left Ethiopia, she had acted in a way that could not arouse societal disapproval or humiliation. The UKIAT found that, if this way of living could be described as being discreet, it was not “very different from the conventional married lives of many other couples who neither flaunt their sexuality nor adopt an overtly heterosexual lifestyle.”

It is thus somehow assumed that homosexuals lead a life that is more extravagant than that of heterosexuals. Yet the reality is that simple, everyday gestures that express homosexuality are likely to generate more severe reactions than expressions of heterosexuality of the same degree. The problem with this heterosexism is that it even leads decision-makers to believe that such harmless expressions of homosexuality violate social norms and are therefore not allowed. This conviction is what ultimately results in the rationalisation of persecution and this will be illustrated by the following case:

Mr Gui, a Chinese gay man, had embraced and kissed his male partner in a park in China. Both men were taken by the police, who kicked and bashed Mr. Gui, detained him for three months and harassed him. Upon release, he discovered that his partner apparently died in the meantime in a car accident. Mr. Gui fled to Australia. However, he did not receive refugee status. The Australian decision-maker found that the facts did not constitute persecution. He decided that cuddling and kissing in public was against the cultural norms prevailing in China and that it was this unacceptable behaviour that made the police notice him. He was not persecuted for being gay, but punished for his public misconduct. According to Millbank, this decision was motivated by the idea that the applicant had been gay in public in a sexual way. The decision-maker sexualised their behaviour, he saw public cuddling and kissing as a form of sex in public, while on the other hand, similar behaviour

342 Amare, para. 6.
344 Heterosexism means that “heterosexual expression is celebrated whilst homosexual expression of the same degree is highly shunned and punished”, see G. KASSISIEH, From Lives of Fear to Lives of Freedom: A review of Australian refugee decisions on the basis of sexual orientation, Glebe, Gay and Legal Rights Lobby, 2008, 64.
347 Millbank believes this is proven since cuddling and kissing were stated between quotation marks in the decision and the behaviour was treated as if it really was sex.
of a heterosexual couple is almost invisible. Ultimately, the discretion reasoning thus stimulates the sexualisation of homosexual conduct and the rationalisation of the mistreatment of LGBTI.

3.2.2.4. The Perseverance of the Discretion Reasoning

115. All the above indicates that the discretion reasoning is rejected by the UNHCR, case law and legal scholars. Notwithstanding this critique, the concealment argument has been far from abandoned. This is in fact illustrated with the case of *HJ and HT v Secretary of State for the Home Department*.

116. The facts of the case were as follows: HJ was a forty-year-old Iranian gay man, who fled to the United Kingdom and claimed asylum. In Iran, he practised his homosexuality and maintained this lifestyle after his arrival in the UK. The circumstances of HT were very similar. He was thirty-six years old, a citizen of Cameroon and also a practising homosexual. Both men claimed refugee status, stating they had a well-founded fear of being persecuted if they would be sent back to their home countries. However, they were both refused asylum by the Secretary of State for the Home Department. Appeals against these decisions were dismissed. The Court of Appeal used the ‘reasonably tolerable test’ that was introduced in *J v Secretary of State for the Home Department*. This test states that it needs to be asked “whether discretion is something that an applicant could reasonably be expected to tolerate, not only in the context of random sexual activity, but in relation to matters following from, and relevant to, sexual identity in the wider sense”. The Court of Appeal found that HJ could reasonably be expected to tolerate the conditions in Iran and concerning HT, it was believed that he would act discreetly on return to Cameroon. Therefore, it was not necessary to raise the question, since HT could not prove that there would be a real risk of persecution in the future. The case came before the UK Supreme Court, in which all five judges agreed that the dismissal of the Court of Appeal had to be set aside.

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350 United Kingdom Supreme Court, *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department*, 7 July 2010, UKSC 31, hereinafter HJ and HT.
351 *HJ and HT*, para. 4.
354 United Kingdom Court of Appeal (England and Wales), *J v Secretary of State for the home Department*, 26 July 2006, EWCA Civ. 1238, para. 16.
355 *HJ and HT*, para. 7.
117. They rejected the reasonable tolerable test that was applied, because it was incompatible with the objectives of the Refugee Convention, and four out of five judges agreed that the test that was proposed by Lord Rodger should be used. According to Lord Rodger, decision-makers should ask four questions when handling a refugee claim based on sexual orientation. First it must be ascertained that the applicant is in fact gay or that potential persecutors in his country of origin would treat him as gay. Secondly, it needs to be investigated whether being openly gay can lead to persecution. The third question is what the applicant would do upon return to his country of origin: would he live discreetly or openly? In the last scenario, it would be clear that this could possibly result in persecution, so it would have to be decided that the applicant has a well-founded fear of persecution. Would he nevertheless live discreetly and that way avoid persecution, the fourth and last question should be why he would live this way. Lord Rodger holds that two scenarios should be distinguished. In the first one, the applicant would live discreetly either because he himself wishes to live his life that way or because of social pressure. In the latter case, he conceals his sexual orientation because he does not want to cause distress to his family or friends or embarrass them by being homosexual. In other words, he makes this choice to maintain his relations with his family and friends. Lord Rodger contends that saving parents or friends from distress or embarrassment does not amount to persecution that a person is protected against by the Refugee Convention. Therefore, the applicant should not be granted refugee status. By contrast, in the second scenario, living discreetly is a method to avoid the persecution that would be encountered by living openly as a gay man. In that case, Lord Rodger states that refugee status should be granted, as the condition of a well-founded fear of persecution would be fulfilled.

118. This case, with its proposed test, illustrates that the idea that LGBTI can live discreetly is still present in the minds of judges. At first sight, HJ and HT seems like a major achievement because the Supreme Court dismissed the discretion reasoning. From now on, it can no longer be expected from someone to live discreetly in order to avoid persecution. According to the Court, enforcing this would be contrary to the objectives of the Refugee Convention. Nonetheless, the distinction between living openly and concealing one’s sexual orientation is

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356 J. WEBELS, HJ (Iran) and another - Reflections on a new test for sexuality-based asylum claims in Britain, Legal Studies Research Paper, Faculty of Law, University of Technology Sydney, 2013/4, 2.
357 HJ and HT, para. 82.
358 This was stated by Hathaway and Pobjoy, who believe that with this judgment, the British Supreme Court followed the Australian High Court’s decision in S395/2002 and “departed in critical ways from accepted refugee law doctrine”. See J. C. HATHAWAY and J. POBJOY, “Queer cases make bad law”, 44 N.Y.U. J. Int’l L. & Pol. 2012, 331.
359 Ibid.
still present in the test that was introduced by Lord Rodger. As a result, this test is affected with the same biases that underlie the discretion reasoning. The test is first of all problematic since the second question, whether living openly as a homosexual can lead to persecution, ‘forgets’ that persons who live discreetly can also be persecuted as a result of being outed against their will, being discovered by accident or for not living ‘the conventional heterosexual life’. Moreover, the distinction that is made between living discreetly out of fear for persecution on the one hand and fear for social pressure on the other hand, supposes that LGBTI have an actual choice. Yet there is no real decision to make, as it is logical for a homosexual, when he lives in an environment that is homophobic or is by him perceived to be hostile towards LGBTI, to conceal his sexual orientation in order not to lose his family, friends and colleagues.

