



UNHCR Observations in the cases of *Minister voor Immigratie en Asiel v. X, Y and Z* (C-199/12, C-200/12, C-201/12) regarding claims for refugee status based on sexual orientation and the interpretation of Articles 9 and 10 of the EU Qualification Directive

1. Introduction¹

1.1. These observations are submitted by the Office of the United Nations High Commissioner for Refugees (“UNHCR”) in relation to the order for reference made by the *Raad van State* (“Dutch Council of State”) in the joined cases of *Minister voor Immigratie en Asiel v. X, Y and Z* (“*X and Others*”). UNHCR, which has been joined as a party to the case by the Dutch Council of State, welcomes the opportunity to provide its observations to the Court in the present case, which raises a number of legal issues relating to international protection.

1.2. In the order for reference, the Dutch Council of State has requested a preliminary ruling from the Court of Justice of the European Union (the “Court”) concerning the interpretation of key concepts in Articles 9 and 10 of 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 (“Qualification Directive”).² The questions address whether applicants who apply for international protection on the basis of their sexual orientation may constitute a particular social group, whether lesbian, gay, bisexual, transgendered or intersex (“LGBTI”) individuals³ can be expected to conceal their sexual orientation⁴ in order to avoid persecution, and whether the criminalization of consensual same-sex relations between adults,⁵ can constitute an act of persecution within the meaning of Article 9 of the Qualification Directive.

¹ This submission does not constitute a waiver, express or implied, of any privilege or immunity which UNHCR and its staff enjoys under applicable international legal instruments and recognized principles of international law.

² 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, OJ L 304/12 of 30.9.2004, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:304:0012:0023:EN:PDF>.

³ UNHCR has opted to use the term “LGBTI individuals”, which is intended to be inclusive of a wide range of individuals who fear persecution for reasons of their sexual orientation and/or gender identity, irrespective of their exact orientation and/or identity. The term “homosexual” tends to make lesbians invisible, does not encompass bisexuals, transgender and intersex people, and may be considered offensive. Not all applicants will self-identify with the LGBTI terminology and constructs, or may be unaware of these labels. Decision-makers therefore need to be cautious about inflexibly applying such labels as this could lead to adverse credibility assessments or failure to recognize a valid claim.

⁴ For the purposes of these Observations, the term “concealment” is used rather than “restraint”.

⁵ For the purposes of these Observations, the term “same-sex relations” is used rather than “homosexual activities”.

1.3. The questions posed by the Dutch Council of State are as follows:⁶

1. *Do foreign nationals with a homosexual orientation form a “particular social group” as referred to in Article 10(1)(d) of 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 (OJ 2004 L 304; 'the Directive')?*
2. *If the first question is to be answered in the affirmative: which homosexual activities fall within the scope of the Directive and, in the case of acts of persecution in respect of those activities and if the other requirements are met, can that lead to the granting of refugee status? That question encompasses the following subquestions:*
 - a. *Can foreign nationals with a homosexual orientation be expected to conceal their orientation from everyone in their country of origin in order to avoid persecution?*
 - b. *If the previous question is to be answered in the negative, can foreign nationals with a homosexual orientation be expected to exercise restraint, and if so, to what extent, when giving expression to that orientation in their country of origin, in order to avoid persecution? Moreover, can greater restraint be expected of homosexuals than of heterosexuals?*
 - c. *If, in that regard, a distinction can be made between forms of expression which relate to the core area of the orientation and forms of expression which do not, what should be understood to constitute the core area of the orientation and in what way can it be determined?*
3. *Do the criminalisation of homosexual activities and the threat of imprisonment in relation thereto, as set out in the Offences against the Person Act 1861 of Sierra Leone, [the Penal Code of Uganda and the Code Pénal of Senegal] constitute an act of persecution within the meaning of Article 9(1)(a), read in conjunction with Article 9(2)(c) of the Directive? If not, under what circumstances would that be the case?*

1.4. It is widely documented that in some countries, LGBTI individuals are the targets of killings, sexual and gender-based violence, physical attacks, torture, arbitrary detention, accusations of immoral or deviant behaviour, denial of the rights to assembly, expression and information, and/or discrimination in employment, health and education.⁷ Many countries maintain criminal laws with severe consequences for persons engaged in consensual same-

⁶ C-199/12, C-200/12 and C-201/12, *Reference for a preliminary ruling from the Raad van State (Netherlands) lodged on 27 April 2012 - Minister voor Immigratie en Asiel v. X, Y and Z*, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=124762&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=351821>.

