

Queen's University Belfast

European Master's Degree in Human Rights and Democratisation  
A.Y. 2015/2016

## When the battle continues

The (lack of) protection of LGBT\* asylum-seekers in the EU asylum  
system

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*“The individual has always had to struggle to keep from being overwhelmed by the tribe. If you try it, you will be lonely often, and sometimes frightened. But no price is too high to pay for the privilege of owning yourself.”*

*Rudyard Kipling, 1935*

## ABSTRACT

This thesis gives an overview of the multi-fronted battle LGBT\* asylum-seekers must often fight to receive protection from discrimination and violence. As an introduction, it discusses the kinds of homo- and transphobic violence and discrimination these individuals may encounter worldwide. The second phase of this battle is their fight for refugee status. A schematic outline is provided of influential domestic case law and UNHCR soft law. Next, EU legislation is analysed, which indicates that in every Member State, some form of international protection should be provided to individuals who have been or can be subjected to serious human rights violations on the basis of their sexual orientation and/or gender identity. LGBT\* individuals who come to the EU can nevertheless experience abuse, mental health problems and a lack of health care in asylum accommodation. This situation is perceived as the third front of their battle. While UNHCR has by now developed many tools to deal with this issue, under EU law, only the extra protection regime of the Recast Reception Conditions Directive could provide solace. This however requires the qualification of LGBT\* asylum-seekers as vulnerable. Although a case study on Belgium indicates that this is indeed needed for a coordinated approach to be established, it is concluded that the economic origin of the EU stands in the way of a true refugee-oriented asylum system.

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## ACKNOWLEDGMENTS

It is fair to say that writing a thesis is not an easy exercise. It requires discipline, demands dedication and takes a lot of time. I was however lucky to have been able to complete this task under the best circumstances possible, to have people supporting me, to have excellent academic guidance and to have people who pulled me away from my desk when it was time to relax.

I had my supervisor, Natasa, who was always available for questions and doubts. Who was kind, yet critical. Who encouraged me to believe in my work, yet challenged me to keep improving it.

I had my Belfast Boulevard housemates, Keira and Kyla, who took care of me, introduced me to rugby, pub quizzes and gin nights and were there when I needed a talk.

I had my fellow masterina, Yeva, with whom I could share my new experiences and worries, who joined me on bike rides, walks and library sessions.

I had Rachel and Eloïse, who welcomed me with open arms, showed me the Belfast night life, its windy hills and its history and made me feel at home when I needed it the most.

I had my friends from Belgium, who I could call for updates, for support and for ‘skype-thesis-sessions’.

And I had my family, who is my biggest fan. My parents, who gave me the opportunity to go on this adventure and, together with my brother, were there in times of need.

For all these people, I am truly thankful.

## LIST OF ABBREVIATIONS

CEAS	Common European Asylum System
CFR	Charter of Fundamental Rights of the European Union
EC	European Community
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EEC	European Economic Community
EU	European Union
Fedasil	Federal Agency for the Reception of Asylum Seekers
HRIT	Heightened Risk Identification Tool
ICCPR	International Covenant on Civil and Political Rights
IOM	International Organisation for Migration
LGBT	Lesbian, Gay, Bisexual and Transgender
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
MS(s)	Member State(s)
NGO(s)	Non-Governmental Organisation(s)
QD	Qualification Directive
RAPD	Recast Asylum Procedures Directive
RCD	Reception Conditions Directive
RQD	Recast Qualification Directive
RRCD	Recast Reception Conditions Directive
RvS	Raad van State
TCN(s)	Third country national(s)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNHCR	Office of the UN High Commissioner for Refugees
UK	United Kingdom



## I. Introduction

There is no better story<sup>1</sup> than that of Aderonke Apata to introduce this dissertation and illustrate the multi-fronted battle LGBT\* asylum-seekers must sometimes fight. Being a lesbian, Apata fled her home country Nigeria where homosexuality is prohibited by law<sup>2</sup> in order to prevent being attacked.<sup>3</sup> She went to the United Kingdom (UK), where she applied for asylum. Her claim was nevertheless rejected. Because she had a child from an opposite-sex relationship in Nigeria, the decision-maker did not believe her story and judged that she had fabricated her sexual orientation for the sole profit of receiving asylum.<sup>4</sup> Apata appealed against that judgment and was detained in asylum accommodation while awaiting a new decision. She there became the victim of harassment by fellow residents because of her sexual orientation and gender identity.<sup>5</sup>

Apata experienced every stage of the battle that LGBT\* asylum-seekers often fight to find protection against violence and discrimination. Three phases can be distinguished and will be dealt with in this thesis. In this introduction, a short account will be given of the first one, which is the violence and discrimination that these individuals can encounter in their home countries. The second phase is the battle for refugee status and thirdly, the violence and discrimination they may be confronted with in asylum accommodation will be discussed. Before we do so, it is necessary to precisely set out the terminology that will be used throughout this dissertation.

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<sup>1</sup> I use the term 'story' because it is predominantly based on Apata's testimonies, which have been refuted

<sup>2</sup> HRW, World Report 2015: Nigeria, <https://www.hrw.org/world-report/2015/country-chapters/nigeria> (Consulted on 8 July 2016).

<sup>3</sup> Allegretti, 5 March 2015.

<sup>4</sup> Blair, 4 March 2015 and Dachen, 1 January 2016.

<sup>5</sup> Blair, 4 March 2015 and Strudwick, 23 June 2015.

## 1. Terminology

LGBT\* stands for ‘lesbian, gay, bisexual and transgender’, terms that are variations of sexual orientation and gender identity. These terms will be explained on the basis of the Yogyakarta Principles<sup>6</sup> and the American Psychological Association, since these are the sources that the United Nations (UN) uses in the context of LGBT\* asylum claims<sup>7</sup> and there are no specific definitions under European Union (EU) law.

Sexual orientation is “each person’s capacity for profound emotional, affectional and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender”.<sup>8</sup> This denominator covers<sup>9</sup> lesbian individuals, who are women who are physically, romantically and/or emotionally attracted to other women; gay persons, who are men who are attracted in such ways to other men and bisexual individuals, who feel these kinds of attraction towards men and women.<sup>10</sup>

Gender identity, on the other hand, is “each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including 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.”<sup>11</sup> This concept incorporates transgender (or gender non-conforming), as it is an umbrella term for individuals whose gender identity and/or gender expression does/do not correspond to

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<sup>6</sup> ICJ, 2007. The Yogyakarta Principles are a non-binding set of principles that were adopted by a group of 29 human rights experts at a seminar held in Yogyakarta in 2006 and were published in March 2007. The group comprised, amongst others, academics, members of treaty bodies, judges, NGOs and a former UN High Commissioner for Human Rights.

See X., Backgrounder: About the Yogyakarta Principles, [http://www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm) (Consulted on 17 June 2016).

<sup>7</sup> HCR/GIP/12/01, 23 October 2012, para. 8.

<sup>8</sup> ICJ, 2007, p. 6.

<sup>9</sup> American Psychological Association, Lesbian, gay, bisexual, transgender, <http://www.apa.org/topics/lgbt/index.aspx> (Consulted on 17 June 2016).

<sup>10</sup> This does not mean that the individual must be attracted to both sexes at the same time or that the number of relationships with each sex must be equal. See HCR/GIP/12/01, 23 October 2012, p. 4.

<sup>11</sup> ICJ, 2007, p. 6.

the biological sex assigned at birth.<sup>12</sup> Gender identity must be distinguished from sexual orientation. It is a different concept. A transgender person, for instance, who identifies as a woman, can therefore be heterosexual, lesbian or bisexual.

This thesis will employ the acronym LGBT\* and not LGBTI. The latter includes intersex persons, whose physical sex characteristics are atypical. When this applies to the external genitals, it is sometimes difficult to ‘classify’ an individual as male or female and that is why this category of persons is also placed under the concept of gender identity. While intersex individuals are technically included in the laws, articles and reports discussed below, the I has been left out as there is little case law on them and the testimonies provided in the reports were given by LGBT persons. An asterisk has however been added to symbolise the fact that some individuals perceive these categorisations as too rigid and choose not to identify as their dominant sexual orientation or gender identity status.<sup>13</sup>

## **2. Violence and discrimination suffered by LGBT\* individuals**

All over the world, individuals suffer violence and/or discrimination because of their sexual orientation and/or gender identity. This can take many forms and is in a high number of States tolerated or even committed by State actors.

### **2.1. State-sponsored homo- and transphobia**

Currently, same-sex sexual relations are functionally outlawed in 73 States.<sup>14</sup> Punishments vary from fines, being placed under police surveillance, imprisonment and corporal punishment to deportation and even the death penalty.<sup>15</sup> State officials

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<sup>12</sup> American Psychological Association, Lesbian, gay, bisexual, transgender, <http://www.apa.org/topics/lgbt/index.aspx> (Consulted on 17 June 2016).

<sup>13</sup> This has been done after the example of my supervisor, Dr Natasa Mavronicola.

<sup>14</sup> ILGA (b), 2016, p.11.

<sup>15</sup> Law Library of Congress, 2014. Currently, the death penalty might be applied in thirteen countries. See ILGA (b), 2016, p. 11.

sometimes incite to violence by outing hate speech against LGBT\* individuals<sup>16</sup> and/or there might be government policies that either directly discriminate against them or have a discriminatory effect. In the field of health care, for instance, the price of gender reassignment surgery can be made unaffordably high<sup>17</sup> or individuals might be afraid to seek health care because this would reveal their criminal conduct.<sup>18</sup> The installation by numerous States of laws that restrict the freedom of expression and assembly of LGBT\* persons, allegedly to protect minors or abolish propaganda,<sup>19</sup> is another example.

Even when there are no laws or policies that target them, LGBT\* individuals are not safeguarded from violence or discrimination committed by State actors. It has been established, for instance, that members of the police sometimes torture LGBT\* persons or that when the latter report an assault, they are harassed or their complaints are not taken seriously.<sup>20</sup>

Criminalisation of same-sex sexual relations or a ‘policy of acquiescence’ has been observed to enhance and legitimise violence and discrimination by private actors.<sup>21</sup> It is, nonetheless, not a prerequisite and these types of harassment also occur in many other countries; even in those who have legislation that protects the LGBT\* community.<sup>22</sup>

## **2.2. Homophobic acts committed by non-State actors**

In every region in the world, LGBT\* individuals run the risk of being the victim of violence or discrimination by private actors.<sup>23</sup>

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<sup>16</sup> HRC (b), 2015, para. 78.

<sup>17</sup> A/HRC/29/37/Add.2, 17 November 2011, paras. 55 and 57.

<sup>18</sup> UNDP (Global commission on HIV and the law), July 2012, pp. 44-47; E/C.12/JAM/CO/3-4, 10 June 2013, para. 28 and A/HRC/29/23, 4 May 2015, para. 51.

<sup>19</sup> A/HRC/29/23, 4 May 2015, para. 48.

<sup>20</sup> *Ibid.*, paras. 34-36; Stotzer, 2014, pp. 46-47 and A/HRC/29/37/Add.4, 6 May 2015, para. 46.

<sup>21</sup> A/57/138, 2 July 2002, para. 37; A/HRC/14/20, 27 April 2010, para. 20; A/HRC/19/4, 17 November 2011, para. 50 and 42 and A/HRC/28/66, 29 December 2014, para. 11.

<sup>22</sup> All Party Parliamentary Group on Global LGBT Rights, 2016, para. 34.

<sup>23</sup> A/HRC/29/23, 4 May 2015, para. 26.

### 2.2.1. Violence

Studies have shown that homo- or transphobic violence mostly happens in the street or in an open space, is often committed by groups of strangers and is extremely violent.<sup>24</sup> It can be spontaneous, yet being (perceived as) an LGBT\* person can make you vulnerable to organised abuse as well, and this by religious extremists,<sup>25</sup> extreme nationalists, paramilitary groups<sup>26</sup> and terrorists.<sup>27</sup> Furthermore, LGBT\* individuals can be attacked by their own communities or their families. ‘Honour killings’, for example, take place because an LGBT\* individual is perceived to bring shame upon his family or community.<sup>28</sup>

LGBT\* persons experience many types of non-lethal violence too, which can be of physical and/or sexual nature.<sup>29</sup> Reports exist of these individuals being tortured, raped,<sup>30</sup> abducted, beaten<sup>31</sup> and stabbed.<sup>32</sup> Bullying is very common as well and can take extremely serious proportions, even leading LGBT\* people to commit suicide.<sup>33</sup>

### 2.2.2. Discrimination

Besides physical violence, LGBT\* individuals are often confronted with discrimination in many aspects of their life, like education, health care, in the work place and in their own families. Within the UN, concerns have been raised about students being refused admission or being expelled from educational institutions;<sup>34</sup> about health care professionals who are insensitive to the needs of LGBT\* individuals or treat them in a

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<sup>24</sup> Stotzer, 2014, p. 49.

<sup>25</sup> A/HRC/28/66, 29 December 2014, para. 11.

<sup>26</sup> A/HRC/26/50, 10 April 2014, paras. 10 and 14.

<sup>27</sup> A/HRC/29/23, 4 May 2015, para. 29.

<sup>28</sup> *Ibid.*, para. 30.

<sup>29</sup> *Ibid.*, para. 31.

<sup>30</sup> Sometimes, LGBT\* individuals fall victim to ‘corrective rape’, which means that the perpetrator(s) believe(s) that by raping the victim, he/she will be cured from his/her deviating sexual orientation or gender identity. This occurs a lot in South-Africa and other countries in Southern Africa. See Muller and Hughes, 2016, p. 2.

<sup>31</sup> A/HRC/29/23, 4 May 2015, para. 31.

<sup>32</sup> A/HRC/4/34/Add.1, 19 March 2007, paras. 631-633.

<sup>33</sup> See for instance Ahuja, Webster, Gibson, Brewer, Toledo and Russell, 2015, pp. 125-144.

<sup>34</sup> E/CN.4/2006/45, 8 February 2006, para. 113.

discriminatory manner;<sup>35</sup> about employers who fire or refuse to hire or promote individuals because of their sexual orientation or gender identity<sup>36</sup> and about LGBT\* persons who are disinherited, excluded from the family home, not allowed to go to school, forced to marry or to give up the custody over their children.<sup>37</sup>

### 3. Thesis outline

To escape the violence and discrimination, many LGBT\* persons have decided to flee their home countries and ask for asylum in the EU. The aim of this thesis was therefore to assess whether these individuals can indeed receive protection from these types of harassment in the EU Member States (MSs). While chapter II will show that it has taken a long time for these individuals to be recognised as refugees, today, every MS provides asylum or subsidiary protection to LGBT\* persons. In theory, these individuals can thus find protection from sexual orientation and/or gender identity-based violence and discrimination in the EU. Chapter III will nevertheless touch upon several problems these individuals may experience while they are awaiting a decision on their asylum request in asylum accommodation provided by the MSs. Chapter IV will therefore seek guidance with UNHCR and EU regulations to explore what is and what could be done to remedy this situation. As this thesis not only intends to give an overview of available (soft) law and wants to assess what the situation is in practice as well, a limited case study is performed on Belgium in chapter V. I have chosen this country, not only because it is my home country, but predominantly because this MS is in the relevant literature often depicted as an example when it comes to the reception of LGBT\* asylum-seekers. The object of the case study was thus to get an understanding of how this issue is dealt with by a State that purports to take this subject seriously and what problems still remain.

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<sup>35</sup> A/HRC/29/23, 4 May 2015, para 54 and Sabin, Riskind and Nosek, 2015, pp. 1834-1836.

<sup>36</sup> And this even in countries where laws exist that forbid this attitude. A/HRC/29/23, 4 May 2015, para 58.

<sup>37</sup> *Ibid.*, para. 66.

## 4. Methodology

This dissertation is the result of mostly desktop research, yet information for the case study was also retrieved from several Belgian organisations and government agencies that deal with LGBT\* individuals, refugees/asylum-seekers or both. This was done by sending emails in which documents with information on the challenges LGBT\* asylum-seekers/refugees face while in asylum detention and the policies or measures that exist on this subject were requested. Additionally, semi-structured interviews were conducted. More information on the organisations and agencies that were contacted can be found in Annex I and an English version of the sample email that was sent has been included in Annex II.

## II. The road to refugee status for LGBT\* individuals

This chapter provides a short and schematic account of the evolution that has taken place in jurisprudence with regard to the recognition of LGBT\* individuals as refugees. It first gives a general history and subsequently discusses the legal measures that have been taken on the matter. Both the UN framework and EU law are discussed as all EU MSs are members of the UN and they should therefore respect these (soft law) regulations.

### 1. The relevant refugee definition

Before relevant case law can be analysed, it must be determined what will be meant with the term ‘refugee’. The definition that will function as the starting point for this dissertation, is the one provided by the 1951 Convention relating to the Status of Refugees,<sup>38</sup> as it is also used as the standard within the Common European Asylum System. Article 1(A)(2) stipulates:

*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.*<sup>39</sup>

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<sup>38</sup> Convention Relating to the Status of Refugees, 28 July 1951, hereinafter ‘Refugee Convention’.

<sup>39</sup> The passages between brackets were part of the refugee definition of the original 1951 Refugee Convention and put in place a temporal and geographical limitation. Article 1(B) clarified that the words ‘events occurring before 1 January 1951’ could either refer to events that took place in Europe before that date or in Europe and elsewhere. When signing, ratifying or acceding to the Convention, each contracting State had to make a declaration in order to specify what meaning it would apply with regard to its obligations under the Refugee Convention.<sup>39</sup> The Convention was, however, amended by the 1967



Four different elements can be distinguished in this definition: (1) the individual must find himself outside of his country of nationality or habitual residence, (2) he must be unable or unwilling to return to that country to seek protection, (3) he must have a well-founded fear of persecution and (4) this persecution must exist for reasons of race, religion, nationality, membership of a particular group or political opinion. The last two elements will be elaborated upon further, as they have been the source of many problems for LGBT\* individuals who claim asylum.

## 1.1. A well-founded fear of persecution

### 1.1.1. Well-founded fear

A ‘well-founded fear’ exists of two separate elements. There is the subjective component, namely the aspect of fear. UNHCR believes this automatically entails an assessment of the applicant’s personality as individuals may react differently to identical conditions.<sup>40</sup> When the facts alone are not sufficiently clear, it will be necessary to assess the credibility of the claimant. This can be done by taking into account elements that could indicate that the main reason for seeking refuge is fear, such as the personal and family background of the individual, whether he is a member of a particular religious, national, racial, social or political group, how he interprets the situation and his personal experiences. This fear must be reasonable, however, exaggerated fear that can be justified, can be considered well-founded as well.<sup>41</sup>

Secondly, there is the objective element of the well-foundedness of the fear. In general, UNHCR finds this to be accomplished when the applicant can establish, to a reasonable

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Protocol Relating to the Status of Refugees, in which paragraphs 2 and 3 of Article 1 abolished the temporal and geographical limitation. The geographical limitation nonetheless stays in place for Congo, Monaco and Turkey, as these States made a declaration that their obligations under the Refugee Convention would only extend to events occurring in Europe

(United Nations Treaty Collection, Status of Treaties – Protocol relating to the Status of Refugees, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=V-5&chapter=5&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-5&chapter=5&lang=en) (Consulted on 24 March 2016)), and for Madagascar, which has not ratified the 1967 Protocol (United Nations Treaty Collection, Status of Treaties – Convention relating to the Status of Refugees, [https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg\\_no=V-2&chapter=5&Temp=mtdsg2&clang=\\_en](https://treaties.un.org/Pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-2&chapter=5&Temp=mtdsg2&clang=_en) (Consulted on 10 July 2016)). These States can still decide to alter this situation by declaring that their obligations will also include events occurring outside of Europe.

<sup>40</sup> HCR/1P/4/enG/Rev. 3, December 2011, p. 11.

<sup>41</sup> *Ibid.*, p.12.

degree, that it has become intolerable for him to stay in his country of origin because of the reasons stated in the refugee definition or that those same reasons would make it intolerable for him to return to that country. While an individual who has already been the victim of persecution before will more easily be considered to have a well-founded fear, previous persecution is not a prerequisite. Hence, persons who flee to avoid persecution can also receive refugee status.<sup>42</sup>

### 1.1.2. Persecution

Although ‘persecution’ could be described as the keystone of the refugee definition of the Refugee Convention,<sup>43</sup> a universally accepted definition of the concept does not exist.<sup>44</sup> The Convention does not contain one and according to some authors, this was a deliberate choice of the drafters, who wanted to ensure that a certain flexibility could be maintained.<sup>45</sup> They thought a firm definition of ‘persecution’ could inhibit the refugee definition from evolving together with and adapting to new forms of persecution.<sup>46</sup>

While the intention of the drafters is understandable, judges and other refugee decision-makers need a tool to determine who qualifies as a refugee and who does not.<sup>47</sup> It is therefore not surprising that many attempts have been made to define ‘persecution’, leading to an amalgam of definitions, both in domestic and international jurisprudence as in legal scholarship.<sup>48</sup> The human rights approach must nevertheless be considered the most dominant view.<sup>49</sup> It uses human rights as a starting point and is most known as formulated by Hathaway, who has defined persecution as “the sustained or systemic violation of basic human rights demonstrative of a failure of State protection”.<sup>50</sup>

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<sup>42</sup> *Ibid.*

<sup>43</sup> Storey, 2014, p. 272.

<sup>44</sup> HCR/IP/4/enG/Rev. 3, December 2011, p. 13.

<sup>45</sup> *Ibid.*, p. 22; Grahl-Madsen, 1966, p. 193 and Wouters, 2009, pp. 58 and 64.

<sup>46</sup> Storey, 2014, p. 273. This idea still lives amongst several commentators like Goodwin-Gill and McAdam (Goodwin-Gill and McAdam, 2007, pp. 93-94) and Türk and Nicholson (Türk and Nicholson, 2003, p. 39).

<sup>47</sup> Storey, 2014, p. 274.

<sup>48</sup> Declerck, 2015, pp. 9-10.

<sup>49</sup> Foster, 2007, p. 31; Maiani, 2010, p. 6; Ramanathan, 1996, p. 10 and Storey, 2014, p. 276.

<sup>50</sup> Hathaway, 1991, p. 101.

UNHCR has adopted this approach, although not exclusively. Its interpretation of persecution is both based on the human rights approach and on Article 33 of the Refugee Convention. This contains the *non-refoulement* principle, which is the prohibition for States to return a refugee to a territory where his/her life or freedom would be threatened on account of one of the persecution grounds of the refugee definition of Article 1(A)(2).<sup>51</sup> According to UNHCR, when one's life or freedom is threatened on the basis of race, religion, nationality, political opinion or membership of a particular social group, this always constitutes persecution. On a second level, persecution can occur when other serious human rights violations are committed for those reasons. Thirdly, depending on the particular circumstances of the case, other prejudicial acts or threats can be qualified as persecution, as well.<sup>52</sup> International and regional human rights treaties can thus influence the interpretation of the Refugee Convention, yet serious or severe human rights violations should not be the only means to define persecution.<sup>53</sup>

As it appears from Article 9 of the Qualification Directive (QD),<sup>54</sup> the EU has adopted the human rights approach too. The directive interprets the term persecution of Article 1(A)(2) of the Refugee Convention as acts that are “sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights”. Specific reference is made to the underogable rights of Article 15(2) of the European Convention on Human Rights (ECHR). These are the right to life, the prohibition on torture, the prohibition on slavery or servitude and the principle that there can be no punishment

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<sup>51</sup> Article 33(1) Refugee Convention.