119. *HJ and HT* confirms that the discretion reasoning has turned out to be a many-headed monster that every time its head is chopped off, grows another. Spijkerboer uses this image to show that, although the concealment argument has been formally abolished in several jurisdictions, it still turns up in other forms. In this case, it appeared in the form of the nexus requirement: only when the applicant has lived discreetly out of fear of persecution, protection is offered. The test of Lord Rodger also includes another head of the ‘discretion monster’, namely the idea that there are LGBTI that conceal their sexual orientation voluntarily, out of a “natural human tendency to be discreet about sexuality. Therefore it is not expected from them that they should conceal their sexual orientation, but it is considered a fact that they will do so voluntarily, which is thought not to be contrary to the spirit of the Refugee Convention. A third way in which the discretion reasoning cunningly manifests itself, is through the definition of membership of a particular social group. In the United States for example, the Board of Immigration Appeals has since 2006 been applying social

360 J. WEBELS, *HJ (Iran) and another - Reflections on a new test for sexuality-based asylum claims in Britain*, Legal Studies Research Paper, Faculty of Law, University of Technology Sydney, 2013/4, 13.

361 It is even a bit absurd that this was not considered, since the case of HT was in fact an example of persecution despite the concealment of his sexual orientation. He had been in a relationship for five years and had been able to hide this, until he was seen by his neighbours while he was kissing his partner in his own garden. Later he became a victim of ‘mob justice’. He was beaten with sticks, thrown at with stones, his clothes were ripped off and the mob tried to cut off his penis with a knife. When the police arrived, the officers participated in the violence. See K. OGG, “A Question of Discretion: A Critical Analysis of New Legal and Evidentiary Hurdles for Lesbian, Gay and Bisexual (LGB) Asylum Seekers in the United Kingdom”, 2 OxMo 2012, 25; WEBELS, *HJ (Iran) and another - Reflections on a new test for sexuality-based asylum claims in Britain*, Legal Studies Research Paper, Faculty of Law, University of Technology Sydney, 2013/4, 14 and 18-19.

362 Ibid., 19. Lord Hope even stated in paragraph 61 that it is “perfectly natural” in that kind of situation “to avoid harming his relationships with his family, friends and colleagues”.


364 These being New-Zealand, Australia, the Netherlands, the United Kingdom, Sweden, Finland and Norway.


366 Ibid.

367 Ibid.
visibility as a precondition for constituting a particular social group. As a consequence, it is often argued that LGBTI who did not live openly in their country of origin are not members of the particular social group of LGBTI with its visible characteristics. The internal flight alternative has also been used by decision-makers (see supra n° 102). This option has been shown to be non-existing in a country where the authorities and/or the community are against LGBTI. However, it is still used and is a variation of the discretion reasoning in that people are being sent back to the country they fled from, yet to another region, so that they can start over without people knowing they are gay or lesbian and prevent their own persecution. The purpose of internal relocation is in these cases re-concealment rather than finding a place that is safe for the applicant. The last ‘monster-head’ Spijkerboer mentions, is the issue of ‘sur place cases’. In these judgments it is reasoned that the applicant has succeeded to conceal his sexual orientation before his leave, so the fact that he is a LGBTI is only known in the country of refuge. Hence, being returned would not endanger the applicant as it is found unreasonable that he would attract the attention of the authorities.

3.2.2.5. A Step in the Right Direction by the ECJ

120. Notwithstanding the formal abolishment of the discretion reasoning, it thus seems really hard to do away with. Nevertheless, it seems as if the tide is slowly turning. In X, Y and Z the Court of Justice of the European Union was asked three preliminary questions by the Dutch Council of State. The second question was whether foreign nationals with a homosexual orientation can be expected to conceal their orientation from everyone in their country of origin in order to avoid persecution. If not, the council wanted to know whether they could be expected to exercise restraint in their country of origin in order to avoid persecution. And if so, to what extent. Additionally, the Council asked whether greater restraint could be expected of homosexuals than of heterosexuals. Lastly, the question was raised if a distinction could be made between forms of expression that relate to the core area of one’s sexual orientation, and if so, how this could be determined.

372 ECJ, Minister voor Immigratie en Asiel v. X and Y and Z v. Minister voor Immigratie en Asiel, 7 November 2013, joined cases C-199/12 to C-201/12, hereinafter X, Y and Z.
373 X, Y and Z, para. 37.
121. Although the Court of Justice answered these preliminary questions to give guidance on the interpretation of Article 10 (1)(d) of the Qualification Directive (see supra n° 25 and 40), it stressed that this must be interpreted in a way that is consistent with the Refugee Convention. With regard to the questions, the Court clarified that it referred to a situation in which the applicant has not proven that he has already been the victim of persecution or that he has been exposed to direct threats of persecution because of his sexual orientation. According to the Court, it was because of the lack of “such a serious indication of a well-founded fear on the part of the applicants” that the Council needed to ask whether concealment could be possible. From this, it can be deduced that proof of previous persecution or threats thereof is a serious indication of a well-founded fear of persecution.

122. The first question was answered negatively by the Court. An applicant for asylum cannot be expected to conceal his homosexuality in his country of origin to prevent persecution, since that would be “incompatible with the recognition of a characteristic that is so fundamental to a person’s identity that the person concerned cannot be required to renounce it”. As for the question whether restraint could be expected, the Court stated that, when it is certain that one’s homosexuality will expose him to a real risk of persecution within the meaning of Article 9(1) of the Qualification Directive, he must be granted refugee status. Thereby, the fact that the applicant could prevent the risk by exercising greater restraint than a heterosexual in expressing his sexual orientation, cannot be taken into account in that respect. The Court did not find it necessary, in the light of the replies that were given to the first and second question, to answer the third question.