⁷ See: UN Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 17 November 2011, hereafter (“OHCHR, Report on sexual orientation and gender identity”), available at: <http://www.unhcr.org/refworld/docid/4ef092022.html>. For an overview of jurisprudence and doctrine, see also International Commission of Jurists (“ICJ”), *Sexual Orientation and Gender Identity in Human Rights Law, References to Jurisprudence and Doctrine of the United Nations Human Rights System*, 2010, fourth updated edition, available at: <http://www.unhcr.org/refworld/docid/4c627bd82.html>; ICJ, *Sexual Orientation and Gender Identity in Human Rights Law, Jurisprudential, Legislative and Doctrinal References from the Council of Europe and the European Union*, October 2007, available at: <http://www.unhcr.org/refworld/docid/4a54bbb5d.html>; ICJ, *Sexual Orientation and Gender Identity in Human Rights Law: References to Jurisprudence and Doctrine of the Inter-American System*, July 2007, available at: <http://www.unhcr.org/refworld/docid/4ad5b83a2.html>.

sex relations, a number of which stipulate corporal punishment and/or the death penalty.⁸ In these and other countries, the authorities may be unable or unwilling to protect LGBTI individuals from abuse and persecution by non-State actors, resulting in impunity for perpetrators and implicit, if not explicit, tolerance of such abuse and persecution.

1.5. UNHCR has a direct interest in this matter, as the subsidiary organ entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions to the problem of refugees.⁹ According to its Statute, UNHCR fulfils its mandate *inter alia* by “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto[.]”¹⁰ UNHCR’s supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention relating to the Status of Refugees (“1951 Convention”)¹¹ and the 1967 Protocol relating to the Status of Refugees (“1967 Protocol”).¹² Such guidelines are included in the *UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (“UNHCR Handbook and Guidelines”),¹³ as well as other notes and guidance, including the *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity* (“Guidance Note on SOGI Claims”).¹⁴ This supervisory responsibility is reiterated in Article 35(1) of the 1951 Convention and Article II of the 1967 Protocol.¹⁵

1.6. UNHCR’s supervisory responsibility has been reflected in European Union law, including by way of a general reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the European Union (“TFEU”),¹⁶ as well as in Declaration 17 to the Treaty of Amsterdam, which provides that “consultations shall be established with the United

⁸ See, International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA), “State-sponsored Homophobia, A World Survey of laws prohibiting same-sex activity between consenting adults”, May 2012, available at: http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2012.pdf.

⁹ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b3628> (“UNHCR Statute”).

¹⁰ *Ibid.*, para. 8(a).

¹¹ UN General Assembly, *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations Treaty Series No. 2545, vol. 189, p. 137, available at: <http://www.unhcr.org/refworld/docid/3be01b964.html>.

¹² UN General Assembly, *Protocol Relating to the Status of Refugees*, 31 January 1967, United Nations Treaty Series, vol. 606, page 267, available at: <http://www.unhcr.org/refworld/docid/3ae6b3ae4.html>.

¹³ UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, available at: <http://www.unhcr.org/refworld/docid/4f33c8d92.html> (“UNHCR Handbook and Guidelines”). This is a reissue of the previous *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, reprinted together with the Guidelines on International Protection. UNHCR issues Guidelines on International Protection pursuant to its mandate, as contained in the UNHCR Statute, in conjunction with Article 35 of the 1951 Convention. The Guidelines complement the UNHCR Handbook and are intended to provide guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff.

¹⁴ UNHCR, *UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity* (“Guidance Note on SOGI Claims”), 21 November 2008, available at: <http://www.unhcr.org/refworld/docid/48abd5660.html>.

¹⁵ According to Article 35 (1) of the 1951 Convention States undertake to co-operate with UNHCR and “shall facilitate its [UNHCR] duty of supervising the application of the provisions of this Convention”.

¹⁶ European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, OJ C 115/47 of 9.05.2008, available at: <http://www.unhcr.org/refworld/docid/4b17a07e2.html>.

Nations High Commissioner for Refugees [...] on matters relating to asylum policy”.¹⁷ Secondary EU legislation also emphasizes the role of UNHCR. For example, Recital 15 of the Qualification Directive states that consultations with UNHCR “may provide valuable guidance for Member States when determining refugee status according to Article 1 of the Geneva Convention”.¹⁸ The supervisory responsibility of UNHCR is specifically articulated in Article 21 of Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status (“Asylum Procedures Directive”).¹⁹

1.7. Against this background, UNHCR expresses its views below on the issues arising from the questions posed to the Court by the Dutch Council of State. Part 2 of these Observations addresses the importance of interpreting the Qualification Directive in conformity with the 1951 Convention. Part 3 covers the interpretation of Article 10(1)(d) of the Qualification Directive, in particular whether applicants making a claim for refugee status based on their sexual orientation and/or gender identity may constitute a “particular social group” (Question 1 referred to the Court). Part 4 provides UNHCR’s interpretation of what constitutes an act of persecution, including whether laws criminalizing consensual same-sex relations may be considered persecutory within the meaning of the 1951 Convention and the Qualification Directive (Question 3 referred to the Court), while Part 5 provides UNHCR’s views on whether applicants can be expected to conceal their sexual orientation and/or gender identity in order to avoid persecution (Questions 2(a) to (c) referred to the Court). By way of conclusion, Part 6 summarises UNHCR’s views on the questions posed to the Court.