<sup>52</sup> HCR/1P/4/enG/Rev. 3, December 2011, p. 13.

<sup>53</sup> UNHCR, 2005, p. 20.

<sup>54</sup> Article 9 Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, hereinafter ‘QD’. Although slightly differently formulated, this is also stated by Article 9 European Parliament and Council Directive 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), hereinafter ‘RQD’.

without a law.<sup>55</sup> When a person is in a similar way affected by an accumulation of different measures, amongst which human rights violations, this can also constitute persecution.<sup>56</sup>

We can thus conclude that persecution is predominantly, although not exclusively, understood as serious human rights violations. What acts decision-makers have found to constitute human rights violations and have consequently been accepted as sufficiently severe with regard to LGBT\* refugees, will become clear later. But first, we must discuss the persecution ground that has been employed by LGBT\* refugees to receive asylum.

## 1.2. Membership of a particular social group

Article 1(A)(2) of the Refugee Convention contains five persecution grounds: race, religion, nationality, membership of a particular social group and political opinion. In earlier cases, LGBT\* refugees sometimes invoked the persecution grounds of political opinion<sup>57</sup> or religion.<sup>58</sup> This has however become very rare<sup>59</sup> and nowadays, these individuals usually rely upon ‘membership of a particular social group’.

The *travaux préparatoires* of the Refugee Convention do not offer any insights into how ‘membership of a particular social group’ should be interpreted because it was only adopted in the draft of the convention near the end of the negotiations.<sup>60</sup> The amendment was introduced by the Swedish delegate Petrén,<sup>61</sup> who believed “past experience had shown that certain refugees had been persecuted for belonging to a

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<sup>55</sup> Article 15(2) Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 and including Protocols Nos. 1, 4, 6, 7, 12, 13 and 14, 3 May 2002, hereinafter ‘ECHR’.

<sup>56</sup> Article 9 (b) QD and RQD.

<sup>57</sup> ECRE, 1997, p. 1.

<sup>58</sup> For an explanation of why these two persecution grounds can be invoked by LGBT\* refugees, see Ramanathan, 1996, pp. 5-6.

<sup>59</sup> Weßels, 2011, p. 5.

<sup>60</sup> Aleinikoff, 2003, p. 265.

<sup>61</sup> UNHCR, Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Nineteenth Meeting, <http://www.unhcr.org/3ae68cda4.html> (Consulted on 10 April 2016).

particular social group”<sup>62</sup> and that the draft convention should comprise such cases.<sup>63</sup> A further specification was not given, nor by Petrén, nor by other delegates.<sup>64</sup>

As the Convention was discussed during the Cold War, assumptions have been made that the persecution ground referred to people fleeing the Communist Soviet Union,<sup>65</sup> like landowners, members of the capitalist class and independent business people.<sup>66</sup> What probably also played a role, was the, at that time, recent World War II and the atrocities committed by the Nazis against certain social groups.<sup>67</sup> Besides Jews and political opponents, other ‘undesirable’ categories of people had been persecuted, such as the Roma and Sinti, the Poles, homosexuals and people who were hereditarily ill.<sup>68</sup> From that point of view, the persecution ground of ‘membership of a particular social group’ could be interpreted more broadly than to refer to people from a different socio-economic class. Some authors deduce from this historical context that the drafters of the Refugee Convention intended to install a catch-all provision,<sup>69</sup> in order to guarantee security for all refugees.<sup>70</sup> The majority of scholars<sup>71</sup> and UNHCR,<sup>72</sup> however, do not support that position, as it could render the other grounds superfluous.<sup>73</sup>

Today, there are three approaches to assess what a particular group is. The first is called the ‘protected characteristics approach’<sup>74</sup> and defines a particular social group as a group of individuals who are united by a common characteristic.<sup>75</sup> This interpretation was established by the case of *Canada v. Ward*,<sup>76</sup> in which sexual orientation was

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<sup>62</sup> Helton, 1983, p. 41.

<sup>63</sup> Aleinikoff, 2003, p. 266.

<sup>64</sup> Einarsen, 2011, p. 62.

<sup>65</sup> *Ibid.*

<sup>66</sup> Goodwin-Gill and McAdam, 2007, p. 74.

<sup>67</sup> Einarsen, 2011, pp. 63-64 and Henes, 1994, p. 379.

<sup>68</sup> Einarsen, 2011, p. 64.

<sup>69</sup> Binder, 2001, p. 171; Helton, 1983, p. 41; Henes, 1994, p. 380 and Raveendran, 2012, p. 1285.

<sup>70</sup> Helton, 1983, p. 41.

<sup>71</sup> Foster, 2007, p. 293; Hathaway and Pobjoy, 2012, pp. 374-375 and Weßels, 2011, p.10.

<sup>72</sup> HCR/GIP/02/02, 7 May 2002, para. 2.

<sup>73</sup> This was also the reasoning of Judge La Forest in *Canada v. Ward*, which will be discussed later. See *Canada (Attorney General) v. Ward* (Canada Supreme Court, 30 June 1993), p. 68.

<sup>74</sup> Aleinikoff, 2003, p. 294 and Weßels, 2011, p. 11.

<sup>75</sup> Wouters, 2009, p. 72.

<sup>76</sup> *Canada (Attorney General) v. Ward* (Canada Supreme Court, 30 June 1993).

already given as an example of an “innate, unchangeable characteristic” that can define a particular social group.<sup>77</sup>

Secondly, there is the ‘social’ or ‘sociological perception approach’. It defines a particular social group as a group that is perceived by society or the authorities as such.<sup>78</sup> It originates from the judgement of *A. v. Minister for Immigration & Ethnic Affairs*<sup>79</sup> wherein a particular social group was described as a collection of people who “share something which unites them and sets them apart from society at large”.<sup>80</sup> In contrast with the first approach, the focus does not lie on the internal but the external, namely the perception that society has of a group of individuals.<sup>81</sup>

The third approach then, the UNHCR approach, is a combination of the ‘protected characteristics approach’ and the ‘social/sociological perception approach’.<sup>82</sup> It was introduced by this organisation to prevent protection gaps from emerging, since, although analyses under the two approaches often converge, gaps do occur.<sup>83</sup> UNHCR consequentially describes a particular social group as “a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society.”<sup>84</sup> This common characteristic will usually be innate or unchangeable or fundamental to someone’s identity, conscience or the exercise of his or her human rights.<sup>85</sup> Important to note is that this definition should not be understood as requiring that the test under both the ‘protected characteristics approach’ and the ‘social/sociological approach’ are met cumulatively. It suffices if the conditions under one of them are fulfilled.<sup>86</sup>

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<sup>77</sup> *Ibid*, p. 79

<sup>78</sup> Wouters, 2009, p. 73.

<sup>79</sup> *Applicant A. and Another v. Minister for Immigration and Ethnic Affairs and Another* (High Court of Australia, 24 February 1997).

<sup>80</sup> *Ibid.*, pp. 8-11.

<sup>81</sup> Aleinikoff, 2003, p. 272.

<sup>82</sup> Weßels, 2011, p. 11.

<sup>83</sup> HCR/GIP/02/02, 7 May 2002, paras. 9-10.

<sup>84</sup> *Ibid*, para. 11.

<sup>85</sup> *Ibid*.

<sup>86</sup> *Ibid*, para. 13. This was later confirmed in the Guidelines on International Protection No. 9. HCR/GIP/12/01, 23 October 2012, para. 45.

## 2. The gradual acceptance of LGBT\* individuals as refugees in domestic jurisprudence

LGBT\* persons have gradually been accepted as refugees but case law remains confusing until now.<sup>87</sup> The problem lies in what has been previously discussed. Because the interpretation of persecution and membership of a particular social group is still highly dependent upon the personal view of the decision-maker, it is not certain that, when an LGBT\* person has been qualified as a refugee before, this will always be the case.<sup>88</sup> The following section will discuss jurisprudence that has been influential for the recognition of LGBT\* individuals as refugees. Notwithstanding the fact that claims before lower courts kept failing on either the condition of persecution, the persecution ground or both<sup>89</sup> and that they all concerned homosexual individuals, they paved the way for other LGBT\* persons.

The first important case was decided in the Netherlands in 1981<sup>90</sup> and concerned a homosexual man who had fled Poland because his name had been reported to the vice squad, after which he was registered as a homosexual. The Judicial Commission of the Dutch Council of State accepted that asylum claims of homosexuals could be considered under the persecution ground of membership of a particular social group, nevertheless denied asylum status because it held that this was ‘only’ a case of discrimination, so the condition of persecution was not fulfilled.<sup>91</sup>

In 1983, the *Verwaltungsgericht* of Wiesbaden in Germany granted asylum to an Iranian homosexual.<sup>92</sup> Although the applicant had not been persecuted, the fact that homosexuals could be and were being executed in Iran was sufficient for the court to decide that the applicant had a well-founded fear of being persecuted upon return.<sup>93</sup>

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<sup>87</sup> Weßels, 2011, p. 12.

<sup>88</sup> Berg and Millbank, 2013, p. 135; Henes, 1994, p. 383 and Ramanathan, 1996, p. 17.

<sup>89</sup> Millbank, 2013, p. 34.

<sup>90</sup> ECRE, 1997, p. 10; Jansen, 2013, p. 2 and Millbank, 2013, p. 34.

<sup>91</sup> *A-2 1113* (Afdeling Rechtspraak Raad van State, 13 August 1981). For a case abstract, see case IJRL/010 in X., Cases and Comments’, p. 246 in *International Journal of Refugee Law*, Vol. 1, 1989.

<sup>92</sup> *No IV/IE 06244/81* (Verwaltungsgericht Wiesbaden, 26 April 1983).

<sup>93</sup> Henes, 1994, p. 384.

With regard to the particular social group element, the court applied the social/sociological approach test and concluded that homosexuals could be qualified as a particular social group because of the pejorative labels that are attached to them, the prejudice they face and the destructive treatment they undergo, not only in Iran but also in many other societies.<sup>94</sup>

Progress was slow. However, by the mid 1990's, in at least ten countries homosexuals were recognised as a particular social group under the refugee definition of the Refugee Convention.<sup>95</sup> A landmark decision in the United States was *Re Toboso-Alfonso* of 1990,<sup>96</sup> which got designated as precedent in 1994.<sup>97</sup> The case concerned a gay Cuban man, who was registered by the authorities as a homosexual. Because that was a criminal offense, he had to go to a hearing every two or three months. This frequently led to detention without charge for three to four days.<sup>98</sup> Additionally, homosexuals were often incarcerated in forced labour camps because of their sexual orientation.<sup>99</sup> The applicant fled Cuba after being informed by an official that he would be detained if he would not leave the country.<sup>100</sup> The Board of Immigration Appeals found this to constitute persecution and by using the protected characteristics approach, it found homosexuals to form a particular social group as it perceived their sexual orientation as an immutable characteristic.<sup>101</sup>

In Canada, *Inaudi* paved the way for homosexual asylum claimants.<sup>102</sup> The Argentinian applicant had been blackmailed, beaten, tortured with electric shocks and repeatedly

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<sup>94</sup> Fullerton, 1990, p. 409.

<sup>95</sup> Ramanathan, 1996, p. 7. These countries were Australia, Austria, Canada, Denmark, Finland, Germany, Ireland, the Netherlands, New Zealand, Sweden, and the United States.

<sup>96</sup> *Toboso-Alfonso* (United States Board of Immigration Appeals, 12 March 1990).

<sup>97</sup> For the official memo, see Office of the Attorney General, Attorney General Order Designating Board of Immigration Appeals Case as Precedent, <http://www.qrd.org/qrd/world/immigration/us.gay.asylum.policy-01.23.95> (Consulted on 7 April 2016).

<sup>98</sup> *Toboso-Alfonso* (United States Board of Immigration Appeals, 12 March 1990), para. 7.

<sup>99</sup> *Ibid.*, para. 10.

<sup>100</sup> *Ibid.*, para. 15.

<sup>101</sup> *Ibid.*, para. 14.

<sup>102</sup> *Inaudi* (Immigration and Refugee Board, 9 April 1992).



raped by the police.<sup>103</sup> The Immigration and Refugee Board found this treatment to constitute persecution and partly relying on the German decision of 1981,<sup>104</sup> it held that the immutability of homosexuality in itself sufficed to qualify homosexual refugees as members of a particular social group.<sup>105</sup> The two conditions of persecution and membership of a particular social group were therefore met and asylum status was granted.<sup>106</sup>

Precedent has also been set in Australia.<sup>107</sup> Although *Morato v. Minister of Immigration* did not concern an LGBT\* individual, in applying the social/sociological approach to the case, Judge Lockhart stated that the interest a particular social group has in common could be one's sexual preference.<sup>108</sup> In the first published decision on a sexual orientation-based asylum claim, the Refugee Review Tribunal drew from *Morato* and granted asylum to an Iranian homosexual whose father had reported his lover to the authorities, which subsequently imprisoned him,<sup>109</sup> because it found the applicant had a well-founded fear of imprisonment and persecution upon return to Iran.<sup>110</sup>

### 3. The necessary clarification at the UN and European level

Decisions on refugee claims made by LGBT\* individuals remained inconsistent. Fortunately, this theme was picked up by UNHCR and the EU so MSs could increasingly find guidance at both the international and regional level.

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<sup>103</sup> Ramanathan, 1996, p. 27.

<sup>104</sup> *Ibid.*

<sup>105</sup> ECRE, 1997, p. 16.

<sup>106</sup> *Ibid.*

<sup>107</sup> Swink, 2006, pp. 254-255.

<sup>108</sup> *Morato v. Minister of Immigration, Local Government and Ethnic Affairs* (Federal court of Australia, 21 December 1992), para. 65.

<sup>109</sup> Ramanathan, 1996, pp. 30-31. This was case *N93/02240* (Refugee Review Tribunal, 21 January 1994).

<sup>110</sup> ECRE, 1997, p. 10 and Ramanathan, 1996, pp. 30-31.

### 3.1. UNHCR soft law on LGBT\* asylum claims

Although internationally there are no binding sources for interpreting the Refugee Convention, by signing the Convention, the State parties agree that UNHCR has a supervising authority. They undertake to facilitate this duty and to cooperate with the organisation,<sup>111</sup> which function is to provide international protection to refugees who fall within the scope of its Statute and to seek permanent solutions for the refugee problem.<sup>112</sup> Interpretations of the UNHCR are therefore of high value.

UNHCR for the first time provided important guidance with regard to refugee claims on the basis of sexual orientation in its Guidelines on International Protection No.1 of 2002, which focused on gender-related persecution.<sup>113</sup> After having recognised that gender-related persecution also includes discrimination against homosexuals,<sup>114</sup> UNHCR stated that a proper interpretation of Article 1(A)(2) comprises gender-related claims.<sup>115</sup> The organisation indicated that one's sexual orientation may be relevant to a refugee claim in cases where the individual has experienced persecutory, amongst which also discriminatory, actions because of his sexual preference. It recognised the claims mainly made by homosexuals, transsexuals and transvestites of severe public hostility, abuse and violence or serious or cumulative discrimination.<sup>116</sup> Severe criminal penalties imposed on the basis of anti-homosexuality legislation may also amount to persecution.<sup>117</sup> With regard to the persecution ground of membership of a particular social group, the guidelines confirmed that one's sexual orientation is defined by innate and immutable characteristics that define these persons as a group in society so that

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<sup>111</sup> Article 35(1) Refugee Convention.

<sup>112</sup> A/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 organisations to facilitate the voluntary repatriation of such refugees, or their assimilation within new national communities."

<sup>113</sup> HCR/GIP/02/01, 7 May 2002.

<sup>114</sup> *Ibid.*, para. 3.

<sup>115</sup> *Ibid.*, para. 6.

<sup>116</sup> *Ibid.*, para. 16.

<sup>117</sup> *Ibid.*, para. 17.

homosexuals, transsexuals or transvestites can fall within the ambit of the social group category.<sup>118</sup>

The issue of LGBT\* refugee claims was later more specifically addressed in the UNHCR Guidance Note on Refugee Claims relating to Sexual Orientation and Gender Identity of 2008.<sup>119</sup> While the guidelines on gender-related persecution only mentioned homosexuals, transsexuals and transvestites, this document deals with LGBT. A first reason for adopting this terminology was that, even though the word ‘homosexuals’ comprises lesbians, it has the tendency to render them invisible. Secondly, UNHCR sought to broaden the scope to include transgender and bisexual individuals<sup>120</sup> and to pay attention to the different experiences these four categories of people have.<sup>121</sup> The guidance note qualifies sexual orientation as a fundamental part of one’s identity<sup>122</sup> and considers it well established that LGBT individuals are entitled to all human rights equally with others, even though there is no explicitly recognised international human right to freedom of sexual orientation.<sup>123</sup> This is an important statement considering the human rights approach to persecution that has been discussed earlier. UNHCR also confirmed that transgender and bisexual individuals can, like gay and lesbian persons, fall within the scope of the membership of a particular social group persecution ground.<sup>124</sup> The guidance note concludes that developments in international and national case law had shown that LGBT individuals can be considered to be a particular social group. These persons are therefore entitled to protection under the Refugee Convention. As refugees from sexual minorities are sometimes confronted with more difficulties during the refugee determination procedure than other refugees, UNHCR urges States to leave the assessment of sexual orientation-based refugee claims to trained decision-makers who have to deal with the issue with the necessary sensitivity. As proof of one’s

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<sup>118</sup> *Ibid.*, para. 30.

<sup>119</sup> UNHCR, 2008.

<sup>120</sup> *Ibid.*, para.6.

<sup>121</sup> *Ibid.*, paras. 15-16.

<sup>122</sup> *Ibid.*, para. 8.

<sup>123</sup> *Ibid.*, para. 9.

<sup>124</sup> *Ibid.*, para. 32.

sexual orientation is difficult to provide, UNHCR stresses that decision-makers should lean towards giving claimants the benefit of the doubt.<sup>125</sup>

Because there was a “growing need to identify and address protection gaps in the treatment of LGBTI asylum-seekers and refugees in all stages of the displacement cycle”, UNHCR in 2010 organised the Roundtable on Asylum-Seekers and Refugees Seeking Protection on Account of Their Sexual Orientation and Gender Identity.<sup>126</sup> As the title indicates, intersex individuals were also dealt with at this time. The experts stated amongst other things that the particular issues that arise when transgender, bisexual and intersex applicants claim refugee status under ‘membership of a particular social group’ needed to be better addressed.<sup>127</sup> Criminalisation of same-sex relationships was found to be persecutory *in se*<sup>128</sup> and attention was paid to the distinct ways in which all lesbian, gay, bisexual, transgender and intersex individuals experience discrimination and persecution.<sup>129</sup>

In 2011, UNHCR issued another guidance note: ‘Working with Lesbian, Gay, Bisexual, Transgender and Intersex Persons in Forced Displacement’.<sup>130</sup> The relevance of this document for refugee determination processes was its overview of the distinct forms of persecution and discrimination that LGBTI individuals can experience. Lesbians, for instance, may be persecuted on the basis of both their gender and sexual orientation. They tend to be more exposed to honour crimes and rape than gay men. The latter, nevertheless, appear to run a more immediate risk of harm because they often lead more public lives. Bisexuals consider their sexual orientation as fluid and flexible, which

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<sup>125</sup> *Ibid.*, para. 41.

<sup>126</sup> UNHCR, 2010. This roundtable was held amongst 29 experts, either from governments, NGOs, academia, the judiciary or international organisations and some UNHCR staff members. The intention was to have discussions on and to examine the substantive and procedural issues that arise in sexual orientation and/or gender identity-based refugee claims. The international legal framework that protects LGBTI asylum-seekers and refugees was reviewed and the operational protection challenges that LGBTI individuals experience as distinct groups were discussed. Several States and NGOs were also heard about their good practices and existing initiatives.

<sup>127</sup> *Ibid.*, para. 10.

<sup>128</sup> *Ibid.*, para. 12.

<sup>129</sup> *Ibid.*, para. 28.

<sup>130</sup> UNHCR (b), 2011.

causes them to be frequently misunderstood by society, who perceives their sexuality as a matter of choice.<sup>131</sup> Transgender individuals, then, are severely marginalised, often experience (sexual) abuse and are on many occasions discriminated by State authorities as well as by their own families and communities. When excluded from education and access to employment and/or housing, they often turn to survival sex work. Lastly, intersex persons may be subjected to unwanted surgery to make their bodies conform to gender expectations or they may have constant medical needs as a result of their condition.<sup>132</sup> The note therefore calls for awareness raising of the common protection challenges that LGBTI individuals are confronted with, yet to also take into account the distinct risks each group faces.

The most important document today, however, is the 2012 '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'.<sup>133</sup> The value of these guidelines is mainly that they build upon all the previous documents and provide a coherent position of UNHCR on the matter. Mention is for instance made of the UNHCR approach on membership of a particular social group and it is stated that, even if States are applying either the protected characteristics approach or the social/sociological approach, under a correct application of these approaches, LGBTI form a particular social group under the refugee definition.<sup>134</sup> The guidelines also provide guidance on how to interpret the aspect of persecution.<sup>135</sup>

### **3.2. EU legislation and case law on LGBT\* asylum claims**

Within the EU, there is legislation and case law on sexual orientation and gender identity-based refugee claims as well. Questions of asylum were nevertheless not

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<sup>131</sup> *Ibid.*, p. 5.

<sup>132</sup> *Ibid.*, p. 6.

<sup>133</sup> HCR/GIP/12/01, 23 October 2012.

<sup>134</sup> *Ibid.*, para. 46.

<sup>135</sup> *Ibid.*, paras. 16-37. UNHCR also provides practical guidance and, together with the Council of Europe, organised the Seminar on Assessing Asylum Claims by LGBTI Asylum-Seekers in 2013.

always a competence of the EU and therefore, it is necessary to give a brief overview of how asylum law was incorporated into the EU sphere.

### 3.2.1. The birth of the Common European Asylum System

Given that the European Economic Community (EEC), the ‘predecessor’ of the European Community (EC), was originally established for economic purposes, namely the creation of a common market,<sup>136</sup> asylum was for a long time not dealt with.<sup>137</sup> To establish this common market, the concept of the ‘four freedoms’ was introduced: freedom of movement of goods, persons, services, and capital.<sup>138</sup> The abolishment of internal borders, however, made the decisions on which third country nationals (TCNs)<sup>139</sup> could enter a MS a matter of concern for all the other States,<sup>140</sup> since once they had entered one MS, TCNs could travel to all the other MSs as well. Until the Treaty of Maastricht of 1992, not every MS was prepared to hand over the control of their borders, so the States that were willing to do so, could only take initiatives outside of the Community sphere.<sup>141</sup>

In 1992, the Maastricht Treaty<sup>142</sup> created the EU, which ‘absorbed’ the EEC. The structure of the EU was comprised of three pillars: the first one was the European Community, which was the new name for the EEC, the second consisted of ‘security and foreign policy’ and the third concerned ‘justice and home affairs’. It was under this third pillar that the ‘European Union’ with the free movement of persons had to be installed.<sup>143</sup> Asylum and the control on the crossing of external borders by persons, immigration and entry, residence and family reunification of TCNs were now

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<sup>136</sup> Guild, 2006, p. 631. See Article 2 Treaty establishing the European Economic Community, 25 March 1957, hereinafter ‘Rome Treaty’.