123. In X, Y and Z, the Court of Justice clearly rejected the concealment reasoning in the sense that it cannot be expected from someone that he conceals his sexual orientation. It went even further than HJ and HT since it explicitly prohibited ordering restraint as well. Nevertheless, it did not say if member States’ courts are now forbidden to decide on an objective basis that someone will in fact live discreetly or even to investigate if there is a possibility that the applicant would do so. If States would still do so, they could circumvent the judgment by

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374 For the complete citation of the Article, see X, Y and Z, footnote 272.
375 X, Y and Z, para. 40.
376 Ibid., para. 63.
377 Ibid., para. 64.
378 Applied on the facts that were at hand in HJ and HT, this means that there was clearly a serious indication of persecution, so the proposed test should not have been used as, according to the European Court of Justice, the condition of a well-founded fear of persecution would have been established.
379 X, Y and Z, para. 71.
380 Ibid., para. 70.
381 Ibid., para. 75.
382 Ibid., para. 77.
reasoning that the applicant would live discreetly, subsequently estimate that he would not risk being persecuted and therefore not provide him refugee status. Den Heijer believes the Court did implicitly prohibit this possibility. According to him, the language of this judgment indicates that the possibility of living discreetly cannot be taken into account in any way. He deduces this from the words “in that respect”, which the Court used when it rejected the possibility of restraint. Den Heijer also points to the fact that the Court did not mention that courts should factor in how it is for the applicant himself to live openly. He believes this was not a mistake, but deliberately done because the Court said earlier that requiring someone to conceal his sexual orientation, a fundamental characteristic of one’s identity, violates the objectives of the Refugee Convention. In my opinion, this interpretation is too far-reaching, probably more inspired by what the author would like the judgment to say, rather than what the Court really intended.

124. It nevertheless needs to be recognised that X, Y and Z is a huge step forward in abolishing the discretion reasoning. Since the Court of Justice bindingly interprets EU law, all twenty-eight States have to comply with this judgment. This means that the concealment argument has now been prohibited in all twenty-eight member States at once. Citing Takis, this judgment is “proof of a social, political and legal consensus regarding the right for LGBT people to live freely, openly and safe”.

3.3. Conclusion

125. From the above, it is clear that LGBTI are confronted with many obstacles in claiming refugee status, which has its impact on the application of the principle of non-refoulement.

126. With regard to the nexus requirement, it has nevertheless been agreed upon that LGBTI constitute a particular social group. Three different approaches are used to establish whether this is the case: the protected characteristics approach, the sociological approach and the UNHCR approach, which is in fact a combination of the two prior ones. All three agree that an innate, unchangeable or fundamental characteristic is necessary. The guidelines provided by UNHCR and case law of the European Court of Justice, the European Court of Human Rights and national courts have accepted that sexual orientation is, if not immutable, at least a

385 A. TAKIS, “Refugee Claims Based on Persecution Due to Sexual Orientation before the Court of Justice of the European Union” in C. M. AKRIVOPOULOU (ed.), Protecting the Genetic Self from Biometric Threats: Autonomy, Identity, and Genetic Privacy, Hershey, IGI Global, 2015, (52) 65.
fundamental characteristic upon which a particular social group can be based, therefore recognising LGBTI as that kind of group.

127. The second precondition, whether LGBTI have a well-founded fear of being persecuted, has also shown to be difficult to establish. Decision-makers tend to turn to a non-existing internal flight alternative or possibility to call for state protection to deny refugee status. In assessing the credibility of the applicant, they are also often misguided by stereotypes, so the sexual orientation of the claimant is doubted and, subsequently, the risk of persecution is too. The biggest issue has nonetheless appeared to be the discretion reasoning that finds it acceptable to ask LGBTI to conceal their sexual orientation. Because of this reasoning, the fear of persecution is taken to be non-existent. While this line of thought has been disapproved by the UNHCR, rejected in several national courts and criticised by legal scholars, it still turns up in many judgments. The formal abolishment does not prevent its reappearance in other forms, such as, amongst others, the voluntary discretion argument and the additional nexus requirement of fear for reason of persecution and not just social pressure. This was illustrated by the judgment of *HJ and HT*. The European Court of Justice has nevertheless provided a major improvement by abolishing the discretion reasoning for all twenty-eight member States of the EU. This indicates a growing consensus on the fact that LGBTI should be able to live openly, without concealing their sexual orientation. As a consequence, it should be recognised that they do have a well-founded fear of being persecuted.

128. The former indicates that the nexus requirement and the condition of a well-founded fear of persecution are in fact fulfilled. This means that the conditions for the prohibition of *refoulement* are met and that LGBTI should be given that protection under the 1951 Refugee Convention.

4. *Non-Refoulement* of LGBTI under Human Rights Law

129. From section II.2.2. on the principle of *non-refoulement* under international human rights law, it is clear that many human rights instruments either contain an explicit provision on *non-refoulement* or have been interpreted to hold one. Not all of the instruments will be discussed here. Since the case law and doctrine on the ICCPR and the ECHR is the most comprehensive, only these two will be elaborated upon.
4.1. The International Covenant on Civil and Political Rights

130. In the introductory part it was mentioned that the HRC has interpreted the right to life and the prohibition on torture, Articles 6 and 7 of the ICCPR, as implicit prohibitions on refoulement (see supra n° 46-49). In Kindler v. Canada, the HRC stated that: “If a State party extradites a person within its jurisdiction in circumstances such that as a result there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party itself may be in violation of the Covenant.” From this citation, Wouters deduces that the HRC is willing to accept a prohibition on refoulement under any of the ICCPR rights. He also bases this opinion on the following formulation of the principle of non-refoulement in the Committee’s General Comment No. 31: “The article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed.” He believes that the words ‘as such’ indicate that the prohibition on refoulement at least includes Articles 6 and 7 of the ICCPR, but is nevertheless not necessarily limited to these rights. That every provision of the ICCPR could lean itself to an implicit prohibition on refoulement, has not been stated explicitly by the HRC. However, the Committee did recently say that it follows from Article 2, paragraph 1 ICCPR that State parties have an obligation to guarantee every individual within its territory and under its jurisdiction the rights enshrined in the Covenant and that they similarly need to ensure these rights while applying their processes for expulsion of non-citizens. This statement appears to support Wouters’ vision. Whether or not all ICCPR rights can contain an implicit non-refoulement, it is clear that the HRC has accepted claims under other provisions than Articles 6 and 7.

388 General Comment No. 31, para. 12.
There has not been much case law from the HRC as to what harm an individual is protected from in the context of non-refoulement. Nevertheless, the risk that needs to be established, can be deduced. The Committee generally describes it as a real risk, meaning that the prohibited treatment must be a ‘necessary and foreseeable consequence of the removal’. To determine the ‘real risk’, the State must consider “the intent of the country to which the person concerned is to be deported” as well as the “pattern of conduct shown by the country in similar cases”.

With regard to sexual orientation, claims have been based mostly on Article 17, the right to privacy, and Article 26, the right to equal protection of the law. Article 2 is often invoked as well, since it is perceived as the general prohibition on discrimination.