2. The Qualification Directive and the 1951 Convention²⁰

2.1. The TFEU creates an explicit obligation for EU secondary legislation on asylum to conform to the 1951 Convention.²¹ The primacy of the 1951 Convention is further recognized in European Council Conclusions and related Commission policy documents, which affirm that the Common European Asylum System is based on the “full and inclusive application”

¹⁷ European Union, *Declaration on Article 73k of the Treaty establishing the European Community*, OJ C 340/134 of 10.11.1997, available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11997D/AFI/DCL/17:EN:HTML>.

¹⁸ The same reference to consultations with UNHCR is made in Recital 22 of the Qualification Directive (recast). See *Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)*, 20 December 2011, L 337/11, available at: <http://www.unhcr.org/refworld/docid/4f06fa5e2.html> (“Qualification Directive (recast”).

¹⁹ *Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status*, OJ L 326/13 of 13.12.2005. Article 21(c) in particular obliges Member States to allow UNHCR “to present its views, in the exercise of its supervisory responsibilities under Article 35 of the Geneva Convention, to any competent authorities regarding individual applications for asylum at any stage of the procedure.”

²⁰ For UNHCR’s remarks on the Qualification Directive, see: UNHCR, *Annotated Comments on the EC Council Directive 2004/83/EC of 29.04.2004 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 (OJ L 304/12 of 30.9.2004)*, 28 January 2005, (“UNHCR Annotated Comments on the Qualification Directive”), available at: <http://www.unhcr.org/refworld/docid/4200d8354.html>.

²¹ Article 78 para. 1 TFEU provides that the policy on asylum “must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties”.

of the 1951 Convention.²² It follows that the transposition of the Qualification Directive into national legislation of EU Member States, all of which are States Parties to the 1951 Convention and therefore bound by its obligations, must also be in line with the 1951 Convention.

2.2. The Qualification Directive recognizes the 1951 Convention as the “cornerstone of the international legal regime for the protection of refugees”²³ and stipulates that the Directive’s minimum standards are aimed at ensuring “full respect for [...] the right to asylum”²⁴ as well as guiding Member States in the application of the 1951 Convention.²⁵ Certain provisions of the Qualification Directive incorporate the wording of the 1951 Convention almost exactly, including Article 2(c) of the Qualification Directive, which replicates almost exactly the refugee definition included in Article 1A(2) of the 1951 Convention.

2.3. The Court has acknowledged these important principles and, consequently, the central role of the 1951 Convention when applying the Qualification Directive. More particularly, the Court has repeatedly reiterated that this instrument must be interpreted “in a manner consistent with the 1951 Convention and the other relevant treaties” referred to in Article 63(1) TEC.²⁶ This implies that the interpretation of the 1951 Convention under international law informs the interpretation of the Qualification Directive as an instrument under EU law. This is all the more justified in the present case, since the very wording of Article 9(1)(a) of the Qualification Directive indicates that the purpose of the provision is to explain the meaning of a concept contained in the 1951 Convention. Although not explicitly stated in the text of the Qualification Directive, its Article 10 similarly seeks to explain the meaning of the reasons for persecution (that is, the Convention grounds) contained in Article 1A(2) of the 1951 Convention.

²² See para. 13 of the *Presidency Conclusions of the Tampere European Council* of 15-16.10.1999, at: http://www.europarl.europa.eu/summits/tam_en.htm?redirected=1; para. 6 of *The Hague Programme: Strengthening Freedom, Security and Justice in the European Union*, 13.12.2004, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2005:053:0001:0014:EN:PDF>; para. 1 of the Green Paper of the Commission on the Future Common European Asylum System COM(2007) 301 final, 06.06.2007, available at: http://ec.europa.eu/justice_home/news/intro/doc/com_2007_301_en.pdf; part 1.1 of the European Commission’s *Policy Plan on Asylum: an integrated approach to protection across the EU*, COM(2008) 360, 17.06.2008, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0360:FIN:EN:PDF>. The Policy Plan recognises the fundamental role played by the 1951 Convention in the existing Treaty provisions and those resulting from the Lisbon Treaty. See also the *European Pact on Immigration and Asylum* adopted on 16 October 2008, in which the European Council reiterates that “any persecuted foreigner is entitled to obtain aid and protection on the territory of the European Union in application of the Geneva Convention [...]”, *European Pact on Immigration and Asylum*, 13440/08, 16.10.2008, p. 11, available at: <http://register.consilium.europa.eu/pdf/en/08/st13/st13440.en08.pdf>.