<sup>137</sup> Battjes, 2006, p. 26.

<sup>138</sup> Article 3 (a) and 3(c) Rome Treaty.

<sup>139</sup> Under EU law, a ‘third country national’ is used as a term for individuals who do not have a nationality of one of the EU MSs.

<sup>140</sup> Battjes, 2006, p. 26 and Pirjola, 2009, p. 348.

<sup>141</sup> Battjes, 2006, pp. 26-28.

<sup>142</sup> Treaty on European Union, 7 February 1992, hereinafter ‘Maastricht Treaty’ or ‘TEU’.

<sup>143</sup> Battjes, 2006, p. 28.

considered as “matters of common interest”.<sup>144</sup> For the first time ever,<sup>145</sup> reference was made to the Refugee Convention as Article K.2 stipulated that these matters had to be dealt with in compliance with it.<sup>146</sup>

It was nevertheless only with the 1997 Treaty of Amsterdam,<sup>147</sup> that things really changed.<sup>148</sup> Decision-making under the third pillar had been ineffective and after moving asylum to the first pillar,<sup>149</sup> Article 63 of the Treaty on the European Community gave the European Council the competence to adopt measures on immigration policy. Additionally, it named some asylum matters the Council should issue legislation on within five years of the coming into force of the treaty, such as minimum standards on the qualification of TCNs as refugees, minimum standards on the reception of asylum-seekers in MSs and criteria and mechanisms for determining which MS is responsible for considering an application for asylum submitted by a TCN in one of the MSs.<sup>150</sup> Again, this needed to be in conformity with the Refugee Convention.<sup>151</sup> With this, the agenda to create a Common European Asylum System (CEAS) was set out.<sup>152</sup>

In 1999, the European Council met in Tampere, Finland, where the objective of developing a CEAS was specified.<sup>153</sup> In the Tampere Conclusions, the Council reaffirmed the importance of the absolute respect of the right to seek asylum and stated

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<sup>144</sup> Article K.1 Maastricht Treaty.

<sup>145</sup> Guild, 2006, p. 632.

<sup>146</sup> Article K.2 Maastricht Treaty.

<sup>147</sup> Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European communities and Certain Related Acts, 2 October 1997, hereinafter ‘ Treaty of Amsterdam’.

<sup>148</sup> Guild, 2006, p. 640 and Peers, 2015, p. 7.

<sup>149</sup> Hatton, 2005, p. 109.

<sup>150</sup> Battjes, 2006, p. 29; Gallagher, 2002, p. 384 and Peers, 2015, p. 7.

Today, the EU’s powers in the field of asylum are set out in Article 78 of the Treaty on the Functioning of the European Union, hereinafter TFEU. Interestingly, paragraph 2(g) of this Article states that the European Parliament and the Council shall adopt measures for a common European asylum system comprising partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection. An example of this competence is the EU-Turkey deal, which will be discussed in title 5 of this section.

<sup>151</sup> Article 63(1) Treaty of Amsterdam.

<sup>152</sup> Gallagher, 2002, p. 378.

<sup>153</sup> Peers, 2015, p. 3.

that the CEAS that was to be established, would be based on the “full and inclusive application of the [Refugee] Convention, thus ensuring that nobody is sent back to persecution”.<sup>154</sup> It was determined that, amongst others, this CEAS should include the “approximation of rules on the recognition and content of the refugee status”.<sup>155</sup> Additionally, subsidiary forms of protection should be installed for individuals who need it.<sup>156</sup>

### 3.2.2. EU instruments interpreting the refugee definition

Between 2003 and 2005, several legislative instruments were adopted to establish the approximation called for in the Tampere Conclusions. They constituted the first phase of the CEAS.<sup>157</sup> One of them was the Qualification Directive (QD) of 2004,<sup>158</sup> which set minimum standards for the MSs on the basis of which TCNs or stateless persons should be qualified as refugees or as persons who otherwise need international protection and which determined the content of the protection that is consequently granted.<sup>159</sup> Two types of protection were installed. When someone does not fulfil the refugee definition of the Refugee Convention as interpreted by the QD, subsidiary protection can be provided.<sup>160</sup> This subsidiary protection is granted to individuals fleeing ‘serious harm’, which according to the directive consists of “the death penalty or execution, torture or inhuman or degrading treatment or punishment of an applicant in the country of origin, or serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict”.<sup>161</sup>

Since the aforementioned case law indicated differences amongst adjudicators in the interpretation of ‘persecution’ and ‘membership of a particular social group’, the QD

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<sup>154</sup> Tampere European Council, 1999, para. 13.

<sup>155</sup> The other three objectives were: “a clear and workable determination of the State responsible for the examination of an asylum application, common standards for a fair and efficient asylum procedure [and] common minimum conditions of reception of asylum-seekers.” The latter will be further discussed in Chapter IV, section 2. See Tampere European Council, 1999, para. 14.

<sup>156</sup> *Ibid.*, para. 14.

<sup>157</sup> Peers, 2015, p. 4.

<sup>158</sup> See footnote 54.

<sup>159</sup> Article 1 QD.

<sup>160</sup> Hatton, 2005, p. 110.

<sup>161</sup> Article 15 QD.



was a welcome instrument to offer guidance on the matter. It has already been established that the EU has adopted a human rights approach to the interpretation of ‘persecution’, and ‘membership of a particular social group’ is determined in Article 10(1)(d) QD, which states: “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.” The EU thus, in contrast with the UNHCR, cumulatively applies the ‘protected characteristic’ and ‘social/sociological approach’.<sup>162</sup> This could have turned out to be disadvantageous for LGBT\*, if it were not for the last paragraph of the Article, which stipulates: “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”. Acts considered as criminal according to the national law of the MSs are nevertheless excluded from this protection.<sup>163</sup>

This statement is of fundamental value for lesbian, gay and bisexual refugees since from that moment, theoretically, the discussion on whether a particular social group can be distinguished on the basis of sexual orientation, has been settled and the different interpretations that exist amongst the MSs should be replaced by this standard.<sup>164</sup> I however agree with Peers that it would have been better to state that they do constitute a particular social group, rather than using the verb ‘might’.<sup>165</sup> This would have created more legal certainty, as the current wording seems to leave the MSs some room for discretion after all.

In 2011, under the second phase of the establishment of the CEAS, the Recast Qualification Directive (RQD)<sup>166</sup> was introduced to replace the former QD and to do

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<sup>162</sup> Peers, 2015, p. 113.

<sup>163</sup> Article 10(1)(d) QD.

<sup>164</sup> ICJ, 2009, p. 131.

<sup>165</sup> Peers, 2015, p. 113.

<sup>166</sup> See footnote 54.

away with the considerable disparities that still remained between the MSs in the context of asylum.<sup>167</sup> The RQD added gender identity to the last paragraph of Article 10(1)(d).<sup>168</sup> It must nevertheless be noted that, whereas sexual orientation is explicitly mentioned as a possible basis for a particular social group, Article 10(1)(d) RQD only says that “gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group”. It is regrettable that the language with regard to gender identity is softer, because this creates a kind of subordinate position and gives the MSs more leeway in refugee status determination decisions. Whether recital 30 RQD, which states that: “For the purposes of defining a particular social group, issues arising from an applicant’s gender, including gender identity and sexual orientation, which may be related to certain legal traditions and customs, resulting in for example genital mutilation, forced sterilisation or forced abortion, should be given due consideration in so far as they are related to the applicant’s well-founded fear of persecution” will be a big help to remedy this in some kind of way, remains the question.

That gender identity should be given the same importance as sexual orientation follows from the ‘Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity’, a resolution introduced by the European Parliament in February 2014.<sup>169</sup> It therein urged the European Commission and other relevant agencies to work together to ensure that specific issues linked to sexual orientation and gender identity are included in the national law of MSs when they are implementing asylum legislation, amongst which the RQD, and to monitor the situation.<sup>170</sup>

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<sup>167</sup> Recital 8 RQD.

<sup>168</sup> FRA, 2015, p. 97 and Jansen, 2013, p. 1.

<sup>169</sup> European Parliament, 2014.

<sup>170</sup> FRA, 2015, p. 98. See para. 4.K(i) European Parliament, 2014.

### 3.2.3. The Charter of Fundamental Rights

To be complete, it is also necessary to touch upon the Charter of Fundamental Rights of the European Union (CFR).<sup>171</sup> Originally adopted at the European Council in Nice in December 2000 as a non-binding declaration,<sup>172</sup> its reviewed version became primary law with the entering into force of the Treaty of Lisbon<sup>173</sup> on 1 December 2009.<sup>174</sup>

The Charter comprehensively catalogues several civil, political, economic and social rights, together with the rights connected to European citizenship.<sup>175</sup> Except for that last set of rules, it applies to all persons, meaning citizens of EU MSs, but also TCNs.<sup>176</sup> The CFR is rather unique because of its applicability.<sup>177</sup> It is primarily addressed to the EU institutions and only to the MSs when they are implementing Union law.<sup>178</sup> They only have to comply with these provisions when they are acting within the scope of EU law.<sup>179</sup> When acting within their own competences, they are bound by their own fundamental rights system, so the fundamental rights included in their constitutions, and the ECHR.<sup>180</sup> The Charter was thus first and foremost intended as a kind of constitution that binds the EU institutions and bodies, which enforcement is left to the European Court of Justice (ECJ). It was introduced to ensure that EU law is applied in a uniform manner<sup>181</sup> and not as an instrument that harmonises fundamental rights across the MSs.<sup>182</sup>

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<sup>171</sup> Charter of Fundamental Rights of the European Union, 7 December 2000, hereinafter ‘CFR’.

<sup>172</sup> Clayton, 2014, p. 158.

<sup>173</sup> Article 6.1 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13 December 2007, hereinafter ‘Treaty of Lisbon’. This Article states that the CFR shall have the same legal value as the Treaties, being the TEU and TFEU.

<sup>174</sup> Lenaerts, 2012, p. 375.

<sup>175</sup> Gil-Bazo, 2008, p. 34.

<sup>176</sup> Peers, 2015, p. 37.

<sup>177</sup> von Danwitz and Paraschas, 2012, p. 1399.

<sup>178</sup> Article 51, para. 1 CFR.

<sup>179</sup> den Heijer, 2014, p. 521 and Peers, 2015, p. 34. This is the case not only when a MS is implementing EU law, but also when EU law has granted a MS discretionary power and the State is exercising that. I.e. when a State is exercising an option to consider an asylum application that is not its responsibility. See *NS and Others* (ECJ, 21 December 2011, Joined cases C-411/10 and C-493/10), paras. 64-69.

<sup>180</sup> von Danwitz and Paraschas, 2012, p. 1400.

<sup>181</sup> *Ibid.*, p. 1401.

<sup>182</sup> Kokott and Sobotta, 2015, p. 70.

Nevertheless, secondary legislation of the EU and national law that falls within the scope of EU law needs to be applied and interpreted in compliance with the provisions of the Charter,<sup>183</sup> hence also the directives that have been discussed above and will be discussed later on. In the context of this dissertation, special attention must therefore go to Article 18 CFR,<sup>184</sup> which stipulates: “The right to asylum shall be guaranteed with due respect for the rules of the [Refugee Convention] and the [1967 Protocol] and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union.” Because the CFR has gained the status of primary law, it can be invoked before national courts of MSs without it having to be transposed into domestic law.<sup>185</sup> Important to note is, however, that Article 18 only confers a subjective right on individuals when they meet the criteria with regard to asylum that are set forth in EU law. These are minimum standards, so MSs can provide additional protection.<sup>186</sup> If a State has opted to do so, Article 18 CFR cannot be invoked to oblige it to give asylum to a certain individual.<sup>187</sup> Yet, in any case, individuals who fulfil the conditions of the RQD that were set out above have to receive asylum.

While the right to asylum under Article 18 CFR must be understood as an autonomous concept,<sup>188</sup> its content is far from self-evident.<sup>189</sup> Case law of the ECJ, however, indicates that it should be understood as it is generally viewed in international law, namely “any form of protection a State decides to grant to a person on its territory or in

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<sup>183</sup> den Heijer, 2014, p. 521; Gil-Bazo, 2008, p. 36; Lenaerts, 2012, p. 376 and von Danwitz and Paraschas, 2012, p. 1413.

<sup>184</sup> As amended by the Treaty of Lisbon.

<sup>185</sup> This is not the case for Poland and the UK since a protocol was added to the Treaty of Lisbon in which these countries are exempted from judicial review on the basis of the CFR by national courts as well as the ECJ. See Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, 13 December 2007.

<sup>186</sup> Peers, 2015, p. 11.

<sup>187</sup> den Heijer, 2014, p. 534 and Gil-Bazo, 2008, p. 48.

<sup>188</sup> This follows from case law of the ECJ. See *Pabst & Richarz KG v. Hauptzollamt Oldenburg* (ECJ, 29 April 1982, No. 17/81), para. 18. The Court stated: “The need to ensure that the provisions of the Treaty [of the European Economic Community] are applied in a uniform manner throughout the Community requires that they should be interpreted independently.” In order to harmonise legislation, concepts in EU law must therefore be interpreted autonomously from interpretations in the MSs. See Gil-Bazo, 2008, p. 51.

<sup>189</sup> Staffans, 2012, p. 247.

some other location against another State’.<sup>190</sup> As a result, Article 18 CFR does not necessarily imply that refugee status must be granted when a person is in need of protection. This was also confirmed by the ECJ. The Court did stress that if some kind of protection is provided to an individual who cannot be qualified as a refugee, it must be in such a way that no confusion is created with refugee status within the meaning of the QD.<sup>191</sup> That the right to asylum is not limited to refugees is also supported by the *travaux préparatoires*, which indicate that attempts to do so were unsuccessful.<sup>192</sup> And although asylum under EU law must be seen as an autonomous concept, one of the guiding principles of the CFR is that it reaffirms the rights as they result from the constitutional traditions common to the MSs<sup>193</sup> and many of them have a concept of asylum that is not restricted to refugees.<sup>194</sup> Lastly, the link must be made with human rights, as the concept of subsidiary protection under EU law was introduced to ‘rescue’ people, who do not fit the definition of refugee under EU law, from human rights violations.<sup>195</sup> This ‘EU right to asylum’ can therefore also come into play when someone needs to receive protection against other human rights violations than those connected to refugee status. By providing asylum in such situations, MSs would simultaneously be respecting the *non-refoulement* principle that is stipulated in Article 19.2 CFR. To help them distinguish under what circumstances subsidiary protection should be provided, they can turn to the extensive case law of the European Court of Human Rights (ECtHR) on the prohibition of *refoulement*.

We can thus conclude that the right to asylum of the CFR equals a right to international protection, which is used in the EU context as an umbrella term for refugee protection as well as subsidiary protection. The importance of Article 18 CFR therefore, is that it offers a right to asylum in EU MSs, either on the basis of refugee status or subsidiary

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<sup>190</sup> *Ibid.*, p. 533.

<sup>191</sup> *Bundesrepublik Deutschland v. B and D* (ECJ, 9 November 2010, Joined cases C-57/09 and C-101/09 B and D), para. 121.

<sup>192</sup> den Heijer, 2014, p. 534. He bases his analysis on amendments 415, 426 and 428, which were defeated. See Draft Charter of Fundamental Rights of the European Union, 25 May 2000.

<sup>193</sup> Para. 5 Preamble to the CFR.

<sup>194</sup> den Heijer, 2014, p. 534.

<sup>195</sup> *Ibid.*, 2014, p. 533.

protection, to individuals who fulfil the conditions of EU asylum law. This means that people, who, on the basis of their sexual orientation or gender identity, suffer those human rights violations on the basis of which under the RQD international protection can be provided,<sup>196</sup> now have a source of primary EU law to rely on before the national courts of the MSs.<sup>197</sup>

#### 3.2.4. Case law of the European Court of Justice on LGBT\* refugees

The ECJ has been asked to elucidate the legislation with regard to LGBT\* refugees in the case of *X, Y and Z v. Minister voor Immigratie en Asiel* in 2013.<sup>198</sup> Three individuals from Sierra Leone, Uganda and Senegal had filed for refugee status in the Netherlands out of fear of being persecuted in their countries because of their homosexual identity. Homosexuality was criminalised in these countries with imprisonment and they claimed to have been the victim of violent reprisals, either by their families and entourage or by the authorities of their countries of origin. Asylum was nevertheless refused, after which an appeal was brought before the *Raad van State* (RvS), which asked the ECJ for a preliminary ruling.<sup>199</sup>

First, the RvS wanted to know whether foreign nationals with a homosexual orientation form a particular social group as referred to in Article 10(1)(d) QD.<sup>200</sup> The Court cumulatively applied the protected characteristics and the social/sociological approach, as foreseen in Article 9 QD. It stated that it is “common ground that a person’s sexual orientation is a characteristic so fundamental to his identity that he should not be forced

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<sup>196</sup> See for refugee status Article 9 RQD and for subsidiary protection Article 15 RQD.

<sup>197</sup> This is because sexual orientation and gender identity are listed in Article 10(1)(d) RQD.

<sup>198</sup> *X, Y and Z v. Minister voor Immigratie en Asiel* (ECJ, 7 November 2013, Joined cases C-199/12 to C-201/12), hereinafter ‘X, Y and Z’.

<sup>199</sup> The RvS asked three questions, which are all extremely relevant when it comes to LGBT\* individuals seeking refuge. Only the first and last one will be highlighted as the second question touched upon the discretion reasoning and would lead us too far beyond the scope of this dissertation. The discretion reasoning entails that some adjudicators have been convinced that it is reasonable to ask from LGBT\* individuals that they conceal their sexual orientation in their country of origin in order to avoid persecution. In *X, Y and Z*, the ECJ explicitly rejected that rationale. See paras. 65-76.

<sup>200</sup> It still concerned the ‘old’ QD, yet there is no reason not to apply this judgment to the RQD. See Chelvan, 2014, p. 54 and ICJ, 2014, p. 2.

to renounce it.”<sup>201</sup> Secondly, it found the criminalisation of homosexuality to support the finding that these persons are perceived by society as being different.<sup>202</sup> As a result, the ECJ stated that the QD must be interpreted as meaning that when criminal laws exist which target homosexuals, these individuals must be regarded as constituting a particular social group.<sup>203</sup>

The RvS further asked whether the mere criminalisation of homosexual activities constitutes an act of persecution within the meaning of Article 9 QD.<sup>204</sup> The ECJ held that not all violations of fundamental rights suffered by homosexual asylum-seekers will be sufficiently serious and that the mere existence of criminal laws against homosexual acts is not enough. Imprisonment in itself, however, can constitute an act of persecution if applied in practice, since it is a disproportionate or discriminatory punishment. The countries in which asylum is claimed must therefore perform an analysis of the situation in the country of origin to determine whether a well-founded fear of persecution exists.<sup>205</sup>

While this case is a landmark judgment for sexual orientation-based refugee claims because it confirms that a well-founded fear of sexuality-based persecution is covered by the QD,<sup>206</sup> it is unfortunate that in all of the countries of origin, criminalising laws were in place. This has led the ECJ to conclude that criminalisation plays a large part in determining whether homosexuals can constitute a particular social group and what the scope of persecution is.<sup>207</sup> This is detrimental for LGBT\* refugees and asylum-seekers since persecution also happens in countries where no criminalising laws exist. Decision-makers should therefore interpret this judgment as affirming that criminalisation is one form of persecution, but that it can also present itself in other forms.<sup>208</sup>

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<sup>201</sup> X, Y and Z, para. 46.

<sup>202</sup> *Ibid.*, para. 48.

<sup>203</sup> *Ibid.*, para. 49.

<sup>204</sup> *Ibid.*, para. 37.

<sup>205</sup> *Ibid.*, paras. 53-61.

<sup>206</sup> Dunne, 2015, p. 412.

<sup>207</sup> Chelvan, 2014, p. 51 and ICJ, 2014, p. 12.

<sup>208</sup> ICJ, 2014, p. 14.

## 4. EU Member States and their legislation on LGBT\* refugees

As UNHCR and the EU have developed standards and guidelines on LGBT\* refugee claims, the question arises whether this has had any effect on the national asylum legislation of the MSs. Because of time restraints and insufficient resources, it was not possible to give a detailed overview of the law as it stands today, yet the situation at the end of 2014 was provided by a report of the EU Fundamental Rights Agency (FRA). We can assume that the situation has not deteriorated, although it is uncertain whether national legislation in the UK will be adapted as a result of its future exit from the EU.

### 4.1. Protection provided on the basis of sexual orientation

As of 2014, all of the MSs explicitly grant refugee status to individuals who are persecuted on the basis of their sexual orientation,<sup>209</sup> except for Estonia. The domestic law implementing the QD does not specifically address what is meant by ‘membership of a particular social group’ and while the Estonian Interior Ministry has stated that sexual orientation is covered by this notion, this is only an implicit recognition.<sup>210</sup>

Denmark also has a different position because it is not bound by the qualification directives.<sup>211</sup> It is nonetheless party to the Refugee Convention and in two 2012 judgments of the Danish Refugee Appeals Board ‘membership of a particular social group’ was interpreted to include LGBTI individuals. As a result, Denmark now offers refugee status to individuals on the basis of their sexual orientation and/or gender identity.<sup>212</sup>

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<sup>209</sup> FRA, 2015, p. 100.

<sup>210</sup> *Ibid.*

<sup>211</sup> See recital 40 QD and recital 51 RQD.

<sup>212</sup> FRA, 2014, pp. 100-101.



## 4.2. Protection provided on the basis of gender identity

The MSs had to implement the RQD, with its new Article 10 that introduced gender identity as a factor to take into account when defining ‘particular social group’ by 21 December 2013.<sup>213</sup> By the end of 2014, 22 MSs had transposed the RQD into national law, of which at least five of them, being Greece, Italy, Luxembourg, Portugal and Slovenia, had adopted provisions on gender identity.

Although the RQD foresaw an exception for Ireland and the United Kingdom, which could continue to work with the previous version,<sup>214</sup> gender identity is in both countries recognised as a ground for persecution.<sup>215</sup> Croatia, which was not an EU MS at the time the RQD was adopted, also has national legislation stipulating that gender identity should be taken into consideration when interpreting ‘persecution of a particular group based on a common characteristic’.<sup>216</sup>

## 5. Back to reality

From EU legislation and case law, one would get the idea that the EU is a ‘paradise’ for refugees, that it has nothing but their interests in mind. Unfortunately, appearances are deceptive and in reality, refugees are not welcomed with much enthusiasm. This can be explained by the original motivation for the establishment of the CEAS and the current EU-Turkey deal is an indication that this motivation still influences decisions on refugees today. Secondly, an overview is given of different strategies that are used to avoid giving LGBT\* individuals refugee status.

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<sup>213</sup> Article 40 RQD.