4.1.1. The Right to Privacy - Article 17 ICCPR

An important case for LGBTI, is Toonen v. Australia of 1994. It involved an Australian homosexual man that lived in Tasmania, which is a State of Australia. The former Tasmanian Criminal Code enabled the police to charge persons with “intercourse against nature” or “indecent practice between male persons”. According to Toonen, the fact that the police could look into intimate aspects of his private life and even detain him if they believed he was involved in sexual activities described by the law, constituted a threat to his private life and liberty. The HRC agreed with this reasoning and dismissed Australia’s argument that these provisions were necessary for moral reasons and to prevent the spread of AIDS/HIV. The Committee judged that “adult consensual sexual activity in private is covered by the concept of "privacy" ” and therefore, the privacy of Toonen was interfered with, regardless of whether the criminal law had been enforced or not. As a consequence, the right to privacy can be invoked by LGBTI in order to prevent refoulement to a country where same-sex conduct is criminalised.

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392 Ibid., 392.
396 Toonen, para. 2.3.
397 Ibid., para. 2.2.
398 Ibid., para. 2.3.
399 Ibid., para. 8.5-8.6.
400 Ibid., para. 8.2.
134. Toonen was in fact used in Refugee Appeal 74665/03 as an argument against the refolement of an Iranian homosexual man. Homosexuality was illegal in Iran and was punishable with the death sentence. The New-Zealand Refugee Status Appeals Authority (RSAA) recognised that to escape this kind of persecution, the appellant would have to conceal his sexual orientation. The RSAA found that this would be a denial of his right to privacy, codified in Article 17 ICCPR (see supra n° 50). It was further held that the Iranian authorities inflicted serious harm on homosexuals and failed to provide them protection, while they are only exercising their fundamental human rights. Therefore, sending the appellant back to Iran, would amount to persecution.

135. Nevertheless, this case has led to criticism by Hathaway and Pobjoy. They contend that the right to privacy is not an adequate basis for the development of sexual minority rights and the principle of non-refoulement of LGBTI. This for three reasons. First, they argue that the language used in Article 17 ICCPR is rather conservative and does not contain an absolute right to privacy. They believe that it simply orders States not to interfere arbitrarily or unlawfully with one’s privacy and therefore find that to judge that unenforced anti-gay laws do so, is too far-reaching. Although Toonen v. Australia was inspired by a decision of the European Court of Human Rights, Article 17 ICCPR can according to them not be aligned with the right to privacy of Article 8 of the ECHR. This is because Article 8 ECHR, in contrast with the negative obligation not to interfere of Article 17 ICCPR, obligates States to respect the privacy, which is an affirmative right. Secondly, they do not agree with the reasonability test that is used to investigate whether the interference of the right to privacy is not arbitrary. Hathaway and Pobjoy consider this standard to be context-sensitive, which would have the consequence that article 17 is more likely to be breached in a country that is expected to respect privacy and autonomy. When commenting on Toonen v. Australia, Joseph too, was convinced that the judgment was strongly influenced by the fact that in general, the Australian society was tolerant towards homosexual lifestyles. She purported that, while some human rights, like the prohibition of torture, can quite easily be interpreted in a universal manner, this is more difficult for other rights because of the differences in cultural attitudes towards homosexuality. The third critique is related to the discretion

\[\text{Refugee Appeal No. 74665/03, para. 25.}\]
\[\text{The RSAA also stated that this would be a violation of the rights to equal treatment and non-discrimination, enlisted in Articles 2, paragraph 1 and 26 ICCPR, but the basis for this will be discussed later.}\]
\[\text{Refugee Appeal No. 74665/03, para. 127.}\]
\[\text{Dudgeon v. UK, which will later be discussed in the section on the European Convention on Human Rights.}\]
\[\text{Ibid.}\]
\[\text{S. JOSEPH, “Gay Rights Under the ICCPR - Commentary on Toonen v Australia”, 3 U. Tas. L. Rev. 1994, 404.}\]
\[\text{Ibid., 405.}\]
reasoning. Hathaway and Pobjoy find it absurd to base sexual minority rights on the right to privacy while it is precisely their desire to live openly, without concealing their sexual orientation. They refer to Justice Edwin Cameron of the South African Constitutional Court to support their argument. He namely stated that using the right to privacy in these situations can have the effect of strengthening the idea that a ‘deviating’ sexual orientation is tolerable as long as it is kept behind bedroom doors. So non-discrimination would also confine itself to the bedroom. 410 This vision is shared by Saiz. He argues that a detriment of the right to privacy is that it still allows moral disapproval to exist. As soon as a State tolerates same-sex conduct in private, the right to privacy is not violated. Therefore, it creates the idea that a ‘deviating’ sexual orientation is respected as long as it stays within “the private sphere of the closet”. 411 Hence, the right to privacy could in this context have the effect of stimulating concealment. 412

136. This opposition is however not shared by Tobin, who states that Article 17 should be read in conjunction with Article 2 ICCPR, that contains the obligation for States to respect and ensure the rights of the Covenant, 413 turning the right to privacy into an affirmative right. This view seems to be right, as in Toonen v. Australia, the HRC decided to a violation of Article 17 juncto Article 2, paragraph 1. 414 He also disagrees with the comment on the reasonability test. He believes that this test requires States to provide objective evidence that the interference is for a legitimate aim and that the measures that are implemented to achieve this goal are proportionate. 415 With regard to the critique inspired by the discretion reasoning, Tobin argues that the right to privacy is not restricted to activities in the private sphere, but supplies individuals with a right to self-determination. 416 Unfortunately, he founds this argument on Pretty v. United Kingdom, 417 which was a case before the European Court of Human Rights, therefore implicitly confirming the argument of Hathaway and Pobjoy that the right to privacy in the ECHR is more encompassing than Article 17 ICCPR. However, Tobin’s vision is supported by Justice Sachs of the South African Constitutional Court. In National Coalition for Gay and Lesbian Equality v. Minister of Justice, he countered the perception that the right to privacy only protects that what happens in the bedroom from state control. He affirmed that privacy protects people, not places and that it encloses “the right to

413 General Comment No. 31, para. 5.
414 Toonen v. Australia, para. 9.
416 Ibid.
417 ECtHR, Pretty v. United Kingdom, 29 April 2002, No. 2346/02.
get on with your life, express your personality and make fundamental decisions about your intimate relationships without penalisation". 418

137. From the above, it must nevertheless be accepted that there is some controversy about the right to privacy enshrined in Article 17 ICCPR as a basis for non-refoulement of LGBTI. This creates the necessity to look for other ICCPR Articles that could serve as a more adequate base for non-refoulement claims.