²³ Recital 3 of the Qualification Directive; Recital 4 of the Qualification Directive (recast).

²⁴ Recital 10 of the Qualification Directive; Recital 16 of the Qualification Directive (recast).

²⁵ Recital 16 of the Qualification Directive; Recital 23 of the Qualification Directive (recast).

²⁶ Now Article 78 para. 1 TFEU. See *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, C-175/08, C-176/08, C-178/08 and C-179/08, Court of Justice of the European Union (“CJEU”), 2 March 2010, at paras. 53-54, available at: <http://www.unhcr.org/refworld/docid/4b8e6ea22.html> (“*Salahadin Abdulla*”); *Bolbol v. Bevándorlási és Állampolgársági Hivatal*, C-31/09, CJEU, 17 June 2010, at para. 38, available at: <http://www.unhcr.org/refworld/docid/4c1f62d42.html> (“*Bolbol*”); *Bundesrepublik Deutschland v. B and D*, C-57/09 and C-101/09, CJEU, 9 November 2010, at para. 78, available at: <http://www.unhcr.org/refworld/docid/4cda83852.html>.

2.4. The Court has acknowledged that international treaties must be interpreted using the rules of interpretation enshrined in Articles 31 et seq. of the Vienna Convention on the Law of Treaties,²⁷ including the ordinary meaning to be given to its terms in their context and in the light of the relevant treaty's object and purpose.²⁸

2.5. Respect for fundamental rights and the principle of non-discrimination are core aspects of the 1951 Convention and international refugee law.²⁹ The refugee definition thus needs to be interpreted and applied with due regard for the principle of non-discrimination, including on the basis of age, sex, gender, sexual orientation, gender identity or any other status or characteristics.

2.6. In general, the Conclusions adopted by Member States of UNHCR's Executive Committee,³⁰ the UNHCR Handbook as well as subsequent Guidelines on International Protection issued by UNHCR, should also be taken into account in interpreting the provisions of the EU asylum *acquis*, in particular those which include explicit references to provisions of the 1951 Convention, like Articles 2(c) and 9 of the Qualification Directive. These documents provide guidance on the interpretation and application of provisions of the 1951 Convention, and influenced significantly the drafting of the Qualification Directive. The Explanatory Memorandum of the Commission's proposal³¹ quotes the UNHCR Handbook and Executive Committee Conclusions as sources, along with the 1951 Convention itself.³²

2.7. The above considerations concerning the documents and standards relevant to the interpretation of the 1951 Convention are all the more significant since the Court has

²⁷ United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations Treaty Series, vol. 1155, p. 331, available at: <http://www.unhcr.org/refworld/docid/3ae6b3a10.html>.

²⁸ *The Queen on the application of: International Air Transport Association (IATA) and European Low Fares Airline Association v. Department for Transport*, C-344/04, Court of Justice of the European Union, 10 January 2006, at para. 40, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0344:EN:HTML>.

²⁹ 1951 Convention, the Preamble; Article 3.

³⁰ The Executive Committee of the High Commissioner's Programme ("ExCom") was established in 1958 and functions as a subsidiary organ of the United Nations General Assembly. It has both executive and advisory functions. Its terms of reference are found in United Nations General Assembly Resolution 1166(XII) which states *inter alia* that it is "to advise the High Commissioner, at his request, in the exercise of his functions under the Statute of his Office." This includes issuing Conclusions on International Protection (often referred to as "ExCom Conclusions"), which address issues in the field of refugee protection and serve as "international guidelines to be drawn upon by States, UNHCR and others when developing or orienting their policies on refugee issues"; see: ExCom Conclusion No. 55 (XL) – 1989, 13 October 1989, at para. (p), available at: <http://www.unhcr.org/excom/EXCOM/3ae68c43c.html>. ExCom Conclusions are adopted by consensus by the States which are Members of the Executive Committee and can therefore be considered as reflecting their understanding of legal standards regarding the protection of refugees. At present, 87 States are Members of the UNHCR Executive Committee.

³¹ European Commission, *Proposal for a Council Directive on minimum standards for the Qualification and Status of Third Country Nationals and Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection*, COM(2001) 510 final, 12.09.2001, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0510:FIN:EN:PDF>.