<sup>214</sup> Recital 50 RQD.

<sup>215</sup> For the UK, see the 2006 Refugee or Person in Need of International Protection (Qualification) Regulations, which transposed the QD, and the UK Border Agency’s training manual ‘Gender Identity Issues in the Asylum Claim’. In Ireland, the 2015 International Protection Act copied the exact phrasing on gender identity of Article 10 RQD.

<sup>216</sup> FRA, 2014, p. 101.

## 5.1. The CEAS as a way to keep people out

From the discussion of the birth of the CEAS earlier in this dissertation, it is clear that it was created to achieve the common market with its four freedoms and not for the purpose of implementing the Refugee Convention,<sup>217</sup> protecting human rights or establishing a common asylum policy.<sup>218</sup> This motivation must be kept in mind at all times when reading CEAS documents and explains why decisions are taken on rather than for refugees. While it must be acknowledged that the situation for refugees and asylum-seekers has legally improved with the second phase of the CEAS,<sup>219</sup> more and more efforts are undertaken to prevent these individuals from entering the EU.<sup>220</sup>

The current Joint Action Plan between the EU and Turkey is an example of such an effort. It is a response to the so-called refugee crisis the Union has been experiencing since 2015. Mainly as a consequence of the war in Syria, unseen high numbers of refugees have entered EU territory, predominantly by crossing the Mediterranean Sea from Turkey to Greece.<sup>221</sup> This situation has brought numerous problems with it, to name but a few the high death toll at sea,<sup>222</sup> the inhuman living conditions in refugee camps in the ‘frontline’ MSs<sup>223</sup> and a flourishing human smuggling business.<sup>224</sup> Additionally, it has put pressure on the CEAS as several MSs decided to no longer act in conformity with its regulations.<sup>225</sup>

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<sup>217</sup> Chetail, 2016, p. 4.

<sup>218</sup> Lavenex, 2001, p. 860.

<sup>219</sup> Chetail, 2016, p. 35.

<sup>220</sup> Guild correctly described this contradicting movement in 2006 when she said that refugees gradually became more visible in EU law, yet that they were the “objects of increasing efforts to render them invisible in practice by ensuring they are not physically present.” See Guild, 2006, p. 633.

<sup>221</sup> IOM, 2016, p. 12.

<sup>222</sup> In 2015, 3770 migrants lost their lives when crossing the Mediterranean Sea. See IOM, 2016, p. 14.

<sup>223</sup> Reference is mostly made here to Greece and Italy. See Trauner, 2016, p. 319.

<sup>224</sup> Human smuggling occurs when an individual “‘voluntarily’ travels illegally to the destination country (i.e. has taken the initiative or has given consent to travel)”. van der Leun and Schijndel, 2016, p. 27. According to a report produced by Europol and Interpol more than 90% of the migrants who are coming to the EU are facilitated, mostly by members of a criminal network. It is estimated that the total profit made by human smugglers in 2015 amounts to 5 to 6 billion dollars. See Europol and Interpol, 2016, pp. 6-8.

<sup>225</sup> Trauner, 2016, pp. 319-321.

According to the EU, the Joint Action Plan is put in place to “break the business model of the smugglers and to offer migrants an alternative to putting their lives at risk”.<sup>226</sup> In return for extra funds and a ‘re-energising’ of the accession process to the EU, Turkey agreed to take back all new irregular migrants, so migrants who have not applied for asylum in Greece or whose asylum request has been denied, who have crossed from Turkey into Greek islands. For every Syrian that is amongst those returned migrants, another Syrian will be resettled from Turkey to the EU.<sup>227</sup>

Although the proclaimed motivation for this deal gives us the idea that the EU wants to improve the situation for refugees, many reasons exist that indicate that keeping them out of the EU prevails over their well-being. I will only touch upon a couple of them. First of all, the deal is only beneficial for Syrian refugees and excludes other refugees from this resettlement agreement.<sup>228</sup> Secondly, the agreement is based on the premise that Turkey can be considered as a safe country for those returned. The falseness of this assumption was already proven by reports of many NGOs, by legal experts, UNHCR, the Council of Europe and recently also by a joint research report of the Dutch Council for Refugees and the European Council on Refugees and Exiles.<sup>229</sup> On the 20<sup>th</sup> of May, the Greek appeals committee even decided in a case concerning a Syrian asylum-seeker that Turkey is not a safe country for him, because he does not receive similar rights under the Turkish asylum system as under the Refugee Convention. This could set a precedent and lead to a caseload of appeals in similar cases.<sup>230</sup> And thirdly, the deal

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<sup>226</sup> Council of the European Union, 2016.

<sup>227</sup> *Ibid.*

<sup>228</sup> Collett criticises the deal for not taking into account other refugees from the Middle East who are also in need of international protection, such as Iraqi and Afghan nationals. See Collett, March 2016. UNHCR reminded the EU of other refugee populations around the world and stated that the resettlement of Syrian refugees out of Turkey should not be at their expense. See UNHCR, 2016.

<sup>229</sup> Dutch Council for Refugees and ECRE, 2016. References to documentation and reports produced by the previously mentioned actors are made throughout this research report. Indications that the qualification of Turkey as a safe country is questionable keep emerging. Mid-June, for instance, Syrian human rights activists and watchdogs reported that Syrian refugees, who were trying to enter Turkey to escape the war in Syria, had been shot by Turkish border guards. See Kingsley, 20 May 2016.

<sup>230</sup> Fotiadis, Smith and Kingsley, 20 May 2016 and Stone, 20 May 2016.

violates the prohibition of collective expulsion<sup>231</sup> included in Article 4 of the Fourth Protocol to the ECHR,<sup>232</sup> which the EU is bound by.<sup>233</sup> So clearly, there were and still are plenty of ‘human rights reasons’ not to close and implement this deal. The EU nevertheless seems to be willing to set those aside to safeguard its borders, thereby reducing the protection it promises refugees in its CEAS documents.

## 5.2. Reluctance to provide refugee status to LGBT\* individuals

Whereas the motivation for the CEAS is an aspect that limits the opportunities for all refugees, this section addresses the ways in which access to asylum is sometimes obstructed for LGBT\* individuals in particular. The number of asylum claims made by LGBT\* individuals has increased,<sup>234</sup> hence it is rather logical that national authorities try to ensure that claimants do not abuse the institution of asylum by pretending to have a certain sexual orientation or to be persecuted when that is not the case.<sup>235</sup> Unfortunately, this has and continues to produce many hurdles for LGBT\* individuals when claiming refugee status, even after the RQD and the *X, Y and Z judgment*. States rely on many different alternatives to avoid providing refugee status. It is often refused because a claimant’s country of origin is considered as a safe third country whereby MSs rely on the general human rights situation and do not look at the situation for LGBT\* individuals specifically.<sup>236</sup> Intrusive means have been used to assess the

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<sup>231</sup> HRW, Human Rights Watch Letter to EU Leaders on Refugees, 15 March 2016, <https://www.hrw.org/news/2016/03/15/human-rights-watch-letter-eu-leaders-refugees> (Consulted on 28 May 2016).

<sup>232</sup> Article 4 Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto, 16 September 1963.

<sup>233</sup> Article 6.3 TEU states that the ECHR forms a general principle of Union law. That the EU must respect the fundamental rights codified in the ECHR was also confirmed by the ECJ. See *Pupino* (ECJ, 16 June 2005, No. C-105/03), para. 58.

<sup>234</sup> ILGA (a), 2016, p. 1 and UNHCR, 2008, para. 1.

<sup>235</sup> Spijkerboer, 2014, pp.1218-1219.

<sup>236</sup> Jansen, 2013, p. 10. That LGBTI individuals may still face abuse in countries that are deemed safe and that they can therefore have a legitimate claim for protection, was stressed by the European Parliament in a recent report. See European Parliament, 2016, para. 12.

credibility of LGBT\* applicants,<sup>237</sup> often as a result of heterosexist biases<sup>238</sup> and homophobic prejudice.<sup>239</sup> States have claimed that applicants have an internal flight alternative,<sup>240</sup> meaning that they can receive effective protection in another geographical area in their country of origin,<sup>241</sup> or that they can ask for state protection<sup>242</sup> even though differing sexual orientation and gender identity are criminalised or the State authorities of the country of origin are homo- and transphobic,<sup>243</sup> And lastly, MSs have required individuals to conceal their sexual orientation or to be discreet when expressing it in order to avoid persecution in their country of origin.<sup>244</sup>

When enumerating these alternatives, one gets the impression that this goes further than just protecting the institution of asylum against abuse. The MSs are clearly willing to ignore what is really happening in the countries of origin and are installing high standards in order to escape granting refugee status to these individuals, despite the fact that UNHCR has already refuted all of these options in its Guidelines No. 9. In practice, the situation for LGBT\* asylum-seekers in the EU is therefore not as positive as the regulations and case law suggest. Nevertheless, in theory, LGBT\* persons should be considered as refugees when fleeing persecution and based on this premise, the next chapter of this dissertation will look at the specific problems that these persons are confronted with when they are waiting in EU MSs to receive the international protection which they are, according to EU and national legislation, entitled to.

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<sup>237</sup> FRA, 2014, p. 106 and Spijkerboer, 2014, p. 1219. As an example of such practices, see *A, B and C v. Staatssecretaris van Veiligheid en Justitie* (ECJ, 2 December 2014, Joined cases C-148/13 to C-150/13). For a further reading, see Lewis, “‘Gay? Prove it’”: The politics of queer anti-deportation activism, 2014.

<sup>238</sup> Weßels, 2011, p. 31.

<sup>239</sup> Millbank, 2009, p. 4.

<sup>240</sup> Biekša, 2011, p. 1561 and Weßels, 2011, pp. 28-29.

<sup>241</sup> Wouters, 2013, p. 26.

<sup>242</sup> Biekša, 2011, p. 1561 and Weßels, 2011, pp. 27-28.

<sup>243</sup> Jansen, 2013, p. 13.

<sup>244</sup> Jansen, 2013, p. 3; FRA, 2014, p. 15 and Ku Wei Bin, 2014, pp. 20-37. This ‘discretion reasoning’ was rejected by the ECJ in *X, Y and Z v. Minister voor Immigratie en Asiel* in paras. 65-71.

### **III. Difficulties experienced by LGBT\* asylum-seekers in reception and detention centres**

In this chapter, an outline will be provided of some of the issues that LGBT\* asylum-seekers may be faced with when living in asylum accommodation. This indicates that their struggle does not end when they cross the external borders of the EU. Their battle continues, which is at odds with the positive picture that is painted by the EU legislation discussed in chapter II. The EU appears to be at the forefront of fighting for these individuals' rights and protection. Yet, it is as a matter of fact exactly in reception and detention centres, where these individuals are in facilities that are run by the State and where they are therefore under its care and responsibility, that these persons face a lot of difficulties. Although systems differ across the MSs, I use the term reception or asylum centre for facilities in which asylum-seekers reside while their claim is being processed and where they are allowed to go outside of the centre. Detention centres then refer to asylum structures where asylum-seekers are not permitted to leave the premises. The latter are used in every MS for people who are being sent back to the MS through which they entered EU territory and where, according to the Dublin III Regulation,<sup>245</sup> their asylum request should be processed. Individuals whose asylum claim has been rejected can also be detained before they are involuntarily returned to a safe country outside of the EU or to their country of origin. Moreover, there are EU MSs that detain asylum seekers from the moment they arrive. If detention will be mentioned in this dissertation, it will be in this last scenario. I will also no longer use the term 'refugee', but 'asylum-seeker' since only individuals who have made an asylum claim are housed in asylum accommodation or detention.

In what follows, problems that recurred in most of the analysed documents will be highlighted. As a consequence of the considerable lack of information on the matter,

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<sup>245</sup> European Parliament and Council Regulation 604/2013/EU of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

most of what will be described below, was retrieved from reports produced in the UK, where, over the last decade, the difficulties experienced by LGBT\* asylum-seekers in asylum centres or detention have become a big issue. The information from the UK is nevertheless complemented with some reports and newspaper articles from the Netherlands and Germany.

Naturally, these documents can hardly be considered conclusive evidence that the situation in other EU MSs is similar to that in the UK. For one, the UK is the only EU MS that holds migrants in detention centres while their asylum claims are being dealt with, without there being a maximum time limit.<sup>246</sup> This can of course be expected to complicate the situation even more. Nonetheless, these documents can be regarded as indicative, as research identified the same difficulties as those that will be cited below in Turkey<sup>247</sup> and the United States.<sup>248</sup> As for the EU, these were also flagged up by FRA in 2009 in its report about the situation of LGBTI people in the EU.<sup>249</sup> Furthermore, in 2011, Jansen and Spijkerboer conducted a study on how LGBTI asylum claims were examined across Europe.<sup>250</sup> It includes a very short passage on the reception of LGBTI individuals in which again, the same problems came up as in the documents of the UK. That the issues faced by LGBT\* individuals in asylum centres are a global phenomenon is lastly underscored by the soft law documents that UNHCR has issued on the matter which will be discussed in the next chapter.

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<sup>246</sup> This situation was recently brought before the ECtHR in the case of *J.N. v. The United Kingdom* (ECtHR, 19 May 2016, No. 37289/12), in which the Court did not find this situation to be in breach of Article 5. For a further reading, see Costello, 'Immigration Detention: The Grounds Beneath Our Feet', 2015.

<sup>247</sup> Helsinki Citizens' Assembly-Turkey, Refugee Advocacy and Support Program and ORAM, 2011, p. 17.

<sup>248</sup> Tabak and Levitan, 2014, pp. 25-42.

<sup>249</sup> FRA, 2009, pp. 99-100.

<sup>250</sup> They addressed every EU MS, but the experts of Estonia, Latvia and Luxemburg were unable to report on LGBTI applicants. Norway, which is not an EU MS, but does participate in the CEAS in some ways, is also included in the research. Jansen and Spijkerboer, 2011, p. 16.

## 1. Different types of violence

A first observation from the reports and studies on the matter is that LGBT\* individuals are often confronted with a high amount of violence in reception and detention centres. This can either be physical violence, sexual abuse or psychological violence. Some recurring complaints will be described and a few testimonies will be included.

### 1.1. Psychological violence

*“I will rape and fuck you to death and make sure I kill you if they ever allow you to stay a night in my cell.”<sup>251</sup>*

*“One of the guards called me a poof and there were Jamaicans who kept hurling abuse at some Iranian guys – calling them batty men.”<sup>252</sup>*

*“You would have somebody threatening to beat you up. You would just have to walk away.”<sup>253</sup>*

Reports and newspaper articles on the situation in Germany, the UK and the Netherlands indicate that LGBT\* asylum-seekers have been confronted with different forms of psychological violence. A lot of them are called names,<sup>254</sup> laughed at<sup>255</sup> or bullied in another way.<sup>256</sup> They are often threatened<sup>257</sup> with physical violence<sup>258</sup> or that they will be turned over to the government of their country of origin upon deportation.<sup>259</sup> Blackmail also occurs in the sense that others threaten to disclose their sexual orientation if they refuse to do something for them.<sup>260</sup>

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<sup>251</sup> Verbal threat made to a homosexual asylum-seeker. Stuart, 2013, p. 46.

<sup>252</sup> Testimony of Johnson, an Ugandan asylum-seeker. Stonewall, 2010, p. 13.

<sup>253</sup> Testimony of Aderonke Apata. Strudwick, 23 June 2015.

<sup>254</sup> College voor de Rechten van de Mens, 2016, p. 6; Luit, 2015, p. 12; Metropolitan Support Trust, 2009, pp. 23-24; Mis, 22 January 2016; Stonewall, 2010, p. 12; Strudwick, 23 June 2015; Stuart, 2013, p. 46; UKLGIG, 2015, p. 7 and X, 22 October 2015.

<sup>255</sup> COC Nederland, 2015; Luit, 2015, p. 10 and UKLGIG, 2015, p. 8.

<sup>256</sup> College voor de Rechten van de Mens, 2016, p. 6; ILGA, 2014, p. 47; Luit, 2013, p. 10 and UKLGIG, 2015, p. 13.

<sup>257</sup> Mis, 22 January 2016.

<sup>258</sup> Bryant, 29 October 2014; COC Nederland, 2015; College voor de Rechten van de Mens, 2016, p. 6; Stuart, 2013, p. 46 and UKLGIG, 2015, pp. 2 and 7.

<sup>259</sup> Strudwick, 23 June 2015.

<sup>260</sup> Metropolitan Support Trust, 2009, p. 35.



## 1.2. Physical violence

*“I feel very unsafe. In the first AZC [asylum centre] somebody tried to kill me. He threw a bike at me and I had a bleeding in my eye.”<sup>261</sup>*

*“There were always fights – they would provoke them and the guys would try to fight back. Eventually the gay guys had to be taken out. So it was very scary.”<sup>262</sup>*

In the EU, LGBT\* asylum-seekers have also been the victim of physical violence in immigration detention.<sup>263</sup> Metropolitan Support Trust and UKLGIG have testimonies of LGBT\* individuals being involved in fights with heterosexual men that were provoked by the latter.<sup>264</sup> In the Netherlands, LGBT\* asylum-seekers complained of being spat at in asylum accommodation, of fellow asylum-seekers throwing stones at them, of being pushed and there was even one individual who survived a murder attempt in which someone tried to kill her by smashing a bike into her head.<sup>265</sup> In Germany, a homosexual asylum-seeker was pulled out of a refugee centre because a co-resident had stuck pieces of paper between his toes while he was sleeping and lit them on fire.<sup>266</sup>

## 1.3. Sexual violence

*“They touch your bum, your cheeks, they would grab my hand and try to put it toward their cock. [...] It was the most horrible experience of my life. People just saw you as a sex toy. They [detainees] are kept inside, many for more than six months, and are desperate to have sex with anyone. I was an easy target”<sup>267</sup>*

LGBT\* asylum-seekers can fall victim to sexual violence as well.<sup>268</sup> Concrete examples can be found in documents about Germany<sup>269</sup> and the UK.<sup>270</sup>

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<sup>261</sup> Testimony of a lesbian asylum-seeker about her stay in a Dutch asylum centre. See Luit, 2013, p. 10.

<sup>262</sup> Stonewall, 2010, p. 13.

<sup>263</sup> Jansen and Spijkerboer, 2011, p. 78; Mis, 22 January 2016 and UKLGIG, 2015, p. 5.

<sup>264</sup> Metropolitan Support Trust, 2009, p. 24 and UKLGIG, 2015, p. 7.

<sup>265</sup> Luit, 2013, p. 10.

<sup>266</sup> Faiola, 24 October 2015.

<sup>267</sup> Testimony of a Pakistani gay asylum-seeker. Strudwick, 23 June 2015.

<sup>268</sup> Jansen and Spijkerboer, 2011, p. 78.

<sup>269</sup> Faiola, 24 October 2015 and Mis, 22 January 2016.

## 2. Mental health

*“I went into survival mode. There was a lot of disassociation I had to do that I didn’t realise I was doing until the process hit me afterwards.”<sup>271</sup>*

*“I was so scared and kept to my cell so much so that I avoided meals at the common dining area and my bath in the common bathroom. I only ventured out when it was very necessary like when I had friends or legal visit. [...] I was re-living all the terrible experiences I had been through in my country and would have committed suicide in that brief period if I had the means and the strength to do that.”<sup>272</sup>*

As a second point, it came across from the British and Dutch documents that LGBT\* individuals can suffer from mental health problems as a consequence of the different kinds of harassment and/or violence they endured in immigration accommodation or detention. Many of them self-isolate<sup>273</sup> and try to avoid the assaults by staying in their rooms.<sup>274</sup> They may lose their self-confidence<sup>275</sup> and have trouble sleeping and/or nightmares.<sup>276</sup> They “go back into the closet”<sup>277</sup> and keep their sexual orientation to themselves in order to stay out of trouble.<sup>278</sup> As a result, some of these individuals feel anxious,<sup>279</sup> depressed<sup>280</sup> or even have suicidal thoughts.<sup>281</sup>

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<sup>270</sup> Bryant, 29 October 2014; Faiola, 24 October 2015; Mis, 22 January 2016; Strudwick, 23 June 2015 and UKLGIG 2015, pp. 5 and 8.

<sup>271</sup> Testimony of a Jamaican lesbian asylum-seeker. Strudwick, 23 June 2015.

<sup>272</sup> Testimony of a homosexual asylum-seeker. Stuart, 2013, p. 46.

<sup>273</sup> Tabak and Levitan, 2013, p. 47 and UKLGIG, 2015, p. 5.

<sup>274</sup> COC Nederland, 2015, p. 6; Luit, 2013, p. 10; Strudwick, 23 June 2015; Stuart, 2013, p. 46 and UKLGIG, 2015, p. 8.

<sup>275</sup> Strudwick, 23 June 2015.

<sup>276</sup> College voor de Rechten van de Mens, 2016, p. 6; Luit, 2013, p. 10 and Strudwick, 23 June 2015.

<sup>277</sup> Strudwick, 23 June 2015.

<sup>278</sup> ILGA, 2014, p. 47; Luit, 2013, p. 10; Metropolitan Support Trust, 2009, p. 31 and Strudwick, 23 June 2015.

<sup>279</sup> Metropolitan Support Trust, 2009, p. 41.

<sup>280</sup> Bryant, 29 October 2014; COC Nederland, 2015, p. 6; Metropolitan Support Trust, 2009, p. 41; Strudwick, 23 June 2015 and UKLGIG, 2015, p. 2.

<sup>281</sup> Metropolitan Support Trust, 2009, p. 42.

### 3. Access to health care

In the UK, concerns have also been raised about the situation for transgender individuals who have decided to alter their body through hormone therapy and/or medical procedures to have it match their gender identity.<sup>282</sup> UKLGIG and Trans Health Action criticise the fact that there are no immigration detention protocols that explicitly mandate that these asylum-seekers should receive the necessary hormones and/or other transition related healthcare.<sup>283</sup> This is left to the discretion of the healthcare team at the centre where the individual is detained.<sup>284</sup> As a result, there is no certainty and these individuals might be denied the necessary healthcare.

Not providing these individuals with the necessary medication can have serious consequences. Physically, it can lead to the development of prominent facial hair, spontaneous erections and breast development reversal.<sup>285</sup> It can also lead to osteoporosis in transsexual men and permanent baldness in transsexual women.<sup>286</sup> A lack of hormones can have mental repercussions as well. The individual can experience depression, moodiness and some might resort to suicide or castrate themselves in order to get rid of the testosterone.<sup>287</sup>

### 4. Factors that enhance the risks for LGBT\* asylum-seekers

Many of the documents indicate that there can be several circumstantial factors that can render LGBT\* asylum-seekers more vulnerable for the described types of violence and mental state.

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<sup>282</sup> These individuals are often called transsexuals.

<sup>283</sup> Action for Trans Health, 2015 and UKLGIG, 2015, p. 10.

<sup>284</sup> Immigration and Border Policy Directorate, Detention Services Order 11/2012 on the Care and Management of Transsexual Detainees, 25 June 2015.

<sup>285</sup> Carcamo, 25 May 2011.

<sup>286</sup> Castagnoli, 2010, footnote 27.

<sup>287</sup> Carcamo, 25 May 2011.