4.1.2. The Right to Non-Discrimination and Equality—Articles 2, Paragraph 1 and 26 ICCPR

138. Toonen v. Australia has delivered another possible basis for LGBTI to rely on the principle of non-refoulement. The HRC stated with regard to Article 2, paragraph 1 (see supra n° 51) and Article 26 (see supra n° 52) that the term ‘sex’ needs to be understood as also meaning ‘sexual orientation’. So discrimination based on that ground is prohibited as well. 419 In Toonen v. Australia, the HRC concluded to a violation of Article 2 and found it unnecessary to further decide on the possible violation of Article 26. 420 In Refugee Appeal No. 74665/03, the RSAA did find that returning the appellant to Iran would be in breach with both Articles. With the case of Young v. Australia, 421 it was established that sexual orientation can in itself be a criterion to cause a breach of Article 26. 422 Sexual orientation should therefore be understood as a status that is protected against discrimination under each of both Articles separately. 423

139. When using the right to equality and non-discrimination as a basis to build sexual minority rights upon, the underlying idea is that LGBTI should not be subjected, either directly or indirectly, to a less favourable treatment than heterosexual men and women. 424 While it is unfortunate that Lord Rodger did not explicitly refer to Article 2 or 26 of the

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419 Toonen, para. 8.7.
420 Ibid., para. 11.
421 HRC, Edward Young v. Australia, 18 September 2003, No. 941/2000, UN Doc. CCPR/C/78/D/941/2000 (2003), hereinafter Young v. Australia. The HRC found Australia to violate Article 26 ICCPR by having as a condition for the partner of a deceased veteran to receive a veteran’s pension that he has the opposite sex.
ICCPR, it is clear that this vision was present in his judgment in X, Y and Z. This is obvious from the statement that, “just as male heterosexuals are free to enjoy themselves playing rugby, drinking beer and talking about girls with their mates, so male homosexuals are to be free to enjoy themselves going to Kylie concerts, drinking exotically coloured cocktails and talking about boys with their straight female mates”.

140. Hathaway and Pobjoy also prefer this approach over the right to privacy as the basis for a ‘right to be out’. They especially believe in the potential of Article 26 ICCPR because it makes it possible to challenge every law that treats sexual minorities differently and this with regard to any right codified in a regional or international instrument. Unfortunately, as stated by Saiz, there is considerable room for subjectivity with regard to the assessment of what circumstances may justify unequal treatment. This is also recognised by Hathaway and Pobjoy. They are, moreover, convinced and regret that the HRC too often relies on the opinion of the Member States in making this assessment. They additionally maintain that, while the duty for States to make sure that everyone is equally protected by the law may one day turn into an ‘affirmative right to be different’, a consensus upon this does not yet exist.

4.1.3. The Prohibition of Torture – Article 7 ICCPR

141. Although the focus in developing sexual minority rights has been mainly on the right to privacy and non-discrimination, Article 7 ICCPR, which contains the prohibition of torture, cruel, inhuman and degrading treatment, cannot be forgotten (see supra n° 46). The Article is extremely relevant as LGBTI are facing severe physical and psychological harm and this violence has been increasing.

142. There is not much case law from the HRC on the harm a person is protected from under Article 7 ICCPR in the context of non-refoulement. From the limited guidance that has

426 HJ and HT, para. 78. To be correct, it is necessary to add that Lord Rodger recognised that this idea of what homosexual men like to do, is inspired by the trivial stereotypical examples from British society. Otherwise this statement would be rather offensive.
428 Ibid., 357.
431 Ibid., 358.
433 C. WOUTERS, International legal standards for the protection from refoulement: a legal analysis of the prohibitions on refoulement contained in the Refugee Convention, the European Convention on Human Rights, the
been provided, it is clear that the ICCPR at least protects people from being returned to a country where they risk being the subject of corporal punishment or if they could be the victim of persecution within the meaning of the Refugee Convention. In order to receive that protection, the risk must be personal. Additionally, the HRC applies a high threshold when assessing the substantial grounds that are provided in order to establish that there is a real risk of irreparable harm.

143. In *M.I. v. Sweden*, Article 7 has successfully been invoked to prevent *refoulement*. It concerned a lesbian woman from Bangladesh, who had been arrested by the Bangladeshi police and was raped and beaten during detention, because of her sexual orientation. She also had a female partner who, she said, was abducted by an Islamic student organisation. She fled to Sweden and asked for asylum, which was not granted. The Committee decided that returning M.I. would constitute a violation of Article 7 ICCPR. Several aspects were taken into account: her rape and the fact that her sexual orientation was well known to the authorities, her severe state of depression and suicidal tendencies after arriving in Sweden and the Bangladeshi Criminal Code that forbids homosexual acts. The Committee considered that, regardless of their enforcement, these laws stigmatise homosexuals in the Bangladesh society and create and impediment to the sanctioning of persecutory acts against LGBTI. The HRC therefore found the risk to torture or other forms of ill-treatment to be too large.

144. Hathaway and Pobjoy are heavy proponents of using Article 7 ICCPR in order to prevent the *refoulement* of LGBTI. They believe it to be the solution for the abolishment of the discretion reasoning. They are convinced that the focus should lie on the endogenous harm suffered by a person who is concealing his identity, rather than on the exogenous harm. With endogenous harm, they mean “the psychological harm occasioned by the permanent state of confinement”. It is the harm that is caused by living in concealment, by the modification of one’s behaviour, the suppression of one’s fundamental identity. They believe that psychological harm should be recognised as persecutory harm and contend that international human rights law jurisprudence and domestic jurisprudence in common law countries have long held it to constitute persecution. To illustrate their point of view, they refer back to the


*M.I. v. Sweden*, para. 2.3.

*Ibid.*, para. 2.6 and 2.9 to 2.10.


example of Anne Frank (see supra n° 111). Imagine she would be sent back after having fled the Netherlands, because the threat of being captured by the Nazi’s and being sent off to a concentration camp was not established. Then she would have no other choice than to return to the attic, where she would suffer psychological harm from living in confinement. Hathaway and Pobjoy want the focus to be on that endogenous harm of living in the attic, rather than on the external risk of persecution.442

145. Hathaway and Pobjoy found their premise that confinement leads to psychological harm on expert information that was given in several cases. According to psychiatrists, the confinement of sexual identity is likely to have traumatic effects443 and is able to further deteriorate the state of the applicant, because he/she is living as someone they are not, which increases anxiety, paranoia and disassociation.444 It can also cause clinical depressions and stress.445 Hathaway and Pobjoy further rely on General Comment No. 20 in which the HRC stated that both physical and psychological harm can amount to cruel, inhuman or degrading treatment of punishment.446 The HRC has similarly ruled in accordance with that view, indicating that psychological harm can in itself be qualified as cruel, inhuman or degrading treatment, without there needing to be any form of psychical harm.447

146. This ‘logic’ of Hathaway and Pobjoy seems to be a good attempt to do away with the concealment reasoning. If the HRC finds psychological harm to be enough to conclude to inhuman treatment, it appears obvious that it would also find concealment to be in breach of Article 7. As there has been no such cases before the HRC, this possibility is still open.