³² *Ibid*, part 3, at p. 5. The 1996 Joint Position of the Council on the harmonized application of the definition of the term "refugee", which constituted the "starting point" of the Qualification Directive, recognized that the Handbook is a "valuable aid to Member States in determining refugee status"; see *Joint Position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term "refugee" in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees*, OJ L 63/2 of 13.3.1996, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996F0196:EN:HTML>.

undertaken to directly interpret the meaning of some provisions of the 1951 Convention,³³ in particular those which are referred to in the Qualification Directive.³⁴

3. Claims to refugee status based on sexual orientation and/or gender identity³⁵ within the context of the “membership of a particular social group” ground included in Article 1A(2) of the 1951 Convention and Article 10(1)(d) of the Qualification Directive³⁶

3.1. Membership of a particular social group as a Convention ground or reason for persecution in the 1951 Convention and the Qualification Directive

3.1.1. Membership of a particular social group is one of the five grounds enumerated in the refugee definition contained in Article 1A(2) of the 1951 Convention. This refugee definition has been incorporated into EU asylum law, notably through Article 2(c) of the Qualification Directive which includes the “membership of a particular social group” ground. Article 10(1)(d) of the Qualification Directive provides specific guidance to Member States on how to interpret “membership of a particular social group” as a reason for persecution.

3.1.2. Of the five Convention grounds, the “membership of a particular social group” ground has posed the greatest challenge with regard to its interpretation. Neither the 1951 Convention nor the 1967 Protocol provides a definition for this ground or a specific list of particular social groups. Although the drafting history also does not shed any light on its meaning, over time, expert commentary and jurisprudence/case law have sought to clarify the term. UNHCR has noted that the term “membership of a particular social group” should be read in “an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms.”³⁷ This is reflected in *UNHCR’s Guidelines on International Protection: “Membership of a Particular Social Group” within the context of Article 1A2 of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees* (“Social Group Guidelines”). The Social Group Guidelines provide legal interpretative guidance on assessing claims of persons who fear being persecuted for reasons of their membership of a particular social group, including groups defined by the members’ sexual orientation and/or gender identity. Of particular relevance to the questions posed in this preliminary reference are also UNHCR’s *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article*

³³ *Salahadin Abdulla and Others*, at paras. 57 and 65.

³⁴ *Bolbol*, at paras. 34, 50 and 51.

³⁵ UNHCR notes that the formulation of “particular social group” provided for in Article 10(1)(d) of the Qualification Directive explicitly mentions sexual orientation. While “gender identity” is not referred to in the Qualification Directive, it may be included under the ground of “particular social group”, especially in light of the wording in Article 10(1)(d), which refers to “gender-related aspects”. Article 10(1)(d) of the Qualification Directive (recast) makes this even clearer by explicitly noting that gender identity shall be given due consideration for the purposes of determining membership of a particular social group. For the purposes of these Observations, UNHCR will focus on claims based on sexual orientation, as the questions raised by the Dutch Council of State only make reference to such asylum claims. The positions articulated in these Observations are however intended to be inclusive of, and relevant to, the range of claims relating to sexual orientation and/or gender identity.

³⁶ This section corresponds to Question #1 of the questions referred to the Court.

³⁷ UNHCR, *Guidelines on International Protection No. 2: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/02, at para. 3, available at: <http://www.unhcr.org/refworld/docid/3d36f23f4.html> (“Social Group Guidelines”).

1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees (“Guidelines on Gender-Related Persecution”),³⁸ and UNHCR’s Guidance Note on SOGI Claims,³⁹ which provide interpretative guidance on the application of Article 1A(2) of the 1951 Convention to persons making claims for international protection based, *inter alia*, upon their sexual orientation and/or gender identity.

3.1.3. As noted in the Social Group Guidelines, States have adopted two main approaches to defining a particular social group consistent with the 1951 Convention: (i) the “protected characteristics” approach⁴⁰ and (ii) the “social perception” approach.⁴¹ UNHCR’s Social Group Guidelines acknowledge the validity of each approach and attempts to thus accommodate both as **alternative** approaches in a standard definition:

“A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, **or** who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, **or** which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.”⁴²

3.1.4. The Social Group Guidelines therefore make it clear that in UNHCR’s view, only one of the two approaches needs to be met in order to satisfy the particular social group definition. UNHCR notes that the final wording of Article 10(1)(d) of the Qualification Directive could be read as suggesting a “cumulative” rather than an “alternative” approach to determining a particular social group. UNHCR has recommended that the EU adopt an “alternative” approach so as to avoid protection gaps.⁴³ UNHCR also notes that the Qualification Directive provides that Member States may introduce or retain more favourable standards than those set out in the Directive,⁴⁴ and that the jurisprudence of a number of Member States reject such an interpretation and instead indicate that Article 10(1)(d) does not demand that the requirements of both approaches be met in order to satisfy the particular social group definition.⁴⁵

³⁸ UNHCR, *Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/01, available at: <http://www.unhcr.org/refworld/docid/3d36f1c64.html>.

³⁹ See note 14 above.