#### 4.1. Detained/housed together with individuals from their country/region of origin

*“Despite the fact that I had fled my country to avoid persecution from my country men, I was being exposed to the same people and other more homophobic individuals in detention.”<sup>288</sup>*

An element that many LGBT\* individuals named as problematic during their stay at immigration accommodation, was the fact that they were housed together with people from their country or region of origin. These individuals often represent exactly the homo- or transphobic environment that they tried to escape by fleeing that territory.<sup>289</sup> Research has indeed indicated that the harassment and violence LGBT\* individuals experience in asylum accommodation is mostly inflicted upon them by people from their own country.<sup>290</sup>

#### 4.2. Lack of support

*“Yes, they called me batty man, my parents gave me up when I was about 12-13 years to someone else because they realised I was gay.”<sup>291</sup>*

*“My elder brother used to send me emails saying, ‘You’re a sinner, you’ll get HIV as a punishment from God, and if you don’t get HIV I will kill you because you [bring] shame on the family and shame on being a Muslim.’”<sup>292</sup>*

*“I have nothing to do with them. I don’t mix with people from my country. Basically because of my sexuality I don’t want to mix. I don’t know how they would react but I don’t even want to try because I know back home how they react so I don’t want to mix with them.”<sup>293</sup>*

Another factor that enhances the danger of being harassed or assaulted is that LGBT\* asylum-seekers can often not rely on their family or people with the same ethnicity or nationality.<sup>294</sup> This is a consequence of the fact that they grew up in a country where as a

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<sup>288</sup> Testimony of a homosexual asylum-seeker. Stuart, 2013, p. 46.

<sup>289</sup> ILGA, 2014, p. 47; Stonewall, 2010, p. 12; Stuart, 2013, p. 46 and UKLGIG, 2015, p. 8.

<sup>290</sup> Jansen and Spijkerboer, 2011, p. 78.

<sup>291</sup> Testimony of a Jamaican gay man. Metropolitan Support Trust, 2009, p. 43.

<sup>292</sup> Testimony of a Pakistani gay asylum-seeker. Strudwick, 23 June 2015.

<sup>293</sup> Testimony of a Congolese gay asylum-seeker. Metropolitan Support Trust, 2009, p. 44.

<sup>294</sup> ILGA, 2014, p. 47 and Metropolitan Support Trust, 2009, p. 31.

person with a differing sexual orientation or gender identity, you are discriminated against or your lifestyle is criminalised. As a result, they either lost the support of their family because they were abandoned by them when they came out, since they ‘brought shame upon the family’, or because the fear of coming out to them was precisely why they decided to flee.<sup>295</sup> Additionally, LGBT\* asylum-seekers find themselves socially excluded from their fellow nationals. These persons, as indicated above, are usually the most hostile towards LGBT\* people. The latter are therefore cast out by them or they self-isolate in order to prevent being harmed.<sup>296</sup>

### 4.3. Homo- and/or transphobic staff

*“The very first day, at check-in, I was wearing bangles and the officer said to me, ‘Take off your bangles,’ and laughed. He started checking my bag and when he found lipstick, foundation and an eyebrow pencil he was showing it to another officer and to everyone, saying, ‘Oh, this is a nice thing!’ to humiliate me.”<sup>297</sup>*

As LGBT\* asylum-seekers seem to be more isolated than other asylum-seekers, one can imagine that it is crucial for them to be able to rely on the staff of the migration accommodation they are staying at. Complaints have nonetheless been made about that. Apparently, staff members do not always react in a sensitive manner when incidents are reported<sup>298</sup> or they do not act upon them.<sup>299</sup> On some occasions, staff members have even participated in the harassment<sup>300</sup> or violence.<sup>301</sup>

### 4.4. The refugee crisis

Lastly the situation of LGBT\* asylum-seekers is influenced by the current refugee crisis. Where the analysed documents predominantly focus on LGBT\* individuals who

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<sup>295</sup> Metropolitan Support Trust, 2009, p. 43.

<sup>296</sup> *Ibid.*, p. 44.

<sup>297</sup> Testimony of a Pakistani homosexual asylum-seeker. Strudwick, 23 June 2015.

<sup>298</sup> COC Nederland, 2015, p. 2 and Metropolitan Support Trust, 2009, p. 24.

<sup>299</sup> Luit, 2011, p. 10; Strudwick, 23 June 2015 and Stuart, 2013, p. 46.

<sup>300</sup> Strudwick, 23 June 2015.

<sup>301</sup> Jansen en Spijkerboer, 2011, p. 78 and Strudwick, 23 June 2015.

have fled their home country in order to escape persecution and discrimination directed against them because of their sexual orientation, the current conflict in the Middle East has slightly adapted that picture. Although this will have occurred in the past too, nowadays there are more LGBT\* individuals coming to the EU to escape a general climate of war and violence rather than sexual orientation-based persecution.<sup>302</sup> It is therefore more likely that incidents like those that have been described above will happen, as there will be more LGBT\* individuals in migration centres. And even when we disregard the growing number of LGBT\* asylum-seekers, the refugee crisis *an sich* has put a lot of pressure on the MSs and affected the quality of reception facilities.<sup>303</sup> It is therefore not unreasonable to assume that providing shelter has become the first priority of the MSs and not the protection of LGBT\* individuals in these centres.

## 5. Translating the experiences of LGBT\* asylum-seekers into human rights

The difficulties faced by LGBT\* asylum-seekers in reception and detention centres can be brought under several provisions of human rights instruments that are applicable in the EU and can be linked to case law of the ECtHR. Their experiences could thus possibly constitute human rights violations and this in two regards. In international human rights law, over the years, a doctrine of positive and negative human rights obligations has been developed. Negative obligations entail that States have an obligation to respect human rights and must refrain from interfering with their exercise by individuals. The positive obligations are sometimes called obligations to protect and fulfil, which require States to take action in order to ensure the protection of these rights.<sup>304</sup> Since LGBT\* asylum-seekers can experience problems which are caused by either State actors, private actors or both, these two types of obligations can be involved in the following discussion.

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<sup>302</sup> Faiola, 24 October 2015.

<sup>303</sup> Guild, Costello, Garlick and Moreno-Lax, 2015, p. 2 and Kegels, 2016, pp. 1-2.

<sup>304</sup> Shelton and Gould, 2013, p. 566.

To start with, the violence that LGBT\* asylum-seekers have complained of can fall within the scope of the prohibition of inhuman or degrading treatment. Provisions on this prohibition can be found in Article 7 of the International Covenant on Civil and Political Rights (ICCPR),<sup>305</sup> Article 16 of the Convention against Torture,<sup>306</sup> Article 3 of the ECHR and Article 4 CFR. Where reception and detention facilities are run by the State and an LGBT\* asylum-seeker has been harassed by members of the staff, it could be argued that this touches upon the negative obligation of a State not to interfere with the right not to be treated in an inhuman or degrading manner. This was illustrated in *M.S.S. v. Belgium and Greece*, where the fact that the police had subjected the applicant to brutality and insults during his stay in an asylum detention centre was taken into account to conclude that Article 3 ECHR had been violated.<sup>307</sup>

When the violence is inflicted by fellow asylum-seekers or by staff members of private facilities, the positive obligations of the State come into play, meaning that it should take measures in order to prevent this right from being violated by private actors. This was confirmed in *Stasi v. France*,<sup>308</sup> a case before the ECtHR, concerning a homosexual prisoner who had been the victim of violence and bullying by fellow inmates. The link between this judgment and reception or detention facilities, is the fact that both prisoners and asylum-seekers live in situations that are overwhelmingly controlled by the State,<sup>309</sup> making them “wholly dependent on State support”.<sup>310</sup> This is the reason both prisoners and asylum-seekers have been qualified as vulnerable persons, whom the States must grant special protection.<sup>311</sup>

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<sup>305</sup> International Covenant on Civil and Political Rights, 16 December 1966.

<sup>306</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984.

<sup>307</sup> *M.S.S. v. Belgium and Greece* (ECtHR, 21 January 2011, No. 0696/09), paras. 227 and 233.

<sup>308</sup> *Stasi v. France* (ECtHR, 20 October 2011, No. 25001/07), para. 77.

<sup>309</sup> Judge Sajó mentioned the fact that a State that tolerates prisoners abusing their fellow inmates might be found responsible under Article 3 ECHR in his opinion in *M.S.S. v. Belgium and Greece*, thereby indicating that the situations in asylum detention and prison facilities are comparable.

<sup>310</sup> *M.S.S. v. Belgium and Greece*, para. 253.

<sup>311</sup> For prisoners and detainees, see *Denis Vasilyev v. Russia* (ECtHR, 17 December 2009, No. 32704/04), para. 115. For asylum-seekers, see *M.S.S. v. Belgium and Greece*, para. 47.

The prohibition of inhuman and degrading treatment under the ECHR also contains a procedural obligation, which implies that the authorities must conduct an effective official investigation into the alleged ill-treatment, regardless of whether it was inflicted by public or private individuals.<sup>312</sup> They thereby have a duty to uncover possible discriminatory motives. The Court nevertheless understands that this is a difficult task and it therefore suffices if the State uses its best endeavours to fulfil this task.<sup>313</sup>

Apart from having an obligation to investigate whether the treatment was based on discriminatory motives, the procedural obligation itself cannot be corrupted with discrimination either. The ECtHR has already established that when an LGBT\* individual is subjected to a measure which adoption was inspired by a discriminatory motivation, this can lead to a violation of the non-discrimination principle of Article 14 ECHR in combination with Article 3 ECHR.<sup>314</sup> From this, it can be deduced that a decision not to investigate a matter because of one's sexual orientation and/or gender identity, could also constitute a violation of the non-discrimination principle of Article 14. Staff members of reception or detention facilities should therefore take complaints of violence that are communicated to them by LGBT\* asylum-seekers seriously and should not allow their possibly negative attitude towards these individuals to stand in the way of dealing with their claims in an appropriate manner. Other non-discrimination provisions, like Articles 2 and 26 of the ICCPR and Article 21 CFR could also be relied on in this regard.

Secondly, the lack of medical health care for the mental health problems LGBT\* asylum-seekers often experience or for the hormone therapy or other gender reassignment procedures, could be brought under Article 12.1 of the International Covenant on Economic, Social and Cultural Rights,<sup>315</sup> which contains the right to the enjoyment of the highest attainable standard of physical and mental health.<sup>316</sup> It can

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<sup>312</sup> *M.C. and A.C. v. Romania*, (ECtHR, 12 April 2016, No. 12060/12), para. 110.

<sup>313</sup> *Ibid.*, para. 113.

<sup>314</sup> *X v. Turkey* (ECtHR, 9 October 2012, No. 24626/09), para. 57.

<sup>315</sup> International Covenant on Economic, Social and Cultural Rights, 16 December 1966.

<sup>316</sup> *Ibid.*, p. 38 and 41.



similarly be linked to the right to physical and mental integrity of Article 3 CFR. For transgender asylum-seekers in particular, case law of the ECtHR could be invoked as well, since the Court considers the freedom to define oneself as female or male as “one of the most basic essentials of self-determination”<sup>317</sup> which falls under the right to private life, codified in Article 8 ECHR. States must therefore not only abstain from arbitrarily interfering with this freedom, like denying access to gender reassignment surgery for a number of years<sup>318</sup> or requiring from the transgender individual to prove that medical treatment is necessary,<sup>319</sup> but additionally have positive obligations, which may involve the adoption of measures that secure respect for this aspect of one’s private life.<sup>320</sup> Because the rights enshrined in the ECHR must be secured to everyone within the jurisdiction of the Member States to the Convention,<sup>321</sup> this case law is applicable to transgender asylum-seekers and refugees and denying them access to the necessary therapy or surgery could therefore constitute a violation of Article 8 ECHR.<sup>322</sup>

Lastly, questions can be posed with regard to the right to human dignity of these LGBT\* asylum-seekers. Article 10.1 ICCPR obliges States to treat all persons who are deprived of their liberty with humanity and with respect for the inherent dignity of the human person. This could be applied to the situations in asylum detention. Article 1 CFR is more general and states that human dignity is inviolable and must be respected and protected.

Because MSs that do not take measures to remedy the current situation might be held responsible under international human rights law, in the next chapter, I will investigate

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<sup>317</sup> *Van Kück v. Germany* (ECtHR, 12 June 2003, No. 35968/97), para. 73.

<sup>318</sup> *Y.Y. v. Turkey* (ECtHR, 10 March 2015, No. 14793/08), para. 122.

<sup>319</sup> *Ibid.*, para. 82.

<sup>320</sup> *Ibid.*, para. 70.

<sup>321</sup> Article 1 ECHR.

<sup>322</sup> In this regard, an application is pending of a transsexual individual who has been imprisoned and complains of the fact that the authorities refuse to bear the costs of his gender reassignment, even though he can provide medical evidence that shows that he urgently needs this treatment. If the ECtHR would decide that these costs must indeed be carried by the State, this could become an important judgment for asylum-seekers to rely on, as it was earlier established that the Court considers the context of asylum accommodation and prisons as similar situations. See *D.Ç. v. Turkey* (ECtHR, still pending, No. 10684/13).

whether they can find guidance on how to deal with these issues in UNHCR documents and whether EU legislation could provide a solution.

## **IV. Guidance offered to and obligations of Member States with regard to LGBT\* asylum-seekers in reception and detention facilities**

The previous chapter has indicated that LGBT\* asylum-seekers can be confronted with many difficulties while awaiting an asylum decision. This chapter will therefore explore whether UNHCR and the EU provide any kind of guidance or regulations on how to deal with these types of problems so MSs could prevent possible human rights violations. Even if the MSs are not enthusiastic to respect human rights and do not adopt a policy on this matter, staff members in asylum accommodation could employ the available materials to ameliorate the situation or LGBT\* or refugee activists could build arguments upon them to put pressure on the MS.

### **1. The protection of LGBT\* refugees by UNCHR**

#### **1.1. Violence against LGBT\* refugees as sexual and gender-based violence**

Since it was not until fourteen years ago that UNHCR started to provide guidance on the interpretation of the refugee definition as also encompassing LGBT\* individuals,<sup>323</sup> it is not surprising that documents on other issues pertaining to these persons in forced displacement are very recent.

In fact, still in 2008, UNHCR was criticised in a report of the Policy Development and Evaluation Service,<sup>324</sup> which evaluated the efforts UNHCR had until that moment undertaken to prevent and respond to sexual and gender-based violence (SGBV) in situations of forced displacement. It stated that the focus of UNHCR's programmes in this domain was usually on sexual violence against women and that it was a serious problem that no appropriate guiding policy existed on how to address and respond to

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<sup>323</sup> See footnote 113.

<sup>324</sup> UNHCR Policy Development and Evaluation Service, October 2008.

SGBV against LGBT people of concern.<sup>325</sup> According to the authors, this reflected the inequality of the situation LGBT persons find themselves in as compared to heterosexual people of concern.<sup>326</sup> They discovered that especially sexual abuse of boys and men was on many occasions neglected, under-reported or hardly addressed by UNHCR's programmes, which was possibly caused by cultural norms that create a taboo around homosexuality and this even amongst humanitarian workers.<sup>327</sup> The authors concluded that prevention or response programmes for LGBT survivors of SGBV were practically non-existent in most of UNHCR's operations.<sup>328</sup> The organisation was therefore advised to install a policy explicitly recognising the needs of LGBT individuals and to incorporate these into the policy, strategies and guidelines that already existed. To deal with the high amount of stigmatisation, awareness-raising activities should be a priority in host and refugee communities as well as among UNHCR staff. Guidelines needed to be amended to explain in more detail the problems associated with SGBV against LGBT and the staff of UNHCR and of the implementing partners on the ground had to be trained in order to actively engage in this matter. Additionally, all training courses, safety planning, intervention and prevention activities had to include the specific problems that are related to SGBV against LGBT.<sup>329</sup>

## 1.2. Difficulties experienced by LGBT\* asylum-seekers and refugees as a separate issue

In 2010 then, attention was drawn to the situation of LGBT\* asylum-seekers and refugees in the discussion paper that was prepared for the UNHCR Roundtable on Asylum-Seekers and Refugees Seeking Protection on Account of their Sexual Orientation and Gender Identity, which was discussed in chapter II as well.<sup>330</sup> A whole section was devoted to the detention and physical security of LGBTI asylum-seekers

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<sup>325</sup> *Ibid.*, p. 2.

<sup>326</sup> *Ibid.*, p. 22.

<sup>327</sup> *Ibid.*

<sup>328</sup> *ibid.*, p. 23.

<sup>329</sup> *Ibid.*, p. 25.

<sup>330</sup> UNHCR Division of International Protection, 2010. The information provided in this report was gathered through questionnaires completed by NGOs, academics, legal practitioners and other individuals with experience in the legal and operational side of the refugee protection regime. In the document, they are referred to as 'the respondents'. See paragraph 4.

and refugees, showing that the issue was now clearly seen as a distinct matter of concern. The report acknowledged that detaining these individuals in countries of transit or asylum increased the risk of sexual assault and other forms of abuse.<sup>331</sup> Analysis of literature<sup>332</sup> and the input of the respondents indicated that the physical safety of LGBTI persons during the asylum process was indeed one of the most prevalent protection issues. The report raised the lack of sufficient police protection of these individuals in predominantly countries where same sex relations are criminalised. Abuse is often not reported to the authorities because the LGBTI victims are afraid of possible revenge by the perpetrators or believe that the police will not act upon it, will abuse them too or arrest and detain them. Because of this, they feel isolated, which highlights the multiple discrimination this population faces.<sup>333</sup> According to the discussion paper, the security issues occur in both urban settings and in camps. The question therefore arose whether special housing arrangements should be made for LGBTI asylum-seekers and refugees. Reducing the waiting times for the completion of the asylum process could also improve the situation, as some respondents found that these were long and aggravated the security issues and multiple discrimination this group of asylum-seekers and refugees is confronted with. They therefore urged UNHCR to speed up its processes and to apply the existing procedures from the moment of registration and in a better way, so asylum-seekers at greatest risk can be identified and their claim can be processed more quickly. Lastly, the discussion paper stressed the important role of NGOs to prepare case files and to refer individuals to UNHCR and other actors for protection and assistance.<sup>334</sup>

Equally relevant are the findings on staff attitudes. Numerous respondents suggested that NGOs and other service providers in host countries are sometimes reluctant to aide LGBTI asylum-seekers and refugees. Different explanations were given: NGOs might

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<sup>331</sup> *Ibid.*, p. 10.

<sup>332</sup> The report explicitly refers to the Unsafe Haven report of 2009, a joint publication of the Helsinki Citizens' Assembly-Turkey, Refugee Advocacy and Support Program and ORAM. I mentioned the updated version of this report earlier when arguing that similar problems to those experienced by LGBT\* individuals in detention in the UK have occurred in Turkey. See footnote 247.

<sup>333</sup> UNHCR Division of International Protection, 2010, p. 11.

<sup>334</sup> *Ibid.*, p. 11.

have a conservative mind-set, there can be a lack of understanding of sexual orientation and gender identity-related issues or the front line or country staff of organisations that do have a policy on assisting LGBTI persons might be prejudiced and unwelcoming. When staff members do want to help these people, their options are sometimes limited because the country they are working in has criminal laws targeting LGBTI. Respondents also noted negative attitudes towards LGBTI and/or a lack of understanding of the dynamics and risks connected to individuals making sexual orientation or gender identity-based refugee claims. To remedy this within its own organisation, UNHCR was already taking steps to mainstream LGBTI issues into its existing policy and procedures in this field.<sup>335</sup>

To conclude on this issue, the summary observations stated that additional steps needed to be taken to remedy the protection challenges that asylum-seekers face while waiting for a decision on their asylum claim. It was found necessary to provide policy and practical guidance for staff and to support additional training and education that takes into account sexual orientation and gender identity-related claims.<sup>336</sup>

The expert roundtable took place a week later and reiterated many aspects of the discussion paper in its summary conclusions. The experts brought forward the Age, Gender and Diversity Mainstreaming approach, and in particular its diversity element, as a possible tool to reach out to LGBTI individuals and enhance their protection.<sup>337</sup> As a follow-up on the criticism UNHCR received in the report of the Policy Development

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<sup>335</sup> UNHCR was at the time updating its Age, Gender and Diversity strategy to reflect LGBTI persons under the 'diversity' component. More information on this strategy will be provided below and a reference can be found in footnote 346.

The Heightened Risk Identification Tool (HRIT) already addressed LGBTI refugees back then. According to the HRIT User Guide, this tool was developed "to enhance UNHCR's effectiveness in identifying refugees at risk by linking community-based/participatory assessments with individual assessment methodologies." It was designed to be used by UNHCR staff that is involved in community services and/or protection activities and by partner agencies. Basically, the HRIT explains to staff members of UNHCR and partner agencies how they can conduct interviews or use checklists to identify refugees at risk, determine the urgency and type of intervention that is required and what kind of follow-up is appropriate. The HRIT User Guide and the HRIT itself can respectively be found at <http://www.refworld.org/cgi-bin/tehis/vtx/rwmain?docid=46f7c0cd2> and <http://www.refworld.org/docid/4c46c6860.html> (Both consulted on 2 June 2016).

<sup>336</sup> UNHCR Division of International Protection, 2010, p. 16.

<sup>337</sup> For a reference, see footnote 346.

and Evaluation Service, the summary conclusions explicitly stated that violence against LGBTI persons can be considered a form of SGBV. Measures to effectively prevent this from happening and response mechanisms were thus called for, both with regard to LGBTI individuals specifically, yet also as part of the broader efforts undertaken by UNHCR to mainstream and elevate gender issues.<sup>338</sup>

Additionally, a separate section was dedicated to the protection of LGBTI asylum-seekers and refugees in the cycle of displacement in which the experts raised different challenges. It firstly called for the development of effective ways to protect LGBTI from the risks they face during the cycle of displacement, among which the high rate of physical and sexual abuse in detention.<sup>339</sup> Secondly, in order to ensure that accommodation for these individuals is safe and appropriate, an important initiative, if doable, would be to allow LGBTI asylum-seekers or refugees to choose where to stay. Scattered site housing was considered better than safe houses as the latter can become unsafe when it is known that LGBTI persons are housed there. Best practices outside the asylum context could provide answers for the situation of transgender individuals, for whom it can be difficult to find the appropriate accommodation when housing is gender-segregated. Lastly, the development and implementation of culturally appropriate field training programmes for staff members of UNHCR, States and NGOs was urged for, to deal with the bias that often exists towards LGBTI persons in operations. This way, specific programmes could be developed to tackle the needs of these individuals. Partnerships with UNHCR and local human rights groups, among which groups that are working with LGBTI, could help to extend the services to LGBTI asylum-seekers and refugees and to support community-based protection.<sup>340</sup>

### 1.3. UNCHR tools to address the issue

In the following year of 2011, UNHCR issued a guidance note on ‘Working with lesbian, gay, bisexual, transgender & intersex persons in forced displacement’. This

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<sup>338</sup> UNHCR (c), 2010, p. 2.

<sup>339</sup> *Ibid.*, p. 4.