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443 United Kingdom Court of Appeal (England and Wales), R. G. (Colombia) v. Secretary of State for the Home Department, 20 January 2006, EWCA Civ. 57, para. 17.
444 UKAIT/Immigration Appellate Authority, MK v. Secretary of State for the Home Department, 9 September 2009, 0036, para. 67.
445 United Kingdom Upper Tribunal (Immigration and Asylum Chamber), SW v. Secretary of State for the Home Department, 24 June 2011, 00251, para. 33.
446 General Comment No. 20, HRC (10 March 1992), para. 5.
4.1.4. The Right to Life – Article 6 ICCPR

147. Article 6 ICCPR contains an implicit prohibition of *refoulement* as well (see supra n° 48). The dominant case law before the HRC has been about people being *refouled* to a country where they will face or risk facing the death penalty.\(^448\) This case law could be used when the country that the individual is being sent back to, punishes same-sex conduct with the death sentence. Article 6 ICCPR could be invoked in other situations as well. The HRC has for instance recognised that also social-cleansing operations that target homosexuals can be a threat to their right to life.\(^449\)

4.2. The European Convention for the Protection of Human Rights and Fundamental Freedoms

148. As is the case with the ICCPR, the European Court of Human Rights has recognised that several rights of the ECHR can hold an implicit prohibition of *refoulement* (see supra section II.2.2.2.1.). While the one that is most invoked is Article 3, we will start with Article 8 ECHR because the rights for LGBTI have been developed through that provision.

4.2.1. The Right to a Private Life – Article 8 ECHR

149. A signature case concerning sexual orientation under Article 8 ECHR, was *Dudgeon v. United Kingdom* of 1981.\(^450\) At that time, criminal law in Northern Ireland prohibited particular acts of gross indecency between males and buggery (anal penetration). Homosexuality in itself was thus not illegal, however, the Court found it evident that the sexual activities of Dudgeon, the homosexual applicant, came within the scope of the offences that were punishable by the law.\(^451\) Therefore, it was concluded that Dudgeon’s private life was interfered with.\(^452\) Since Article 8 ECHR is not absolute and paragraph 2 of the Article provides an exception clause (see supra n° 58), interference with the right to privacy is possible. However, three conditions need to be met: the interference must be in

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\(^{451}\) Dudgeon v. United Kingdom, para. 39.

accordance with the law, it needs to have a legitimate aim and the interference has to be necessary in a democratic society. With regard to that last requirement, the ECtHR stated that, since the case concerned one of the most intimate aspects of private life, particularly serious reasons needed to exist for the interferences to be legitimate.\(^453\) It found that there was no pressing social need to have such laws in order to protect certain vulnerable groups in society and that the possible detrimental effects which this law could have on the life of a homosexual person outweighed these given justifications.\(^454\) The Court thus concluded to a violation of Article 8.\(^455\)

150. With this decision, criminalisation of consensual same-sex sexual conduct was found to be in breach of Article 8 ECHR and this was reiterated in Norris v. Ireland\(^456\) and Modinos v. Cyprus.\(^457\) It was therefore attempted in F. v. United Kingdom\(^458\) to rely on Article 8 in order to prevent the *refoulement* of F., as the case involved the sexual orientation of the applicant. The Court recognised that, were the applicant to be sent back, he would have to live under a ban against homosexual adult consensual relations and that this would be in breach of Article 8 if the situation would occur in one of the Contracting parties. However, it stressed that the implicit *non-refoulement* in Articles 2 and 3 ECHR is based on the fundamental importance of those two provisions and that States are obligated to make their guarantees effective in practice. In contrast, this is not automatically the case for the other rights enshrined in the Convention. According to the Court, it can therefore not be expected from the member States that they only expel individuals to countries that are in full and effective enforcement of all the rights enlisted in the ECHR. In the case of F., the Court found that it was not proven that “his moral integrity would be substantially affected to a degree falling within the scope of Article 8".\(^459\)

151. Although this approach was not successful for F., Wouters holds that the Court left open the possibility of interpreting Article 8 ECHR as an implicit prohibition of *refoulement* when the rights therein will be substantially affected.\(^460\) However, it appears to be unlikely that this will soon be established. In *F. v. United Kingdom*, the fact that in Iran homosexuality was tolerated as long as it was hidden from the public, was a decisive factor. By that, it is shown

\(^453\) Dudgeon v. United Kingdom, para. 52.
\(^454\) Ibid., para. 60.
\(^455\) Ibid., para. 63.
\(^456\) ECtHR, Norris v. Ireland, 26 October 1988, No. 10581/83, para. 38.
\(^458\) ECtHR, F. v. United Kingdom, 22 June 2004, No. 17341/03, hereinafter F. v. United Kingdom.
\(^459\) F. v. United Kingdom, para. 3.
that the Court’s judgment was inspired by the discretion reasoning. The Court tends to see homosexuality as an ‘essentially private’ phenomenon. According to Johnson, this is proven by the fact that the ECtHR persistently deals with complaints concerning homosexuality under the right to private life and refuses to consider them under other provisions. For instance, in Fretté v. France, the Court made an assessment on the refusal to authorize a homosexual man to adopt a child under the right to privacy instead of under the right to family life. The Court thus systematically pushes homosexuality back into the private sphere, which makes the chance rather small that it will in the near future decide to a violation of Article 8.

4.2.2. The Prohibition of Torture, Inhuman and Degrading Treatment – Article 3 ECHR

152. It could also be attempted to avoid refoulement on the basis of Article 3 ECHR (see supra n° 55). When based on this provision, the principle of non-refoulement protects a person from three types of ill-treatment: torture, inhuman treatment and degrading treatment. None of these concepts are defined in the ECHR. However, following from case law of the Court, the criteria for distinguishing these three types, are the intensity of the caused suffering and the intention of the perpetrator, as well as the long-term impact on the victim’s well-being. To amount to torture, the conduct must be intentional and must inflict severe mental or physical pain upon the victim. Concerning inhuman treatment, the former European Commission has established that this consists of treatment that deliberately causes severe mental or physical suffering that is unjustifiable in the particular situation. Degrading treatment was described by the Commission as conduct that grossly humiliates a

462 Ibid., 110.
463 Ibid.
467 However, sometimes the Court qualifies ill-treatment as torture, regardless of the intentions of the perpetrator. This was the case in for example ECtHR, Selmiou v. France, 28 July 1999, No. 25803/94.
person before others or drives him to act against his will or conscience. In earlier case law, the element of intent was considered necessary for the categories of inhuman and degrading treatment, but the Court has moved away from that view. This is extremely relevant in the context of non-refoulement, since a state can be held accountable under Article 3 ECHR for exposing someone to inhuman or degrading treatment without having the intention to do so. Physical harm is not required either. When this conduct is inflicted upon someone as a penalty, it will be qualified as inhuman or degrading punishment.