⁴⁰ The protected characteristics approach examines whether a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it. An immutable characteristic may be innate (such as sex or ethnicity) or unalterable for other reasons (such as the historical fact of a past association, occupation or status): Social Group Guidelines, at para. 6.

⁴¹ The social perception approach examines whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large: Social Group Guidelines, at para. 7.

⁴² Social Group Guidelines, at para. 11 (emphasis added).

⁴³ Regarding Article 10(d) of the QD Recast. UNHCR has recommended that the EU adopt an alternative approach. See, e.g. *UNHCR Annotated Comments on the Qualification Directive* and UNHCR, *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554, 21 October 2009)*, August 2010, available at: <http://www.unhcr.org/refworld/docid/4c63ebd32.html>.

⁴⁴ Article 3 of the Qualification Directive; Article 3 Qualification Directive (recast).

⁴⁵ For example, France has adopted the social perception approach in its jurisprudence, and has not transposed the cumulative approach of Article 10(1)(d) into its national asylum legislation. See: UNHCR Statement on the Application of Article 1A(2) of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol to Victims of Trafficking in France, 12 June 2012, available at: <http://www.unhcr.org/refworld/docid/4fd84b012.html>. See also: *Secretary of State for the Home Department (Respondent) v. K (FC) (Appellant)*; *Fornah (FC) (Appellant) v. Secretary of State for the Home Department*

3.2. Claims to refugee status based on sexual orientation and/or gender identity within the context of “particular social group” under the 1951 Convention and the EU Qualification Directive

3.2.1. Sexual orientation and/or gender identity has been recognized as a reason for persecution within the meaning of the refugee definition in asylum claims by courts and tribunals in at least 37 jurisdictions globally, including a significant number of EU Member States.⁴⁶ Principle 23 of the *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* (“Yogyakarta Principles”)⁴⁷ recognizes the “right to seek and enjoy in other countries asylum from persecution, including persecution related to sexual orientation or gender identity.”

3.2.2. Refugee claims based on sexual orientation and/or gender identity are most commonly recognized under the “membership of a particular social group” ground. This is reinforced by the text of Article 10(1)(d) of the Qualification Directive, which explicitly mentions sexual orientation and gender-related aspects.⁴⁸ In addition to the inclusion of sexual orientation in the Qualification Directive’s definition of particular social group, 22 EU Member States have explicitly recognized in their national legislation that sexual orientation is included in the notion of particular social group.⁴⁹ Refugee claims based on sexual

(Respondent), [2006] UKHL 46, UK House of Lords (Judicial Committee), 18 October 2006, at p. 11, available at: <http://www.unhcr.org/refworld/docid/4550a9502.html>. See, e.g., Michelle Foster, *The ‘Ground with the Least Clarity’: A Comparative Study of Jurisprudential Developments relating to ‘Membership of a Particular Social Group’*, UNHCR Legal and Protection Policy Research Series, at 17 n.98 (2012), available at <http://www.unhcr.org/4f7d8d189.pdf>.

⁴⁶ See list of 33 Council of Europe countries in Council of Europe, *Discrimination on grounds of sexual orientation and gender identity in Europe*, September 2011, ISBN 978-92-871-7257-0, at p. 65, available at: <http://www.unhcr.org/refworld/docid/4eb8f53f2.html> at p. 65. See also UNHCR Guidance Note on SOGI Claims, note 37 above, at Section (C)

⁴⁷ International Commission of Jurists (ICJ), *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007, available at: <http://www.unhcr.org/refworld/docid/48244e602.html> (“Yogyakarta Principles”). The Yogyakarta Principles, although not binding, reflect well-established principles of international law, and were developed and unanimously adopted by a distinguished group of human rights experts, from diverse regions and backgrounds, including judges, academics, a former UN High Commissioner for Human Rights, UN Special Procedures, members of treaty bodies, NGOs and others.

⁴⁸ In defining a particular social group, the Qualification Directive notes the following regarding sexual orientation and gender identity: “[...] depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States: gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article.” Article 10(1)(d) of the Qualification Directive (recast), goes further, and recognizes that gender-related aspects, including gender identity, must be given due consideration when considering claims based on particular social group, stating that: “[...] depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States. Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group.”