<sup>340</sup> *Ibid.*, p. 5.

note was already touched upon briefly in chapter II, though its relevance lies mostly in the directions it provides to UNHCR staff to ensure that the rights of LGBTI refugees<sup>341</sup> are respected during forced displacement.<sup>342</sup> The note acknowledges that LGBTI persons can still suffer harm while in transit or after they arrived in a country of asylum. Since many of them try to avoid further abuse by hiding their sexual orientation or gender identity, it is difficult for UNHCR to identify these individuals and give them the specific assistance that may be required. The note lists a few types of specific assistance, amongst which particular reception or care arrangements, protection from physical harm or sexual violence in detention, medical care (like gender affirming hormone treatment/surgery or HIV-related treatment), specific protection actions, safe housing and other social services, such as psychosocial support.<sup>343</sup>

Because LGBTI asylum-seekers and refugees often hide their true identity, the note also contains guidance on how to create a safe identification and registration environment. This should help the staff to gain their trust and confidence. For this task, they should work together with NGOs and other civil society organisations in the field of LGBTI rights. These actors can help identify LGBTI refugees so staff members can reach out to those in need of assistance. Other things that might help to reach out to them are to put up posters that are addressed to them in reception areas, to hold separate meetings and to offer information in locations that are considered safe by these individuals. The note does stress that, regardless of what initiative is taken to accomplish this goal, the privacy of these persons must be respected at all times so the risks they are already confronted with do not increase.<sup>344</sup>

In another section, the physical security of LGBTI refugees is dealt with. This almost completely repeats the findings of the expert roundtable. It tackles the unwillingness of authorities to help them, the security issues that exist in both urban and camp

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<sup>341</sup> The focus of the note is on refugees, yet, depending on the context, it can also be applied to asylum-seekers.

<sup>342</sup> UNHCR (b), 2011, p. 2.

<sup>343</sup> *Ibid.*, p. 4.

<sup>344</sup> *Ibid.*, p. 9.



environments and the problems that sex-segregated housing may cause. Lastly, the note again confirms that violence against LGBTI can constitute SGBV and that this type of violence enhances the vulnerability of this group to HIV/AIDS.<sup>345</sup>

In that same year of 2011, UNHCR also distributed a new version of its Age, Gender and Diversity Policy (AGD).<sup>346</sup> This is an approach that UNHCR wants to see systematically applied in its operations worldwide in order to guarantee that every person of concern can enjoy his rights on an equal footing and can participate fully in the decisions that are taken about him, his family and his community.<sup>347</sup> Multi-Functional Teams<sup>348</sup> visit refugee camps, reception centres, detention facilities and private homes to listen to the asylum-seekers and refugees individually and in focus groups. That way, these individuals get the opportunity to report their needs and problems and it gives them the chance to propose practical solutions. As recommended by the discussion paper of 2010, the updated version lists sexual orientation and gender identity as aspects of the diversity component. It states that UNHCR staff must recognise, understand and value these aspects in every specific context and operation so protection can be ensured for everyone.<sup>349</sup> LGBTI are next discussed in a separate paragraph that again notes the vulnerability of these individuals in forced displacement. It points to the often virulent nature of the discrimination they encounter, their isolation and marginalisation and the serious harm that is sometimes inflicted upon them. The AGD document therefore finds their participation central to maximising their protection, to make sure they have access to their rights and it thinks they can positively contribute to community life.<sup>350</sup>

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<sup>345</sup> *Ibid.*, p. 10.

<sup>346</sup> The AGD approach was introduced in 2004 and for the first time applied in 2005 in Hungary, Poland, Slovakia and Slovenia. See EC/63/SC/CRP.14, 5 June 2012, p. 2 and UNHCR, Age, Gender and Diversity, <http://www.unhcr-centraleurope.org/en/what-we-do/age-gender-and-diversity.html>. (Consulted on 2 June 2016).

<sup>347</sup> UNHCR (a), 2011, p. 1.

<sup>348</sup> These teams are comprised of representatives of host governments, UNHCR, NGO partners and sometimes also of other UN agencies. See UNHCR, Age, Gender and Diversity, <http://www.unhcr-centraleurope.org/en/what-we-do/age-gender-and-diversity.html> (Consulted on 2 June 2016).

<sup>349</sup> UNHCR (a), 2011, p. 2.

<sup>350</sup> *Ibid.*, pp. 4-5.

Another UNHCR document that must be mentioned, is the report issued in December 2015: ‘Protecting Persons with Diverse Sexual Orientations and Gender Identities - A Global Report on UNHCR’s Efforts to Protect Lesbian, Gay, Bisexual, Transgender, and Intersex Asylum-Seekers and Refugees’.<sup>351</sup> It presents the key findings of an assessment of the progress that has been made by UNHCR in the effective protection of LGBTI asylum-seekers and refugees. Roughly ninety per cent of the regional and country operations participated in this study.<sup>352</sup> The whole document is of high relevance as it provides useful tips and best practices covering different aspects of the displacement phase. I will nonetheless only touch upon the titles that discuss the displacement conditions of LGBTI persons of concern. Under ‘accommodation’, offices indicated that they have helped LGBTI persons of concern to find suitable accommodation in camp settings, out-of-camp settings, as well as in emergency response settings. The arranged accommodation varied and included private accommodation or, in case of financial constraints, temporary LGBTI-specific accommodation in transit centres. Safe houses that were installed for other persons at heightened risk have in some situations also provided a solution for LGBTI individuals.<sup>353</sup> Offices were asked about the acceptance of LGBTI individuals by the larger asylum-seeker and refugee community as well. This led to the conclusion that this was the lowest in camp settings. Consequences of that lack of acceptance are social exclusion and sometimes physical abuse. This was similarly reported by an office in Europe.<sup>354</sup>

The section on detention revealed that also in detention, LGBTI asylum-seekers and refugees face security risks such as physical abuse and exploitation. This seems to be a worldwide phenomenon. Still, one respondent in Europe said there were no particular concerns apart from the fact that the wishes of transgender persons about the gender they would like to be identified as and the according placement cannot always be

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<sup>351</sup> UNHCR Division of International Protection, 2015.

<sup>352</sup> *Ibid.*, p. 3.

<sup>353</sup> *Ibid.*, p. 27.

<sup>354</sup> It is not clear whether this office was located in an EU MS.

granted.<sup>355</sup> Later, it nevertheless becomes clear that there are problems in other European countries, as a different respondent from the region stated that the office he/she works at has received complaints about rape or sexual assault incidents.<sup>356</sup> There is also a title on participatory engagement, which lists some initiatives undertaken by offices to include LGBTI individuals in participatory assessments.<sup>357</sup> Lastly, in the section on the challenges that still exist, the report highlights the fear of LGBTI persons to be open about their sexual orientation and/or gender identity because of safety concerns. Offices have considered this as one of the factors contributing to the difficult asylum conditions.<sup>358</sup>

Lastly, mention must be made of a training package that has been developed by UNHCR, together with the International Organisation for Migration (IOM), on the protection of LGBTI persons in forced displacement. It is created for UNHCR staff as well as for the broader humanitarian community and consists of different modules, covering amongst others terminology, operational protection and communication.<sup>359</sup>

#### 1.4. How the UNHCR documents can be useful in the EU context

From the documents that have been discussed, it is clear that the abuse and mental health problems LGBT\* asylum-seekers and refugees might face in asylum accommodation have been picked up by UNHCR as issues that need to be dealt with. These reports, policy documents and papers are nevertheless thematic rather than regional and they therefore contain information received from its offices all around the world. They consequently also include findings about for instance camp settings, which are not mentioned in the documents that were used to describe the situation in the EU. I nonetheless believe that they can still provide guidance and that, by working on some of

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<sup>355</sup> UNHCR Division of International Protection, 2015, p. 28. Again, it is not sure whether the respondent was located in an EU Member State.

<sup>356</sup> *Ibid.*, p. 29.

<sup>357</sup> *Ibid.*, p. 33.

<sup>358</sup> *Ibid.*, p. 34.

<sup>359</sup> UNHCR (b), 2015.

the focus points that UNHCR seems to have, the MSs could improve the situation in their country.

One of these focus points is the education and training of staff members in order to give them a better understanding of what sexual orientation and gender identity are. This might then increase their willingness to help LGBT\* asylum-seekers and refugees and can improve their response when incidents occur. Secondly, the identification of these individuals needs to be improved and UNHCR does this by including them in existing policies and by asking NGOs and LGBT\* civil society organisations for help. Thirdly, by recognising that violence against this group can be qualified as SGBV, the protection of these individuals has been enhanced because the documents that are issued to prevent and remedy that type of violence are now also applicable to them. Next, UNHCR is working on the reduction of the waiting time for asylum claims so the risks that LGBT\* asylum-seekers and refugees face would not increase over time. Participatory assessment is also something UNHCR uses to hear from these individuals what their needs are, what problems they are facing and to learn what they would see as a solution. And lastly, different accommodation arrangements have been provided by UNHCR staff as a preventive measure or to bring LGBT\* individuals to safety.

## 2. Obligations under EU law

Like we did in chapter II, we now also turn to the EU to see whether this legal framework can provide guidance to the MSs on how to deal with the issues LGBT\* asylum-seekers may experience in immigration accommodation. In contrast with the analysis of UNHCR documents, this exercise renders a rather disappointing result. This subject does not explicitly turn up in EU asylum legislation. The only EU measure that could potentially offer some solace is the Recast Reception Conditions Directive (RRCD),<sup>360</sup> which contains the obligations MSs have under EU law when it comes to

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<sup>360</sup> European Parliament and Council Directive 2013/33/EU of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), hereinafter 'RRCD'.

the reception of asylum-seekers.<sup>361</sup> It covers both detention centres as accommodation centres. It defines the former as the “confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement.”<sup>362</sup> Accommodation centre is understood as “any place used for the collective housing of applicants.”<sup>363</sup> The RRCD is dotted with the concept of vulnerability to which a regime of extra protection is connected. This regime could be beneficial for LGBT\* asylum-seekers and that is why I will try to argue that this category of persons should be considered as vulnerable.

## **2.1. Overview of the relevant provisions of the Recast Reception Conditions Directive**

When reading the RRCD after knowing about the difficulties LGBT\* asylum-seekers can be confronted with in asylum accommodation and what UNHCR’s focus points are in this regard, some Articles appear extremely relevant. I will now list these ‘thematically’, so not in chronological order, but by connecting them to the difficulties that were discussed in chapter III. Later on, I will then investigate whether these could provide protection to LGBT\* asylum-seekers.

First of all, two provisions can be connected to the violence that has been described. Article 18.3 obliges MSs to “take into consideration gender and age-specific concerns and the situation of vulnerable persons in relation to applicants within the premises [used for the purpose of housing applicants during the examination of an application for international protection made at the border or in transit zones]”<sup>364</sup> and accommodation centres”. This is particularly interesting for the situation of LGBT\* asylum-seekers when read in combination with Article 18.4, which states that MSs “shall take appropriate measures to prevent assault and gender-based violence, including sexual assault and harassment” within the aforementioned facilities. Concretely, these

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<sup>361</sup> Article 3 RRCD specifies that it only applies to TCNs and stateless persons who apply for international protection on EU territory.

<sup>362</sup> Article 2(h) RRCD.

<sup>363</sup> Article 2(i) RRCD.

<sup>364</sup> Article 18.1(a) RRCD.

provisions could be interpreted as ordering MSs to, amongst others, take into account the often difficult relationship between LGBT\* asylum-seekers and asylum-seekers from their home country or region. This could then help to take appropriate measures to prevent the physical, sexual and psychological violence against these individuals, as Article 18.4 prescribes.

Next, Articles 11 and 19 are important for the mental health problems LGBT\* asylum-seekers have complained of. Article 11 focuses on the situation in detention centres. It stipulates that: “the health, which also includes the mental health, of applicants in detention who are vulnerable persons shall be of primary concern to national authorities.” Article 19 is a general provision that makes it mandatory for the MSs to “ensure that applicants receive the necessary health care which shall include, at least, emergency care and essential treatment of illnesses and of serious mental disorders.” It could be argued that the depressive and suicidal thoughts LGBT\* asylum-seekers have described, should be qualified as serious mental disorders. Yet the second paragraph could offer more protection, as it states that MSs must “provide necessary medical or other assistance to applicants who have special reception needs, including appropriate mental health care where needed.”

From the testimonies of LGBT\* asylum-seekers, it appeared that staff members do not always respond empathetically to the complaints made or that they even induce the violence. These situations could be prevented were Article 18.7 to be complied with. According to this provision, “Persons working in accommodation centres shall be adequately trained and shall be bound by the confidentiality rules provided for in national law in relation to any information they obtain in the course of their work.” Another Article addressing staff members is Article 29, which states that “appropriate measures [need to be taken by MSs] to ensure that authorities and other organisations implementing this Directive have received the necessary basic training with respect to the needs of both male and female applicants.

Lastly, two other provisions concerning the implementation of the RRCD must be cited. First, there is Article 21: “Member States shall take into account the specific situation of vulnerable persons such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation, in the national law implementing this Directive.”

The other one is Article 22, of which paragraph 1 stipulates: “in order to effectively implement Article 21, Member States shall assess whether the applicant is an applicant with special reception needs. Member States shall also indicate the nature of such needs. That assessment shall be initiated within a reasonable period of time after an application for international protection is made [...]. Member States shall ensure that those special reception needs are also addressed, in accordance with the provisions of this Directive, if they become apparent at a later stage in the asylum procedure. Member States shall ensure that the support provided to applicants with special reception needs in accordance with this Directive takes into account their special reception needs throughout the duration of the asylum procedure and shall provide for appropriate monitoring of their situation. According to paragraph 3 “only vulnerable persons in accordance with Article 21 may be considered to have special reception needs and thus benefit from the specific support provided in accordance with this Directive.”

It goes without saying that Article 21 could be useful for LGBT\* asylum-seekers, as it would oblige States to take their specific situation into account. Still, for this provision and Articles 11 and 18.3 to be of relevance, it must be established that these individuals are vulnerable persons. In addition, Articles 19 and 22 are connected to the concept of ‘special reception needs’. We must therefore explore what is meant with these two terms and if LGBT\* individuals can be considered as such.

## 2.2. The meaning of ‘vulnerable persons’ and ‘special reception needs’

Article 2 RRCD, which sets out the definitions that are used in the directive, does not define what is meant with ‘vulnerable persons’. The only provision in the directive that can give us a better understanding of the concept is Article 21. This lists up some categories of people who are considered vulnerable: minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children, victims of human trafficking, persons with serious illnesses, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence, such as victims of female genital mutilation. The problem, nonetheless, lies in the fact that this enumeration starts with the words ‘such as’. This list is therefore not exhaustive,<sup>365</sup> so other individuals can be qualified as vulnerable as well.<sup>366</sup> Who these other individuals might be and what conditions they would have to fulfil to be considered vulnerable is the big question.

While nowadays, the term ‘vulnerable’ is omnipresent in legal discourse, there is no precise definition.<sup>367</sup> Resorting to case law of the ECtHR will be unsuccessful as it deems all asylum-seekers vulnerable persons,<sup>368</sup> whereas the EU clearly makes a distinction between vulnerable and not-vulnerable asylum-seekers.<sup>369</sup> We can, nonetheless, take a look at other CEAS instruments that also use this concept of

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<sup>365</sup> Bauloz, Ineli-Siger, Singer and Stoyanova, 2015, p. 72; De Bauche, 2012, p. 110; Peers, 2015, p. 507 and Pétin, 2016, p. 93.

<sup>366</sup> This reasoning is supported by the fact that in the Return Directive (European Parliament and Council Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals) the list of vulnerable persons is closed. See Art 3.9 which states: “‘vulnerable persons’ means minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence”. The words ‘such as’ have not been used.

<sup>367</sup> Pétin, 2016, p. 91.

<sup>368</sup> Slingenbergh, 2014, p. 346 and Peroni and Timmer, 2013, p. 1069.

<sup>369</sup> Pétin, 2016, p. 92. This also becomes clear from a report of 2007, which was the result of a study performed at the request of the European Parliament to investigate the conditions in centres for TCNs. The study team recognised that while migrants from countries outside of the EU can be considered to be in a vulnerable situation, they cannot be considered as one homogenous group since some are better equipped than others because they are stronger and are physically and psychologically more resilient than others. See European Parliament Committee on Civil Liberties, Justice and Home Affairs, 2007, p. 43.



vulnerability. Unfortunately, we will not get any wiser from the Dublin III regulation,<sup>370</sup> as it only mentions vulnerability in the context of unaccompanied minors,<sup>371</sup> a category which is also explicitly listed in Article 21 RRCD. The Asylum Procedures Directive and the RQD are not of much help either, as the former simply refers to Article 22 of the RRCD<sup>372</sup> and the latter lists the same categories as those in Article 21 RRCD.<sup>373</sup>

Article 22 RRCD nevertheless introduced the concept of ‘applicant with special reception needs’. This concept is defined in Article 2(k) as “a vulnerable person, in accordance with Article 21, who is in need of special guarantees in order to benefit from the rights and comply with the obligations provided for in this Directive.” While this does not shed much light on what is meant by ‘special reception needs’, it can help clarify what the concept of vulnerability is, as the wording of Article 2(k) RRCD is almost identical to that in Article 2(d) of the Recast Asylum Procedures Directive (RAPD) that defines an ‘applicant in need of special procedural guarantees’. The only difference is that the RRCD assumes that an applicant with special reception needs must be vulnerable, where this is not stated in the RAPD. Yet, what is interesting, is that the latter lists some aspects that might cause a person to be in need of special procedural guarantees, which are “*inter alia* age, gender, sexual orientation, gender identity, disability, serious illness, mental disorders or as a consequence of torture, rape or other serious forms of psychological, physical or sexual violence.”<sup>374</sup> Since the RRCD presumes that being in need of special treatment means that you are vulnerable, vulnerability under the CEAS might thus also be caused by these aspects listed in the RAPD, which would add gender, sexual orientation and gender identity to those cited in Article 21 RRCD.

The RQD can also give us some more insight, as its recital 30 states that someone’s gender, sexual orientation and gender identity can be related to genital mutilation, one

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<sup>370</sup> See footnote 245.

<sup>371</sup> Recital 13 Dublin III regulation.

<sup>372</sup> Article 31.7(6) European Parliament and Council Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), hereinafter ‘RAPD’.

<sup>373</sup> Article 20.3 RQD.

<sup>374</sup> Recital 29 RQD.

of the factors for vulnerability enumerated in Article 21 RRCD.<sup>375</sup> Moreover, in *A, B and C v. Staatssecretaris van Veiligheid en Justitie*, the obligations under the first phase QD were tempered by the fact that an applicant was considered vulnerable under the old Asylum Procedures Directive.<sup>376</sup> This implies that the vulnerability concepts used in the different directives do not have to stay confined to their respective directive and can also be of relevance in the context of another directive.

These considerations are important because since the new RRCD, having special reception needs has been connected to the status of vulnerability.<sup>377</sup> As a consequence, MSs are only obliged to respect and act upon those special reception needs if the person in question is a vulnerable person.<sup>378</sup> This is regretful, because even though the list of categories in Article 21 RRCD is exhaustive, to avoid difficult discussions, MSs might only transpose those categories in their national law.<sup>379</sup>

### **2.3. Can LGBT\* asylum-seekers benefit from the protection regime of the RRCD?**

Because the RRCD only offers extra protection to vulnerable persons and applicants in need of special reception needs, LGBT\* individuals need to be qualified as such to be able to benefit from this regime. The question therefore arises whether there are arguments to support this position.

#### **2.3.1. Support for the qualification of LGBT\* asylum-seekers as vulnerable**

First of all, LGBT\* asylum-seekers could fall under the category of “persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.” Section I.2 of this thesis on the persecution and harm suffered by

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<sup>375</sup> Pétin, 2016, p. 94.

<sup>376</sup> *A, B and C v. Staatssecretaris voor Justitie en Veiligheid* (ECJ, 2 December 2014, Joined cases 148/13-150/13), para. 70.

<sup>377</sup> Articles 2(k) and 22, 3 RRCD.

<sup>378</sup> Bauloz, Ineli-Siger, Singer and Stoyanova, 2015, p. 73. This is applauded by Pétin, who believes this was a necessary evolution to prevent the concept of vulnerability from becoming eroded if too many individuals would be identified as such. See Pétin, 2016, p. 95.

<sup>379</sup> Bauloz, Ineli-Siger, Singer and Stoyanova, 2015, p. 73.

LGBT\* individuals has indicated that this is often the case. There are nevertheless also other LGBT\* persons, who managed to flee their country before they experienced these atrocities and are spared during their flight to the EU, which fall outside of this category but need protection as well.

This protection gap could legally be closed by amending the RRCD or if the EU would officially declare that LGBT\* individuals are vulnerable. Thus far, no clear message has been sent, yet the RQD and the RAPD indicate that the EU legislator, meaning the Council of Ministers of the EU and the European Parliament, believes sexual orientation and gender identity are factors that may enhance one's vulnerability. Additionally, in a recent report on the situation of women refugees and asylum-seekers, the European Parliament stressed the need for LGBTI-sensitive reception facilities across all the MSs and highlighted that violence against LGBTI individuals is common in reception facilities.<sup>380</sup> Later on in the study report, it stipulates that in producing a list of safe countries of origin, the Commission must ensure that full account is taken of "the situation of women, LGBTI persons and other vulnerable groups." This shows that LGBT\* asylum-seekers are clearly considered as a category of vulnerable persons by the Parliament.<sup>381</sup> That the Commission deems LGBT\* individuals as vulnerable as well can be deduced from the working document that accompanied the fifth Annual Report on Immigration and Asylum. It addressed the situation of unaccompanied minors and other vulnerable groups, amongst which LGBT groups.<sup>382</sup> While the EU legislator paid no regard to the concerns voiced by ILGA Europe<sup>383</sup> in 2011 about the Commission proposal for the RRCD that did not include LGBTI asylum-seekers in the list of vulnerable persons,<sup>384</sup> the documents listed above are more recent and the current situation might be more promising.

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<sup>380</sup> European Parliament Committee on Women's Rights and Gender Equality, 2016, p. 8.

<sup>381</sup> *Ibid.*, p. 16.

<sup>382</sup> European Commission, 2014, p. 63.

<sup>383</sup> The International Lesbian, Gay, Bisexual, Trans and Intersex Association, region Europe.

<sup>384</sup> ILGA, 2011, p. 15

The EU-Turkey deal has however shown that some scepticism is still appropriate. Luckily, as long as the EU does not take steps, recital 28 and Article 4 RRCD give MSs the freedom to introduce or maintain more favourable provisions in the field of reception conditions for TCNs and stateless persons who ask for international protection. Hence, MSs have the competence to adopt national legislation that recognises LGBT\* individuals *as such* as a vulnerable group. By doing that, MSs would not only be answering calls from within the EU, but would also respect UNHCR statements in this regard. After having discussed the initiatives it undertakes to help LGBT\* individuals in asylum accommodation and detention, it is clear that UNHCR considers them as vulnerable. Additionally, it has made comments on the RRCD in which it first of all welcomed Article 18.7 RRCD on the training of staff in asylum accommodation and recommended that staff members should be trained in the field of responding to possible needs of LGBTI persons.<sup>385</sup> When discussing Article 21 RRCD, it noted that LGBTI have not been included in the list and encouraged MSs to consider the specific vulnerability and specific reception needs of such persons as well, when making reception arrangements.<sup>386</sup> With regard to Article 22, UNHCR again pointed to LGBTI and stated that later disclosure should not be held against them or inhibit their access to any special support measures or necessary treatment. It noted that special needs should ideally be identified at an early stage because applicants could otherwise be put at risk in collective accommodation.<sup>387</sup> If a MS would recognise LGBT\* asylum-seekers as vulnerable, it would similarly be answering the pleas made by ILGA<sup>388</sup> and FRA.<sup>389</sup>

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<sup>385</sup> UNHCR (a), 2015, p. 44.