153. Of high importance is the fact that to fall under any type of ill-treatment listed in Article 3 ECHR, a minimum level of severity must be attained and this standard depends on the specific facts and circumstances of the case. Therefore it is difficult to predict how the Court will decide. The insecurity is even bigger in cases concerning non-refoulement, as the ECHR will not examine the particular treatment the person risks to be subjected to, but will investigate the conditions in the country of destination and if they are in conformity with Article 3 of the Convention. After that assessment, the ECtHR will decide whether there are substantial grounds for believing that the applicant would face a real risk in that country to be subjected to conduct contrary to Article 3 ECHR or not.

154. As for the element of risk, this is considered as the ‘backbone’ of the principle of non-refoulement under Article 3 of the ECHR. The Member states are prohibited from exposing someone to the risk of being treated in a way that violates Article 3 ECHR, regardless of whether that risk materialises. To invoke non-refoulement under Article 3 ECHR, one must be able to demonstrate that there are substantial grounds for believing that the person concerned, if extradited, would face a real risk of being subjected to torture or inhuman or

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471 Ibid., 16.
472 ECtHR, Soering v. UK, 7 July 1989, No. 25803/94, para. 100.
475 Ibid., 247.
degrading treatment or punishment.\textsuperscript{476} Absolute certainty is not required, nonetheless, “a mere possibility of ill-treatment is not in itself sufficient to give rise to a breach of Article 3\textsuperscript{477}.

155. The case that must be looked at in the context of Article 3 ECHR, is \textit{F. v. United Kingdom},\textsuperscript{478} concerning an Iranian homosexual man, who was going to be sent back by the UK to his home country. The applicant filed a claim on the basis of, amongst others, Article 3 ECHR stating that he would run a real risk of being subjected to torture or other forms of ill-treatment upon return to Iran.\textsuperscript{479} The ECHR received information on Iran through several reports. The Islamic code of law, Sharia law, strongly condemns homosexuality and sodomy is punished by death if it is considered that both parties are adults of sound mind and free will. To convict someone, courts need four confessions from the accused, testimonies by four righteous men who have witnessed the act or the statement of a Sharia judge who has derived his knowledge through customary methods.\textsuperscript{480} In all the reports, it was made clear that prosecution is difficult, either because of the high standard of proof or because homosexuality is tolerated as long as it stays discrete. In Iranian society, it is furthermore difficult to know whether someone is a homosexual, since men have very close physical contact. Holding hands and kissing is accepted by society.\textsuperscript{481}

156. The Court strongly relied on these expert reports to make its assessment and concluded that the Iranian authorities are rather tolerant towards homosexuality. It stated that, “while draconian punishment can be imposed on homosexual acts”, the applicant did not provide substantial grounds to establish that he ran a real risk of being subjected to such punishment. Although the ECtHR did recognise that the general situation in Iran did not “foster the protection of human rights”, so that homosexuals could be the victim of abuse, it considered his claim ill-founded.\textsuperscript{482}

157. In the comparable case of \textit{M.E. v. Sweden}, the Court similarly amounted high weight to the fact that the Libyan authorities did not actively persecute homosexuals.\textsuperscript{483} This


\textsuperscript{478} ECtHR, \textit{F. v. United Kingdom}, 22 June 2004, No. 17341/03, hereinafter F v. United Kingdom.

\textsuperscript{479} F. v. United Kingdom, 8.

\textsuperscript{480} \textit{Ibid.}, 3-4.

\textsuperscript{481} \textit{Ibid.}, 5-7.

\textsuperscript{482} F. v. United Kingdom, para. 1.

\textsuperscript{483} M.E. v. Sweden, para. 87.
observation, in combination with other elements, led the Court to again conclude that the applicant had failed to provide substantial grounds for believing that he would be exposed to a real risk of being subjected to treatment contrary to Article 3 ECHR.484 It can therefore be assumed that there is a possibility to base a sexual orientation-related claim on Article 3 ECHR on the precondition that there is evidence that a real risk exists that the applicant will be subjected to torture or other forms of ill-treatment. The claimant must therefore be able to provide substantial grounds to prove that risk and the persecutory policy of the authorities is found highly relevant in that regard. The Court appears to pay no attention to the fact that criminalisation of same-sex conduct creates a hostile environment towards LGBTI and stimulates stigmatisation, which can result in treatment contrary to Article 3.

158. Unfortunately, judgments under Article 3 ECHR are not spared from the concealment reasoning either. In M.E. v. Sweden the Court also took into account the fact that the applicant had made ‘an active choice’ of concealing his sexual orientation from his family. The ECtHR stressed that he did not do so out of fear for persecution, but because of private considerations.485 The Court thereby referred to the test that was applied by the Swedish Migration board. This test was in fact the same as the one that was introduced by Lord Rodger in HJ and HT,486 which makes a distinction between living discreetly to avoid persecution or because of social pressure or the natural desire to live discreetly (see supra n° 117). As said before, instead of abolishing the discretion reasoning, this test adds a nexus requirement that must be established in order to avoid being refooled to a country where LGBTI are forced to conceal their sexual orientation.

159. Perhaps the suggestion of Hathaway and Pobjoy could here too provide a solution for the obstructing effect of the discretion reasoning. As the Court has determined that Article 3 ECHR can also be violated in case of psychological harm,487 the provision could lend itself to recognising the endogenous harm as inhuman treatment, therefore prohibiting non-refoulement. Until now, no such case has been brought before the Court, so the future will have to tell.

484 M.E. v. Sweden, para. 90.
485 Ibid., para. 86.
486 Ibid., para. 36.
487 ECtHR, Soering v. UK, 7 July 1989, No. 25803/94, para. 100.
4.2.3. The Right to Life – Article 2 ECHR

160. In cases where article 3 ECHR is invoked to prevent being refouled, the applicant often claims that his life would be in danger upon return and therefore also relies on Article 2 ECHR (see supra n° 56).\(^{488}\) The ECtHR does not rule out that Article 2 ECHR can be interpreted in a way that is analogous to the interpretation of Article 3 ECHR.\(^{489}\) In most cases, it even examines the claims under both Article 2 and 3 ECHR at the same time as it finds that more appropriate.\(^{490}\)

161. In *F. v. United Kingdom*, the applicant claimed that his return to Iran would expose him to the risk of becoming the victim of extra-judicial killings.\(^{491}\) In this case too, the Court decided to examine this claim together with the one under Article 3 ECHR.\(^{492}\) As it found that the applicant did not provide substantiated grounds that he would be exposed to a real risk of being ill-treated, the claim under Article 2 was similarly considered ill-founded.\(^{493}\)

4.3. Conclusion

162. Both the ICCPR as well as the ECHR contain human rights that could be used to prevent the refoulement of LGBTI. With regard to the ICCPR, the right to privacy of Article 17 has provided great help in developing the rights of sexual minorities. However, there is no consensus whether the right is adequate to serve as a non-refoulement provision, since it has been stated to stimulate concealment. Articles 2, paragraph 1 and 26 ICCPR, the rights to non-discrimination and equality, serve as a strong alternative. Nevertheless, Hathaway and Pobjoy fear that the margin of appreciation the HRC leaves for the States is too wide. According to those scholars, the prohibition of ill-treatment in Article 7 ICCPR is the only real solution. They firmly believe that the psychological harm suffered by LGBTI when living in concealment should be recognised as inhuman treatment and that an implicit non-


\(^{489}\) The standard formulation which is used by the Court, reads as follows: “Moreover, the Court does not exclude that analogous considerations might apply to Article 2 of the Convention where the return of an alien puts his or her life in danger, as a result of the imposition of the death penalty or otherwise.” See for instance ECHR, *Sinnarajah v. Switzerland*, 11 May 1999, No. 45187/99 (decision); *Razaghi v. Sweden*, 11 March 2003, No. 64599/01 (decision); F. v. United Kingdom, para. 1.