⁴⁹ See: Fundamental Rights Agency, *Homophobia, transphobia and discrimination on grounds of sexual orientation and gender identity in the EU Member States: Summary of findings, trends, challenges and promising practices*, June 2011, available at: http://fra.europa.eu/fraWebsite/attachments/FRA-homophobia-synthesis-report-2011_EN.pdf at p.55. Twenty-six Council of Europe member states have explicitly recognized in their national legislation that sexual orientation is included in the notion of particular social group, while an additional seven Council of Europe Member States, even in the absence of explicit legislative recognition, have

orientation may also be linked to other Convention grounds, notably political opinion and religion, depending upon the political, religious and cultural context of the claim.⁵⁰

3.2.3. An applicant's sexual orientation can be relevant to a refugee claim where he or she fears persecutory harm on account of his or her actual or perceived sexual orientation, which does not, or is seen not to, conform to prevailing political, cultural or social norms. The concept of "sexual orientation" is defined by the Yogyakarta Principles, as:

"each person's capacity for profound emotional, affectional and sexual attraction to, and intimate sexual relations with, individuals of a different gender or the same gender or more than one gender."⁵¹

3.2.4. Sexual orientation is therefore a fundamental part of human identity. While sexual orientation may be revealed by sexual conduct or a sexual act, it may also be evidenced by a range of other factors including how the applicant lives in society, or how he or she expresses his or her identity. Whether one's sexual orientation is determined by, *inter alia*, genetic, hormonal, developmental, social, and/or cultural influences (or a combination thereof), most people experience little or no sense of choice about their sexual orientation. Different people realize at different points in their lives that they are LGBTI and their sexual and gender expressions may vary with age, and other social and cultural determinants.

3.2.5. Whether applying the "protected characteristics" or "social perception" approach, there is wide-spread acknowledgment of the legally correct position that lesbians,⁵² gay

granted asylum in claims in which sexual orientation has been recognized as a ground of persecution. See: Council of Europe, *Discrimination on grounds of sexual orientation and gender identity in Europe*, September 2011, ISBN 978-92-871-7257-0, available at:

<http://www.unhcr.org/refworld/docid/4eb8f53f2.html> at p. 65.

For instance, Ireland: Statutory Instrument No. 518 of 2006 (European Communities (Eligibility for Protection) Regulations 2006) Reg.10 (1)(d)(ii); Sweden: Aliens Act (2005:716), Chapter 4, Section 1; Finland: Though there is no mention of sexual orientation in the Aliens Act, the *travaux préparatoires* explain that sexual orientation is to be viewed as a particular social group when applying the legislation: "Even sexual orientation can be mentioned as one example of belonging to a particular social group, which constitutes one ground of persecution within the meaning of the provision"; Austria: the explanatory remarks to the Austrian Asylum Law 1991 (RV 270 BlgNr 18. GP; AB 328 BlgNR 18. GP) note that sexual orientation can be the basis for belonging to a particular social group; Latvia: Article 22 of the Asylum Law states that sexual orientation and/or gender identity is included in the notion of "particular social group"; Greece: Presidential Decree 96/2008, Art. 10d; Slovenia: Article 27 (6) of the International Protection Act (ZMZ-UPB2); Romania: Asylum Law no. 122/2006 (*Legea nr. 122/2006 privind azilul in Romania*), Art. 23 and 26; Hungary: Section 60 (2)b of the Asylum Act (LXXX of 2007); Section (3) of Government Decree 301/1997 (XI.9); Poland: Act of 13 June 2003 on granting protection to foreigners on the territory of the Republic of Poland (JL.of 2009, no 189, item 1472 with amendments): Art. 14.2; Spain: Article 7.1 Asylum Law 12/2009; Bulgaria: Law on the Asylum and Refugees, Additional Provisions § 1. (Am., SG, issue 52 of 2007), item 5; Italy: Legislative Decree N.251/2007 Art.8(1)(d); Portugal: Article 2(2) of Act 27/2008 Asylum Act; Malta: Regulation 18(1)(d)(iii) of the Procedural Standards in Examining Applications for Refugee Status, Subsidiary Legislation 420.07, Legal Notice 243 of 2008; Germany does not explicitly refer to sexual orientation but only to sex/gender. The respective provision in Section 60 (1) 3 Residence Act reads: "When a person's life, freedom from bodily harm or liberty is threatened solely on account of their sex, this may also constitute persecution due to membership of a certain social group."

⁵¹ Preamble, Yogyakarta Principles. In comparison "gender identity" is understood as "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 and other expressions of gender, including dress, speech and mannerisms", Preamble, Yogyakarta Principles.

⁵² A lesbian is a woman whose enduring physical, romantic and/or emotional attraction is to other women. For cases recognizing that lesbians are members of a particular social group within the meaning of the refugee definition, see: *Islam (A.P.) v. Secretary of State for the Home Department*; *R v. Immigration Appeal Tribunal*

men,⁵³ bisexuals⁵⁴ and transgender persons⁵⁵ are members of particular social groups within the meaning of the refugee definition.⁵⁶ Relatively fewer claims have been made by intersex applicants, but they would also on their face qualify under either approach.⁵⁷ Sexual

and Another, Ex Parte Shah (A.P.), UK House of Lords (Judicial Committee), 25 March 1999, at pp. 8-10, available at: <http://www.unhcr.org/refworld/docid/3dec8abe4.html>; *Arrêt no. 50 966*, Belgium, Conseil du Contentieux des Etrangers, 9 November 2010, <http://www.unhcr.org/refworld/docid/4dad967f2.html>; *Germany*, Verwaltungsgericht (VG) Neustadt an der Weinstraße [Neustadt an der Weinstraße Administrative Court], 3 K 753/07.NW, 8 September 2008; *Pitcherskaia v. INS; Decisions VA0-01624 and VA0-01625 (In Camera)*, VA0-01624 and VA0-01625, Canada, Immigration and Refugee Board, 14 May 2001, available at: <http://www.unhcr.org/refworld/docid/48246f092.html>;