<sup>386</sup> *Ibid.*, p. 50.

<sup>387</sup> *Ibid.*, p. 51. It is rather unfortunate that these comments were only made by UNHCR after the RRCD was already adopted and LGBTI individuals were not mentioned in comments to the earlier proposals that were made for this directive. See for instance UNHCR (a), 2012. Of course, it is doubtful whether the EU would have followed this advice since it did not listen to ILGA's recommendations.

<sup>388</sup> ILGA, 2014, p. 48.

<sup>389</sup> FRA, 2015, p. 98.

### 2.3.2. The benefits of national legislation recognising LGBT\* asylum-seekers as vulnerable

The adoption of national legislation recognising LGBT\* asylum-seekers as vulnerable could mean a big improvement in three regards.

First of all, it would make the regime of extra protection of the RRCD applicable to them. Article 11, with regard to the mental health of vulnerable asylum-seekers in detention, Article 18.3 on the relationship between vulnerable applicants and other asylum-seekers and Article 21 obliging MSs to take into account the specific situation of vulnerable persons, could then come into play. In order to comply with those obligations, MSs would then have to make arrangements to address the specific vulnerabilities LGBT\* asylum-seekers might have. Because of the link between vulnerability and special reception needs, being recognised as vulnerable is also necessary for the applicability of Article 19.2 on the necessary medical or other assistance to applicants with special reception needs and Article 22 which contains the obligation of MSs to address the special reception needs of such applicants during the asylum procedure and to monitor their situation.

Secondly, the recognition of LGBT\* asylum-seekers as vulnerable in national legislation could enhance the enforceability of the RRCD before the ECtHR. The adoption of the former Reception Conditions Directive (RCD)<sup>390</sup> and the RRCD already created a legal obligation for MSs to provide reception benefits to asylum-seekers,<sup>391</sup> yet in the case of *M.S.S. v. Belgium and Greece*, the Court attached great importance to the fact that the RCD had been transposed into Greek law, making it positive law by which the Greek authorities were bound.<sup>392</sup> This enhanced their obligations towards the applicant, an asylum-seeker and therefore, as mentioned before, considered by the Court

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<sup>390</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers, hereinafter 'RCD'.

<sup>391</sup> Slingenbergh, 2014, p. 346.

<sup>392</sup> *Ibid.*, para. 250.

as vulnerable.<sup>393</sup> When LGBT\* asylum-seekers would be recognised by national law as vulnerable, this would mean that the MSs would not only have to be attentive and responsive to the needs the individual might have because of his status of asylum-seeker, but would additionally have to pay attention to and act upon the distinct and ‘supplementary’ types of vulnerabilities and difficulties he can experience because of his sexual orientation and/or gender identity.

Thirdly, the recognition of LGBT\* asylum-seekers as vulnerable would also enhance the enforceability of the CFR. As recital 35 RRCD states, the directive “seeks to ensure full respect for human dignity and to promote the application of Articles 1, 4, 6, 7, 18, 21, 24 and 47 of the Charter and has to be implemented accordingly.” When LGBT\* asylum-seekers would be recognised in national law as vulnerable, this would be an act of implementation of EU law, which means that the cited provisions of the CFR would have to be respected. In chapter III, I linked the difficulties that these asylum-seekers might experience to human rights, amongst which provisions of the CFR, being Article 1 on human dignity, Article 4 on inhuman and degrading treatment and Article 21 on the prohibition of discrimination. I also mentioned the right to physical and mental integrity, stipulated by Article 3, which is unfortunately not included in the list of recital 35. Article 51 CFR, nevertheless, makes the Charter binding on MSs when implementing EU law *tout court*, so it can be argued that this, as a source of primary law, prevails over the limitation that recital 35 RRCD seems to put in place. Were LGBT\* asylum-seekers to be recognised by a MS as vulnerable, this State would therefore also have to treat these asylum-seekers in conformity with the CFR and they could rely on another level of protection, additional to that of the RRCD.

## **2.4. Will the protection regime really offer additional protection?**

Like the RQD, the RRCD is an instrument of the CEAS, which was established to safeguard the internal market rather than to offer protection to refugees. Similarly, the

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<sup>393</sup> *Ibid.*, para. 251. The Court considers asylum-seekers as an underprivileged and vulnerable population group in need of special protection and refers to the Refugee Convention, the activities of UNHCR and the standards set out in the RCD to support that perception.

initial intention of the RCD was to install a common minimum standard of reception conditions in order to discourage asylum-seekers from moving from one MS to another. There was a fear amongst the MSs that asylum-seekers would only go to States with good reception conditions, which would consequently become flooded with asylum claimants, and others with bad reception conditions could that way escape their responsibilities.<sup>394</sup> That the RCD was a way to prevent the secondary movement of asylum-seekers, was illustrated by its recital 8, of which an updated version is also included in recital 12 RRCD, which states: “The harmonisation of conditions for the reception of applicants should help to limit the secondary movements of applicants influenced by the variety of conditions for their reception.” With its amended proposal for a recast RCD in 2011, the Commission nevertheless wanted to achieve a true CEAS that would benefit MSs and refugees alike.<sup>395</sup> From the content of the final result, it is still questionable whether this goal has been reached.<sup>396</sup> While the RRCD, like the RCD, may also have the intention to install minimum standards to ensure asylum-seekers a dignified standard of living,<sup>397</sup> the discussions leading up to the RRCD and content lead to the conclusion that MSs still considered it more important to prevent possible abuse of their reception systems, to make sure that they do not create a pull factor by having generous reception conditions and to facilitate the expulsion of rejected asylum-seekers.<sup>398</sup>

The potential improvement that the RRCD might entail therefore depends on how the MSs implement this directive. And from a 2007 Commission report on the application of the RCD followed that it was exactly addressing the needs of vulnerable persons that was one of the main deficiencies of the previous directive.<sup>399</sup> In its 2007 Green Paper on the future CEAS, the Commission specified that the MSs lacked the necessary resources, capacities and expertise to provide an appropriate response to the special

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<sup>394</sup> Peers, 2015, p. 499 and Slingenberg, 2014, p. 2.

<sup>395</sup> COM(2011) 320 , 1 June 2011, p. 2.

<sup>396</sup> Peers, 2015, pp. 543-544.

<sup>397</sup> Recital 7 RCD and recital 12 RRCD.

<sup>398</sup> Slingenberg, 2014, p. 82.

<sup>399</sup> Commission of the European Communities (b), 2007, p. 9.

needs of vulnerable persons.<sup>400</sup> The question also arises whether MSs are motivated to offer more protection to vulnerable persons, and specifically to LGBT\* individuals. A member of the European Parliament stated that the adoption of the RAPD in 2013, with its mechanism to identify vulnerable asylum-seekers in order to provide them with special procedural guarantees, including on the ground of their sexual orientation and gender identity, was a clear achievement because this was strongly opposed by most MSs.<sup>401</sup> That MSs were not enthusiastic to recognise LGBT\* asylum-seekers as vulnerable in that context, can of course not be a good thing for their situation under the RRCD.

There have, nevertheless, been MSs that have adopted legislation to identify and offer more protection to vulnerable asylum-seekers.<sup>402</sup> This is, however, only the first step, because neither the RRCD, nor any other EU document provides the MSs with guidance on how to fulfil their obligations with regard to vulnerable persons. The directive prescribes that an identification procedure should be installed and that special reception needs should be respected, but not how this can be done. Fortunately, like UNHCR suggested itself,<sup>403</sup> some documents that it has issued on the matter and which were discussed earlier, can assist them with this. MSs can for instance turn to the 2011 Guidance Note on Working with Lesbian, Gay, Bisexual, Transgender and Intersex Persons in Forced Displacement to know what specific forms of assistance can be required and how a safe identification and registration environment can be created.<sup>404</sup> The HRIT explains how interviews and checklists can be used to identify these individuals, determine how urgent the situation is, what type of intervention is needed and how to foresee in an appropriate follow-up.<sup>405</sup> In the ‘Protecting Persons with Diverse Sexual Orientations and Gender Identities’ report,<sup>406</sup> they can find good

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<sup>400</sup> Commission of the European Communities (a), 2007, p. 7.

<sup>401</sup> X., 12 June 2013.

<sup>402</sup> While it is still early to evaluate the RRCD, as the implementation deadline was only 20 July 2015 (see Article 31 RRCD), an overview of how five MSs (Belgium, Spain, Finland, Malta and Poland) have implemented the former RCD is given in De Bauche, 2012.

<sup>403</sup> UNHCR (a), 2015, pp. 52-53.

<sup>404</sup> See footnotes 343-344.

<sup>405</sup> See footnote 335.

<sup>406</sup> See Footnote 351.



practices and staff members can be trained by using the 2015 training package that was developed by UNHCR and the IOM.<sup>407</sup>

Since in literature on the matter, Belgium has often been brought forward as an example of a MS in which good initiatives have been taken to ameliorate the situation for LGBT\* asylum-seekers in asylum accommodation, in the following chapter, a case study will be performed on this country to see how this issue is being dealt with.

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<sup>407</sup> See footnote 359.

## V. Case study: LGBT\* asylum-seekers in Belgium

### 1. The recognition of LGBT\* individuals as refugees

Under Belgian law, LGBT\* individuals can receive refugee status or subsidiary protection. With regard to the persecution ground of particular social group, the law applies the ‘protected characteristics’ and the ‘social/sociological’ approach cumulatively, like in the RQD. In fact, the definition of particular social group is identical to that in the RQD. It is nevertheless explicitly stated that, when the common characteristic of a group is their sexual orientation, this group ‘must’ be considered as a particular social group.<sup>408</sup> This formulation is stronger than that of the RQD, which stipulates that in that case, the group ‘might’ be considered a particular social group. Gender identity is, however, touched upon in the same wording as that of the RQD, namely that it has to be given due consideration.

While the law was thus adapted to be compatible with the RQD, this did not have a huge impact as in practice, decision-makers had already accepted sexual orientation as a persecution ground.<sup>409</sup> In fact, since 2005, a ‘gender unit’ has been established within the Office of the Commissioner-General for Refugees and Stateless Persons, which is the federal organ that deals with asylum requests. Its task is to ensure the harmonisation and improvement of practices of the Office in the processing of sexual orientation and/or gender identity-related asylum claims.<sup>410</sup> Protection officers, who deal with the claims, also receive a training course on these types of asylum requests. Additionally, meetings are organised between protection officers and representatives of LGBT organisations, activists known for defending LGBT rights in their country of origin and LGBT individuals who have been recognised as refugees. To give an indication, in 2015, 762 individuals requested asylum on the basis of their sexual orientation and/or

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<sup>408</sup> Article 48/3, §4, d) Wet betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, 15 December 1980, hereinafter ‘Entry Act’.

<sup>409</sup> Federaal centrum voor de analyse van de emigratiestromen, 2013, p. 89. Already in 1994, a homosexual man from Bangladesh was granted refugee status. See ECRE, 1997, p. 7.

<sup>410</sup> *Ibid.*, p. 92.

gender identity, of which 236 of them were recognised as refugees and two individuals received subsidiary protection.<sup>411</sup>

## 2. The situation for LGBT\* asylum-seekers in Belgian reception centres

After having submitted an asylum claim, individuals who want to rely on their right to material assistance, are allocated a reception place. In principle, this will first be a collective reception structure and after six months individual housing can be requested.<sup>412</sup> Reception facilities are open<sup>413</sup> and are organised by different actors. Collective centres, which will be the focus of this case study, are run by the Red Cross,<sup>414</sup> two non-profit organisations,<sup>415</sup> Mutualités Socialistes,<sup>416</sup> and private companies. Fedasil, the Federal Agency for the Reception of Asylum Seekers, which also manages federal collective reception structures itself, coordinates this network.<sup>417</sup>

In all of these facilities, the reception of asylum-seekers must be organised according to the same principles, which are regulated by the 2007 Reception Act<sup>418</sup> and royal decrees. Although the act only transposes the RCD and not its recast version, it went further than what was required by the 2003 directive and already installed an evaluation

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<sup>411</sup> Email from Stefaan Moens, Administrative assistant, Office of the Commissioner-General for Refugees and Stateless Persons, 4 July 2015.

<sup>412</sup> Article 38 Wet houdende diverse bepalingen inzake asiel en migratie en tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen en de wet van 12 januari 2007 betreffende de opvang van asielzoekers en van bepaalde andere categorieën van vreemdelingen, 4 May 2016.

<sup>413</sup> According to the law, only the following individuals can be detained in closed facilities:

- foreigners who presented themselves at a border post without a passport or visa
- asylum-seekers whose asylum claim must be handled by another MS
- asylum-seekers whose claim has been rejected
- people staying in Belgium illegally

(See articles 7; 8bis, § 4; 25; 27; 29, paragraph 2; 51/5, § 1 and § 3; 52/4, paragraph 4; 54; 57/32, § 2, paragraph 2; 74/5; 74/6, § 1 and §1bis of the Entry Act).

<sup>414</sup> In Belgium, the Red Cross consists of Rode Kruis-Vlaanderen and Croix-Rouge de Belgique.

<sup>415</sup> Caritas International and Samu Social.

<sup>416</sup> A socialist mutual insurance fund.

<sup>417</sup> Fedasil, Alle opvangcentra, <http://fedasil.be/nl/inhoud/alle-opvangcentra> (Consulted on 6 July 2016).

<sup>418</sup> Wet betreffende de opvang van asielzoekers en van bepaalde andere categorieën van vreemdelingen, 12 January 2007, hereinafter 'Reception Act.'

of the personal situation of asylum-seekers, which was later required by the RRCD. This evaluation must be carried out by a social worker within thirty days after a reception facility has been assigned and must be continued during the individual's stay. Its goal is to detect vulnerabilities that are not immediately visible and to assess whether the reception structure and care is adapted to the specific needs the asylum-seeker might have with regard to his/her medical, social and psychological situation. If that is not the case, the individual can be transferred.<sup>419</sup> While the act only copies the list of vulnerable persons of the RCD and LGBT\* individuals are therefore not explicitly recognised as such,<sup>420</sup> this evaluation can reveal potential problems they are experiencing in their reception facility and solutions could be sought. LGBT\* individuals can for instance be referred to a specialised NGO for support.<sup>421</sup> The asylum-seekers themselves can also request to be transferred to a more suitable location, like a smaller centre or a centre with less countrymen or -women.<sup>422</sup>

## 2.1. Violence

While the 2015 annual report of Fedasil on complaints and appeals only contains one complaint about insecurity and no incidents of verbal or physical violence against a resident on the basis of his/her sexual orientation or gender identity has been registered in 2016 so far, Fedasil recognises that this does not mean that homophobic and transphobic violence does not occur.<sup>423</sup> Professionals have indeed confirmed that incidents do take place,<sup>424</sup> but find it difficult to assess the frequency as conflicts are often kept quiet or are given different explanations, like for instance religion, because the victim is ashamed of his sexual orientation or gender identity and the perpetrator is

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<sup>419</sup> Article 22 Reception Act and Koninklijk besluit van 25 april 2007 tot bepaling van de nadere regels van de evaluatie van de individuele situatie van de begunstigde van de opvang.

<sup>420</sup> Article 36 Reception Act.

<sup>421</sup> Like Merhaba or Omnya. For information about what these organisations do, see Annex I.

<sup>422</sup> Fedasil (a), 2016.

<sup>423</sup> *Ibid.*

<sup>424</sup> Email from Kenneth Mills, Policy worker, Çavaria, 26 April 2016; interview with Oliviero Aseglio, Project manager education permanente, Rainbowhouse, Brussels, 29 June, 2016; Interview with Bart Hermans, AHHA project leader, Fedasil, Brussels, 27 June 2016; Interview with Assaad Idrissi, Social manager, Omnya, Brussels, 5 July 2016 and interview with Sam Mouissat, Project coordinator, Merhaba, Brussels, 7 June 2016.

ashamed of being associated with that person.<sup>425</sup> What is currently done to remedy this situation will be discussed later, but first, previous initiatives will be described.

#### 2.1.1. Former initiatives

The project that Belgium is praised for in reports on this subject, was initiated in 2008 and called AHHA-aSOSda, a Dutch and French acronym that stand for ‘Adjusted Assistance for LGBTI Asylum-seekers’.<sup>426</sup> It sought to remedy several difficulties LGBTI asylum-seekers may encounter in reception facilities. It first of all recognised that many of these individuals were afraid to come out because of the lack of understanding or support of staff members, lawyers or guardians. Secondly, they were afraid to do so because of the nearly zero tolerance of other residents towards homosexuality, which often turns into aggression, discouraging these individuals even more to open up and sometimes leading to isolation, depression and alcohol problems. Thirdly, when they do out themselves, they often struggle with integrating into society and do not know what Belgian LGBT organisation they can turn to.<sup>427</sup>

With regard to the reception of these individuals specifically, the project aimed to offer tailored aid and to sensitise staff members and other asylum-seekers. To do so, it wanted to involve many different stakeholders: agencies who provide reception facilities (collective and individual), LGBTI organisations, lawyers, guardians, interpreters, ...<sup>428</sup>

#### 2.1.2. Current situation

AHHA-aSOSda, however, never became an official project of Fedasil.<sup>429</sup> The first phase was carried out in the two biggest reception centres,<sup>430</sup> but the project was put on

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<sup>425</sup> Bart Hermans (interview).

<sup>426</sup> Bart Hermans, who worked at the reception centre of Sint-Truiden, initiated AHHA in 2008 in Flanders. Daniel Huygens and Adel Kassem had been working on the same issues, respectively in the centres of Petit Château in Brussels and in the reception centre for non-accompanied minors in Steenokkerzeel. These initiatives were then joined in 2010 under the AHHA-aSOSda project.

<sup>427</sup> Fedasil, 2008, p. 1 and Fedasil, 2010, p. 1.

<sup>428</sup> Fedasil, 2008, p. 3.

<sup>429</sup> Email from Martine Hendrickx, Staff worker study and policy, Fedasil, 12 June 2016.

hold in 2012<sup>431</sup> and has until today not been revived.<sup>432</sup> ASSIST, a project that was launched in 2010 by Çavaria<sup>433</sup> to educate professionals in the asylum sector on sexual orientation and refugees, ended in 2012. As a result, the coordinated system that was envisioned by both projects is lacking. Federally, in 2013, two intergovernmental action plans were issued; one against homophobic and transphobic violence<sup>434</sup> and one against homophobic and transphobic discrimination,<sup>435</sup> which focuses on the broader climate in which these types of violence can occur and proposes a wider prevention of different forms of discrimination. While the latter contains a title on asylum and migration that asks to consolidate and further promote good practices like AHHA-aSOSda and ASSIST, this has still not happened.<sup>436</sup>

What has nevertheless remained from the AHHA-aSOSda project is Rainbows United. One day per month, LGBT\* asylum-seekers can gather in the Rainbowhouse in Brussels, where workshops are organised on for instance the Belgian asylum procedure, on homosexuality versus religion or workshops exclusively for women.<sup>437</sup> Besides offering information, this initiative aims to be a safe place for LGBT\* asylum-seekers, where their sexual orientation is dedramatised.<sup>438</sup> They do not have to hide their sexual orientation, so it gives them some breathing space, they get an opportunity to build up a social network and it can empower them by helping them to gain confidence to go back to their reception facility.<sup>439</sup> Train tickets to Brussels are refunded by Fedasil or the Red

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<sup>430</sup> Sint-Truiden and Petit Château.

<sup>431</sup> Bart Hermans (interview).

<sup>432</sup> In 2015, the Intergovernmental Expert Network, that was established to monitor the implementation of the intergovernmental action plans, to no avail called for the necessary measures to be taken and the necessary funds to be provided for the implementation of the AHHA-aSOSda project. See Intergovernmental expert network, 2015, p 11.

<sup>433</sup> This is an umbrella organisation of LGBTI organisations. See Annex I.

<sup>434</sup> Intergovernmental Actieplan Tegen Homofoobie en Transfoobie Geweld, 31 January 2013.

<sup>435</sup> Intergovernmental Actieplan Ter Bestrijding van Homofobie en Transfobie Discriminatie, 10 June 2013.

<sup>436</sup> *Ibid.*, p. 10.

<sup>437</sup> Hermans, 2012, p. 3.

<sup>438</sup> They are explained that their sexual orientation is not a disease or a crime.

<sup>439</sup> Fedasil, 2010.

Cross.<sup>440</sup> Similar initiatives, which are not specifically addressed to asylum-seekers, but to LGBT individuals with a migration background, also exist.<sup>441</sup>

Apart from this, Fedasil refers to several measures that can protect LGBT\* asylum-seekers. The dispatching unit of Fedasil, with whom the decision lies where to send individuals after they have filed an asylum claim, can decide to house an LGBT\* asylum-seeker in one of the smaller reception centres, or, when an increased vulnerability is assumed, an individual reception facility. Reception facilities specifically for LGBT\* asylum-seekers do not exist. The State Secretary for Migration and Asylum is very clear that he does not want to organise that to avoid stigmatisation. Next, when arriving in the reception network, every asylum-seeker is informed about the ‘code of internal order’ that prohibits any form of physical and verbal violence, sexual and gender-based violence and discrimination and obligates the residents to respect each others privacy and family life. Moreover, the code of internal order includes applicable Belgian laws, of which the 2007 Antidiscrimination Act<sup>442</sup> and the 2007 Act on discrimination between women and men<sup>443</sup> are important, as they respectively prohibit discrimination on the basis of sexual orientation and gender identity. Asylum-seekers are also informed about a procedure they can use when they have complaints about the reception conditions. In addition, Fedasil points to social and cultural orientation trainings, provided in most reception facilities, discussing the social norms and values in the Belgian society. Lastly, LGBT\* asylum-seekers are referred to LGBTI organisations and activities, like for instance Omnya, Merhaba and Rainbowhouse United.<sup>444</sup>

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<sup>440</sup> Oliviero Aseglio (interview).

<sup>441</sup> In Brussels, for example, Merhaba organises the Merhaba and Omnya has activities asylum-seekers are invited to. In Hasselt, Bart Hermans organises the True Colours Café.

<sup>442</sup> Wet ter bestrijding van bepaalde vormen van discriminatie, 10 May 2007.

<sup>443</sup> Wet ter bestrijding van discriminatie tussen vrouwen en mannen, 10 May 2007.

<sup>444</sup> Fedasil (a), 2016.