\(^{490}\) Ibid.

\(^{491}\) F. v. United Kingdom, para. 1.

\(^{492}\) Ibid.

\(^{493}\) Ibid.
refoulement principle in Article 7 ICCPR should prevent that. Additionally, applicants can appeal to the right to life of Article 6 ICCPR in case same-sex conduct is punished with the death penalty or when LGBTI are threatened by lethal violence.

163. The ECHR also carries potential non-refoulement provisions for LGBTI. Cases have for instance been brought under Article 8, which contains the right to private life. Unfortunately, the qualification of LGBTI-related problems under that right seems to reflect that the Court considers homosexuality as a private matter. This discretion reasoning can similarly be found in the case law under Article 3. The ECtHR has adopted the test that was introduced in *HJ and HT* and has by doing that, introduced the precondition that concealment cannot be for reasons of social pressure if one wants to receive protection. The right to life of Article 2 ECHR can also be interpreted to prohibit refoulement, however, as it is mostly dealt with together with Article 3, it has been considered to be ill-founded as well.
IV. FINAL CONCLUSION

164. The first research question of this master’s thesis was to determine the scope of the principle of *non-refoulement*. The investigation has made it clear that this concept is of high importance in international refugee law as well as in international human rights law. In the former, the principle has primarily been developed through Article 33 of the Refugee Convention. Unfortunately, there is a strong correlation with the refugee definition of Article 1(A)(2) of the Convention. As a consequence, the scope of the prohibition on *refoulement* under the Refugee Convention is limited *ratione personae*. People who cannot be qualified as a refugee are therefore excluded from the protection of Article 33. Regional refugee instruments have tried to remedy this by adopting a broader refugee definition. The scope of the principle of *non-refoulement* has also been broadened by the complementary protection that is provided under international human rights law. The principle is in that context used as an enforcement mechanism to avoid the violation of the underlying human right. As the focus in that context lies on the human right, the protection can be offered to more beneficiaries.

165. The second research question that needed to be answered, was whether this principle of *non-refoulement* can also protect LGBTI from being sent back to a country where they run a risk of being persecuted. Despite the fact that the divide between the principle of *non-refoulement* under international refugee law and international human rights law has been criticised, it was still necessary to investigate the application of the principle in both contexts separately, as their starting point is different. With regard to international refugee law, it needed to be established whether LGBTI are considered as refugees and can therefore rely on Article 33 of the Refugee Convention. After analysing UNHCR documents and case law, it was clear that sexual orientation is perceived as an immutable, or at least a fundamental, characteristic which cannot be expected to be forsaken. LGBTI are therefore considered as a particular social group and the nexus requirement from the refugee definition of Article 1(A)(2) of the Refugee Convention is fulfilled. Nonetheless, the biggest problem has proven to be the recognition that LGBTI have a well-founded fear of being persecuted when returned to their country of origin. The basis of this problem, is the perception that sexual orientation is a characteristic that can be concealed. It is assumed that by living discreetly, the homosexual individual can prevent his own persecution. Although this discretion reasoning has been formally abolished in the case of *HJ and HT* by the United Kingdom Supreme Court and by the European Court of Justice in *X, Y and Z*, it still seems to influence judges when making an assessment. Nonetheless, it needs to be recognised that this last judgment was a step in the right direction by formally abolishing the discretion reasoning for all EU Member States.
However, it has left open some questions and while the flaws of the discretion reasoning have been exposed in case law and by legal scholars, it thus remains uncertain whether LGBTI will in the future be able to rely on Article 33 of the Refugee Convention.

166. The principle of non-refoulement under international human rights law could serve as a solution for this problem. Under the ICCPR, LGBTI rights have originally been developed through the interpretation of the right to privacy of Article 17. This right has therefore been invoked by LGBTI to prevent their refoulement. Other provisions of the ICCPR that have been relied upon, are the general prohibition on discrimination in Article 2, paragraph 1 and the right to equal protection, contained in Article 26. These two approaches are however criticised by Hathaway and Pobjoy. These authors suggest to use the prohibition on torture, cruel, inhuman and degrading treatment of Article 7 ICCPR as an implicit prohibition on refoulement. They purport that adjudicators should recognise that LGBTI suffer harm if they have to conceal their sexual orientation in order to prevent persecution. According to these authors, this endogenous harm should be recognised as inhuman treatment. While this reasoning could do away with the discretion argument, it has not been used so far. It is therefore unclear if it would be accepted. The only thing that is certain, is that the right to life under Article 6 ICCPR prohibits States to return LGBTI to countries that impose the death penalty for same-sex conduct. With regard to the ECHR, the right to a private life of Article 8 has been accepted by the ECtHR to provide protection to LGBTI. Yet, this appears to be a manifestation of the opinion held by the Court that sexual orientation is something that should remain in the private sphere. This case law thus demonstrates that the ECtHR is influenced by the discretion reasoning as well. The prohibition of torture, inhuman and degrading treatment has not provided a solution either. The Court in fact amounts greater weight to the fact that criminal laws against same-sex conduct are not actively applied by the authorities, than to the hostile environment LGBTI would be sent back to. Moreover, the Court also takes into account that the applicant would conceal his sexual orientation. As claims under the right to life of Article 2 are dealt with together with Article 3, this provision has not been able to provide protection either.

167. The conclusion of this master’s thesis must therefore be that the necessary tools to protect LGBTI from being returned to a country in which they risk being persecuted, are available and that LGBTI should be able to rely on them. Nevertheless, the discretion reasoning makes it impossible for them to invoke the principle of non-refoulement, regardless of whether it concerns the principle under international refugee law or in the international human rights context. Despite the formal abolishment of this perception in several cases, no real progress has been made. In order for that to happen, the mind-set of judges and decision-
makers will have to be changed, as it is their underlying perception that sexual orientation can be concealed, which ultimately obstructs the human rights protection of LGBTI.
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