With regard to staff members, a code of ethics based on the four principles of respect, client orientation, impartiality and discretion, applies. They should have received training on the matter or are still being trained.<sup>445</sup>

When an incident does occur, an ‘incident report form’ must be completed, as this should be done every time verbal or physical violence is reported to or has been taken note of by a staff member.<sup>446</sup> The victim is informed that he has a right to file a complaint with the police, as the Belgian antidiscrimination acts are criminal laws. The incident can also be reported to Unia, the centre for equality of opportunities and the fight against racism, which can in a limited number of cases take legal steps or intervene in a procedure.<sup>447</sup> Incidents on the basis of one’s gender identity can be reported to the Centre for Equality of Women and Men. The Reception Act foresees different sanctions that can be imposed, amongst which the transfer of the perpetrator.<sup>448</sup> According to Fedasil, this will automatically be requested and when the facts are very serious, he/she can even be temporarily removed from all reception facilities and thus be excluded from the reception network.<sup>449</sup>

### 2.1.3. New initiatives

Currently, Fedasil supports the pilot project ‘Safe Havens’ of Çavaria. Its aim is to guarantee a safe environment for LGBT individuals who have fled to Belgium. In the first phase, Çavaria wants to train professionals in four reception centres so they can become persons of reference for these asylum-seekers and sensitise their colleagues. The second phase consists of organising meetings for LGBT asylum-seekers, where the latter can socialise with fellow LGBT asylum-seekers and LGBT organisations, and of providing collective guidance with regard to their LGBT background and the transition

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<sup>445</sup> Fedasil (b), 2016.

<sup>446</sup> On this form, (attempt of) sexual assault is listed as one of the incident types, yet it does not ask whether the incident has occurred against someone from a sexual minority. It does require a complete description of what happened, including the circumstances prior to and the incident itself. In case of a verbal assault, the words uttered must be literally transcribed and the motivations can become clear.

<sup>447</sup> Fedasil, 2013, p. 1.

<sup>448</sup> Article 45, 6 Reception Act.

<sup>449</sup> Fedasil, 2013, p. 1.



to an independent life in the Belgian society (i.e. how to find a job and how to deal with homophobia).<sup>450</sup> Important to note is that, currently, this project only focuses on LGBT individuals who have already been recognised as refugees or have received subsidiary protection and must leave the reception network within two months. There have been proposals to also include asylum-seekers in this project, but how this could be carried out, is still being examined.<sup>451</sup>

Furthermore, in the context of the new RRCD, Fedasil is conducting an extensive study on vulnerable asylum-seekers, including on options to assess and improve the situation of LGBT\* individuals. However, as the study is still ongoing and results are not yet publicly available, this has not been included in the analysis.

## 2.2. Mental health

The AHHA-aSOSda project already raised the mental health problems LGBT\* asylum-seekers can experience as a result of concealing their sexual orientation or gender identity during their stay in a reception centre. Professionals have indicated that today, this is still a problem.<sup>452</sup> Asylum-seekers can talk about their mental state with their social worker,<sup>453</sup> who can refer them to a psychologist, or they can request to talk to a psychologist themselves. When the situation is very serious, people can be brought to psychiatric hospitals as well. In practice, it has however appeared difficult to ascertain that a person is suffering from psychological problems as a result of the events he has been experiencing in reception centres on the basis of his sexual orientation or gender identity. Professionals believe that LGBT\* asylum-seekers not always reveal the real reason for their psychological situation out of shame, fear of officials or as a ‘survival mechanism’. Building trust is therefore considered essential.<sup>454</sup>

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<sup>450</sup> X., project, [www.safehavens.be](http://www.safehavens.be) (Consulted on 2 July 2016).

<sup>451</sup> Email from Bieke Machiels, Executive study and policy, Fedasil, 8 July 2016.

<sup>452</sup> Oliviero Aseglio (interview) and Bart Hermans (interview).

<sup>453</sup> As the psychological situation of an asylum-seeker must also be assessed during the obligated evaluation.

<sup>454</sup> Bart Hermans (interview) and Sam Mouissat (interview).

### 2.3. Access to health care for transgender individuals

While no written documents were available on transgender individuals specifically, it was stated by Fedasil that people going through gender transition can report this to the Dispatching Unit and will immediately be assigned a local reception initiative where they can live alone. When it is reported later on, a transfer can be requested to such location.<sup>455</sup> A recent example has nevertheless indicated that in reality, this transfer does not always happen.<sup>456</sup>

As for gender reassignment treatment or operations, the law and implementing royal decree do not explicitly touch upon that. The latter, however, does foresee the possibility of medical treatment that is not listed in the nomenclature to be carried out when it is considered necessary to respect human dignity and is approved by the medical coordinator of Fedasil.<sup>457</sup> No such cases have occurred, nevertheless, the medical coordinator explained that an asylum-seeker who wishes to start a gender reassignment therapy or operation would be advised to postpone this until after he/she has received asylum. When the therapy was already initiated before the individual arrived in Belgium, it would be continued.<sup>458</sup>

## 3. Critical assessment of the situation

The rather positive picture painted above was mostly based on information provided by the head office of Fedasil. Interviews with professionals in the field have nevertheless revealed some problems. What came across from the interviews, and can also be detected within the Fedasil documents, is first and foremost that there is a lack of

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<sup>455</sup> Email from Martine Hendrickx, Staff worker study and policy, Fedasil, 27 June 2016.

<sup>456</sup> Email from Bieke Machiels, Executive study and policy, Fedasil, 13 July 2016.

<sup>457</sup> Article 4 Koninklijk besluit van 9 april 2007 tot bepaling van de medische hulp en de medische zorgen die niet verzekerd worden aan de begunstigde van de opvang omdat zij manifest niet noodzakelijk blijken te zijn en tot bepaling van de medische hulp en de medische zorgen die tot het dagelijks leven behoren en verzekerd worden aan de begunstigde van de opvang.

<sup>458</sup> Email from Martine Hendrickx, Staff worker study and policy, Fedasil, 27 June 2016.

coordination. Because the AHHA-aSOSda project has not been implemented, there is currently no coherent State-sponsored system in place that involves the main stakeholders and provides information and training to staff members working with LGBT\* asylum-seekers.

A first consequence of this seems to be that staff members and social workers do not always react in a proper way to complaints made by LGBT\* asylum-seekers. This has been attributed to homophobic attitudes amongst the staff,<sup>459</sup> yet also to time restraints,<sup>460</sup> heteronormativity<sup>461</sup> and a lack of understanding.<sup>462</sup> The interviewees thus felt that there is a need for guidelines<sup>463</sup> and appropriate training for social workers as well as staff members on how to deal with LGBT\* asylum-seekers in general and how to act when an incident occurs. Some members within Fedasil, nevertheless, do have the expertise needed and are at times contacted by colleagues to ask for advice.<sup>464</sup>

Another result of this lack of coordination appears to be that when help is provided, this happens on an *ad hoc* basis. LGBT\* asylum-seekers either find the way to LGBT\* initiatives or organisations themselves or are sent there by social workers or staff members who are aware of them.<sup>465</sup> When incidents occur, these organisations then try to defend the individual's interests and find a solution, either together with the staff of the reception facility or alone.<sup>466</sup> Hence no certainty exists about what this solution will be.<sup>467</sup> It has been stated that the policy of transferring the aggressor and not the victim is not always respected.<sup>468</sup> It must nevertheless be recognised that this is not always

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<sup>459</sup> Bart Hermans (interview), Assaad Idrissi (interview) and Sam Mouissat (interview).

<sup>460</sup> Sam Mouissat (interview).

<sup>461</sup> Bart Hermans (interview).

<sup>462</sup> Oliviero Aseglio (interview), Bart Hermans (interview), Assaad Idrissi (interview) and Sam Mouissat (interview).

<sup>463</sup> Sam Mouissat (interview).

<sup>464</sup> Bart Hermans (interview).

<sup>465</sup> Flyers of for instance Merhaba and Rainbows United are provided to social workers.

<sup>466</sup> Assaad Idrissi, for example, organised a kind of safe house where LGBT\* asylum-seekers can stay.

<sup>467</sup> Assaad Idrissi (interview).

<sup>468</sup> Bart Hermans (interview) and Sam Mouissat (interview).

possible because the victim might be harassed by a whole group or because there are no available spaces.<sup>469</sup>

While more concerns were raised, these will not be touched upon due to limited space and because those listed above were the most predominant ones. Nonetheless, it must be concluded that a coherent system coordinated by Fedasil is needed. Although it is a good thing that there is a new project which revives the idea that LGBT\* refugees have specific needs, as long as it excludes asylum-seekers and does not focus on the issues of violence, mental health and access to healthcare for transgender individuals, it only partially addresses the current situation. Maybe it would be better to revive AHHA-aSOSda and where necessary turn to UNHCR for good practices.

I believe this case study shows that despite the goodwill of many actors (both within Fedasil as civil society), a concerted policy is needed to deal with the possible human rights violations that LGBT\* asylum-seekers might encounter in reception centres. Unfortunately, as long as the EU or the national MS do not qualify these individuals as vulnerable, the necessary resources to establish this will be lacking and actors in the field will not have the necessary leverage to put pressure on the government to tackle this issue.

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<sup>469</sup> Bart Hermans (interview).

## VI. Conclusion

This thesis has provided an overview of the battle for protection that LGBT\* asylum-seekers have to fight on many fronts.

Their home countries are perceived as the first stage of this battle. Chapter I gave an indication of the many forms of violence and discrimination LGBT\* individuals may face all over the world, either only from their fellow citizens, or sometimes also sponsored and tolerated by their home State. As a result, some of these persons decide to flee to EU MSs to find protection from homo- and transphobia.

This has led to the second phase of their battle, the fight for refugee status. The schematic overview in chapter II showed that this was a rather slow and irregular process. At the domestic level, some judgments paved the way, yet claims kept failing on either the condition of persecution or because LGBT\* asylum-seekers were not considered as a particular social group. Guidance was first provided at the international level by UNHCR, which issued several soft law documents on the persecution LGBT\* individuals may experience and secondly settled the discussion by confirming that these persons constitute a particular social group. At the regional level, legislation on the matter was also adopted by the EU with its QD and RQD which stipulate that sexual orientation may form the basis of a particular social group and that gender identity shall be given due consideration in that regard. An analysis of Article 18 CFR led to the conclusion that there is now also a primary source of EU law upon which LGBT\* asylum-seekers can rely in order to claim international protection within the EU. This legislation must however be taken with a grain of salt, as the motivation for the CEAS was not the protection of refugees, but the achievement of the economic goals of the EU. Refugees thus seem to come second whenever other interests are at stake, which has become awfully observable with the EU-Turkey deal. The inhospitality of the MSs towards LGBT\* asylum-seekers in particular, can be illustrated by the many alternatives that are still used by decision-makers to reject their asylum claims. The

question whether this battle has really been decided in favour of LGBT\* refugees thus remains.

That disregarding, in theory, these individuals are entitled to some sort of international protection in EU MSs. Unfortunately, chapter III has made clear that by entering these MSs, for some of them yet another phase of their battle for protection against violence and discrimination starts. While awaiting a decision on their asylum request in asylum accommodation, LGBT\* individuals have been reported to have become the victim of physical, sexual and verbal abuse, which can have an impact on their mental health situation. With regard to transgender individuals who wish to undergo gender reassignment therapy or surgery more specifically, concerns have been raised about the physical and mental repercussions a lack of the necessary medications can have and about the absence of legislation to foresee the required treatment in order to avoid these consequences. When translated into human rights, it therefore appears that even in an environment where they are under the care of a MS that via its national asylum legislation offers protection from violence and discrimination abroad, LGBT\* asylum-seekers again run the risk of having their human rights violated.

The question that was consequently posed in chapter IV, was whether again, MSs could turn to UNHCR and the EU to find guidance on this matter and prevent these possible human rights violations. While UNHCR has by now developed many tools to deal with this subject, the exercise on the EU rendered a very disappointing result. The only legal instrument that could provide solace is the RRCD and the regime of extra protection that it installs. The obstacle, however, is that in order to profit from this protection an individual must be recognised as vulnerable. The EU has so far not done so explicitly, hence it is up to the MSs to employ the possibility of adopting more favourable measures and respond to the calls that have come from both the EU institutions as well as from outsiders to consider LGBT\* asylum-seekers as vulnerable. This would not only oblige the MSs to respond to the specific needs this group of asylum-seekers may have, but would also enhance the enforceability of the obligations MSs have towards them. Of course, this again raises the issue of the origin of the CEAS and its

instruments. Originally, the reception of asylum-seekers was not regulated out of concern for the circumstances they lived under in asylum accommodation, but out of fear that some MSs would avoid their responsibilities and secondary movements of asylum-seekers would emerge. This can naturally explain why MSs are not that enthusiastic to go beyond the requirements adopted under EU law and offer extra protection to other groups than those listed in the RRCD.

There are nevertheless States that do undertake initiatives to improve the situation for LGBT\* asylum-seekers. Since Belgium was often mentioned in this regard, in chapter V, a case study was performed on this country to see how it deals with this matter. The research indicated that there is indeed a certain willingness of the government agency to deal with this issue, but that it is not enough if only a few staff members are involved and the rest is left to civil society organisations who are committed or have taken on the task of helping LGBT\* asylum-seekers in reception facilities. What is needed is a coordinated system for which the necessary resources must be made available. The stagnation of these kind of initiatives could be prevented if the EU were to explicitly recognise LGBT\* individuals as a category of vulnerable asylum-seekers which may have specific needs that must be answered or if the MS would do so. We must obviously not fool ourselves and believe that this will solve the problem, but it could at least provide civil society with leverage to put pressure on the State to take action, provide a favourable climate in which initiatives are supported and maybe prevent the State from being held accountable for human rights violations.

The battle of LGBT\* asylum-seekers for the protection of their human rights is far from over. And rather than having the EU as a companion in this struggle, this thesis has shown that the protection offered by EU legislation is often ‘corrupted’ by its economic origins. Besides other individuals, LGBT\* asylum-seekers thus often find a second opponent in the EU’s history. Whilst it can of course not be demanded from the EU to fight the battle for them, it can be asked to help establish the minimum level of protection that is needed for their empowerment.

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Interview with Idrissi, Assaad (in French), Social manager, Omnya, Brussels, 5 July 2016.

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## **3. Emails**

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Email from Bieke Machiels, Executive study and policy, Fedasil, 13 July 2016.

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## ANNEX I - Organisations and agencies contacted for the case study performed in chapter V of the dissertation

### 1. Agencies and organisations that organise reception facilities

#### Fedasil

The Federal Agency for the Reception of Asylum Seekers is a public interest organisation that falls under the political responsibility of the Belgian State Secretary of Asylum and Migration. Its task is to grant material aid to asylum-seekers and other categories of foreigners who have a right to reception under the Belgian Reception Act. Together with partner organisations, it organises reception and support services and provides monitoring and guidance for unaccompanied foreign minors. Fedasil coordinates the different voluntary return programmes and is responsible for the design, preparation and implementation of the reception policy. Via different initiatives, it additionally seeks to promote the integration of reception centres within the local community.

**Contact information:**

Fedasil's Head Office (Brussels)  
Rue des Chartreux 21  
1000 Brussels  
[info@fedasil.be](mailto:info@fedasil.be)  
<http://fedasil.be/en>

#### Rode Kruis-Vlaanderen (Red Cross Flanders)

Rode Kruis-Vlaanderen falls under the umbrella organisation of the Belgian Red Cross and operates in Flanders and Brussels. While its activities are mostly focussed on blood supply and first aid and support, when asked by the Belgian government it also provides reception to asylum-seekers.

**Contact information:**

Rode Kruis-Vlaanderen  
Motstraat 40  
2800 Mechelen  
[info@rodekruis.be](mailto:info@rodekruis.be)  
<http://www.rodekruis.be>

## Croix-Rouge (Red Cross)

Croix-Rouge is the branch of the Belgian Red Cross that operates in Wallonia and Brussels. Like Rode Kruis-Vlaanderen, it provides reception to asylum-seekers when asked by the government.

**Contact information:**

Croix-Rouge de Belgique  
Rue de Stalle 96  
1180 Bruxelles  
[info.crb@croix-rouge.be](mailto:info.crb@croix-rouge.be)  
<http://www.croix-rouge.be>

## 2. Organisations working with LGBT\* individuals

### 2.1. Organisations working with LGBT\* individuals in general

#### Çavaria

Çavaria is an umbrella organisation of more than 120 LGBT organisations. It gives these organisations support, participation and training. With its equal opportunities policy, Çavaria also addresses the broader society and fights for the rights of LGBTI individuals in every day situations. Additionally, it aims to promote the rights of LGBTI individuals by working on a structural level: it pursues campaigns, provides information, sensitises, lobbies and voices its opinions on certain issues. People can call the ‘Holibifoon’ for help or to report discrimination and it also has its own magazine ‘ZiZo’.

**Contact information:**

Çavaria vzw  
Kammerstraat 22  
9000 Gent  
[info@cavaria.be](mailto:info@cavaria.be)  
<https://cavaria.be>



## Rainbowhouse

The Rainbowhouse houses different French- and Flemish-speaking LGBTQI (lesbian, gay, bisexual, transgender, queer and intersex) associations from Brussels. It offers them a location where they can provide information to LGBTQI individuals, their friends and families. It is also a location where socio-cultural activities can be organised by LGBTQI organisations as well as by other organisations. Moreover, the Rainbowhouse has a café, which is open to all, where information can be provided on LGBTQI issues and a social service can redirect individuals who need social, psychological or medical assistance.

### **Contact information**

Rainbow House  
Rue du Marché au Charbon 42  
1000 Bruxelles  
[info@rainbowhouse.be](mailto:info@rainbowhouse.be)

## 2.2. Organisations focused on LGBT\* individuals with a migration background

### Merhaba

Merhaba is an organisation that is comprised of LGBT\* individuals, predominantly with roots in the Maghreb, the Middle East, Turkey and sub-Saharan Africa. It addresses LGBT\* individuals from ethno-cultural minorities and aims to improve their welfare, emancipation, social participation and acceptability. Merhaba does this by informing and sensitising allochthonous as well as autochthonous communities and services that LGBT\* individuals with a migration background are part of or come into contact with.

### **Contact information**

Merhaba  
Steenkoolkaai 9  
1000 Brussel  
<http://www.merhaba.be/en>

## Omnya

Omnya is an organisation by and for individuals from the Middle-East and Nord Africa which aims to promote and defend human rights, particularly the human rights of 'LGBT+' individuals. It supports these individuals, provides guidance and defends their interests. Apart from individual situations, it fights against any kind of discrimination. It organises activities for LGBT+ asylum-seekers specifically, activities for asylum-seekers in general and activities whereby asylum-seekers and Belgian citizens can meet each other.

### **Contact information:**

Omnya  
Marché au Charbon 42  
1000 Brussels  
[contact@omnya.org](mailto:contact@omnya.org)  
<http://www.omnya.org>

## 3. Organisations working with refugees and asylum-seekers

### Vluchtelingenwerk Vlaanderen (Flemish Refugee Action)

Vluchtelingenwerk Vlaanderen is an organisation that supports asylum-seekers and refugees. It puts pressure on policy, sensitises the general public and increases awareness about the refugee theme, provides support to those who assist refugees and mobilises associations and individuals to undertake action and improve the quality of support. Additionally, it coordinates its own reception network, is involved in integration and works around repatriation when necessary.

### **Contact information:**

Vluchtelingenwerk Vlaanderen  
Kruidtuinstraat 75  
1210 Brussel (Sint-Joost-ten-Node)  
[info@vluchtelingenwerk.be](mailto:info@vluchtelingenwerk.be)  
<https://www.vluchtelingenwerk.be>

### UNHCR Belgium and Luxembourg

The regional representation for West-Europe of UNHCR in Brussels has as one of its targets to guarantee that the principles of refugee protection in the Belgian legislation and asylum procedures are respected. Apart from that, UNHCR also plays a role in the promotion of sustainable solutions like resettlement. It also tries to promote the public support for asylum-seekers, refugees and UNHCR in the world by awareness and fund raising campaigns.

**Contact information:**

UNHCR Belgium  
Louizalaan 283  
B-1000 Brussel  
[belbr@unhcr.org](mailto:belbr@unhcr.org)  
<http://www.unhcr.be>

## **ANNEX II – Email originally sent to the selected organisations and agencies**

Dear Sir/Madam,

My name is Eva Declerck and I am a student of the European Master on Human Rights and Democratisation. For this master, I am currently writing my thesis at Queen's University Belfast. My subject concerns the challenges that are faced by lesbian, gay, bisexual, transgender and intersex (LGBTI) refugees while in asylum accommodation. For the research on this matter, I would like to ask for your help.

Research on this topic has shown to be very limited and public studies are scarce. However, research that has been performed in the United Kingdom, has indicated that LGBTI refugees face several challenges in asylum detention. Complaints are made of physical, sexual or mental abuse and while this group of individuals is more vulnerable when it comes to aids/HIV, access to the necessary health care or preventive programs are often lacking.

In the context of my dissertation, I have chosen to perform a case study on Belgium and this for two reasons. First of all, there is no public report of the situation in Belgium. This research could to a limited extent fill this gap. Secondly, relevant literature on the matter often depicts Belgium as an example because it has undertaken some steps. With my research, I would therefore like to see whether or not LGBTI refugees are still confronted with the same challenges and to what extent. This could then be used to determine whether LGBTI refugees should be considered as 'vulnerable persons' under Article 21 of the Recast Reception Conditions Directive of the European Union (Directive 2013/33/EU) and if States should therefore take additional measures to protect them. Said otherwise, if LGBTI refugees are still confronted with these challenges even though measures have been taken, then the situation must be even less favourable in countries that do not provide extra attention to LGBTI refugees in asylum

accommodation. This could then form an argument to consider LGBTI refugees as vulnerable persons.

My question to you, as an organisation working with and for refugees/LGBTI individuals, is therefore whether you would be willing to provide me with extra information on this subject. As initiatives have been taken to ameliorate the situation for LGBTI refugees in reception facilities, I assume research has been performed and these insights would be very helpful for me. Many types of documents could be useful: internal working documents, policy notes, studies or even just a view of your organisation on the subject.

Because this is a delicate matter, confidentiality is key. As these documents are internal and will not have been made public by your organisation before, I would like to ask you to specify whether your organisation can be identified in my dissertation or not.

The information you would provide me with would be dealt with carefully. It would be stored on the personal Queen's network drive of my supervisor, Dr Natasa Mavronicola. As I believe it could have a high re-use potential, I would like to retain it for five years. If other researchers would like to use it, they would have to make a request to Dr Mavronicola and the information would only be transferred after your consent has been received. If you would object to this arrangement, this would of course be respected and the data would only be stored until my dissertation is finished and/or not be available to other individuals than my supervisor and myself.

Because the research I am performing is of 'medium risk', meaning that it concerns vulnerable persons, I have to ask you to respect the confidentiality of those individuals your data reports on. The documents would need to be completely anonymized before they are sent to me.

As EU Member States have been receiving larger numbers of refugees over the last years, I believe this research is extremely relevant. States have to improvise when it

comes to asylum accommodation and I believe this is detrimental for the situation of LGBTI refugees. Therefore, I am convinced that this research is becoming more and more important everyday. Any information and insights you could provide me with, would thus be very useful.

Thank you for your time and I look forward to hearing from you,  
Eva