⁵³ Gay is often used to describe a man whose enduring physical, romantic and/or emotional attraction is to other men, although the term was sometimes used in the past to describe both men and women whose enduring physical, romantic and/or emotional attraction are to persons of the same sex. For cases recognizing that gay men are members of a particular social group within the meaning of the refugee definition, see: *Germany*, VG Schleswig-Holstein 21 November 2006, 4 A 244/05; *Belgium*: *Arrêt no. 50 967* Conseil du Contentieux des Etrangers, 9 November 2010, available at: <http://www.unhcr.org/refworld/docid/4dad97d92.html>; *France*, Cour nationale du droit d'asile (CNDA), 23 décembre 2010, M. K., n° 08014099, C, reported in CNDA, Jurisprudence du Conseil d'Etat et de la Cour nationale du droit d'asile: Contentieux de réfugiés, Année 2010, February 2012, available at: <http://www.cnda.fr/media/document/CNDA/recueil-2010.pdf>, pp. 83–84; CNDA, 10 janvier 2011, M.N., No. 09012710, available at: p. 83, <http://www.unhcr.org/refworld/pdfid/500516fa2.pdf>; *New Zealand: Matter of Toboso-Alfonso; Refugee Appeal No. 1312/93, Re GJ*, No 1312/93, Refugee Status Appeals Authority, 30 August 1995, available at: <http://www.unhcr.org/refworld/docid/3ae6b6938.html>.

⁵⁴ “Bisexual” is used to describe a person who is physically, romantically, and/or emotionally attracted to both men and women. Bisexuality does not have to involve attraction to both sexes at the same time, nor does it have to involve equal attraction to or number of relationships with both sexes. Bisexuals often describe their sexual orientation as “fluid” or “flexible”. For cases recognizing that bisexuals are members of a particular social group within the meaning of the refugee definition, see: *VRAW v. Minister for Immigration and Multicultural and Indigenous Affairs*, [2004] FCA 1133, Australia, Federal Court, 3 September 2004, available at: <http://www.unhcr.org/refworld/docid/4dada05c2.html>; *Decision T98-04159*, Immigration and Refugee Board of Canada, 13 March 2000, available at: <http://www.unhcr.org/refworld/docid/4dada1672.html>.

⁵⁵ While there is no generally accepted definition of the term “transgender”, it is used to describe people whose gender identity and/or gender expression differs from the sex they were assigned at birth (i.e. their biological sex). Transgender is a gender identity, not a sexual orientation and a transgender individual may be heterosexual, gay, lesbian or bisexual. They could identify as female-to-male or male-to-female, and may or may not have undergone surgery and/or hormonal therapy. For cases recognizing that transgender persons are members of a particular social group within the meaning of the refugee definition, see: *France: CE, SSR*, 23 juin 1997, 171858, *Ourbih*, 171858, Conseil d'Etat, 23 June 1997, available at: <http://www.unhcr.org/refworld/docid/3ae6b67c14.html>; *CRR*, 15 février 2005, M.B., No. 49775, Austria: Independent Federal Asylum Senate (UBAS), 244.745/0-VIII/22/03, 28 March 2006; *RRT Case No. 0903346*, [2010] RRTA 41, Australia, Refugee Review Tribunal, 5 February 2010, available at: <http://www.unhcr.org/refworld/docid/4b8e783f2.html>.

⁵⁶ See *Ireland: M.A. v. Minister for Justice and Law Reform, and others*, [2010] IEHC 519, Ireland: High Court, 2 December 2010, available at: <http://www.unhcr.org/refworld/docid/4f2a5f992.html>, and *S.A. v Minister for Justice* [2012] IEHC 78 (High Court, Hogan J) available at: <http://www.courts.ie/80256F2B00356A6B.nsf/0/BB3B9837E902D8DA802579EC0052787F?Open>; *Sweden*: several cases from the Migration Courts in Malmoe, Gothenburg and Stockholm summarized by the Swedish Migration Board in Judicial Position, RCI 03/2011 of January 2011 available at: ; *France*: CNDA, 10 janvier 2011, M. N. n° 09012710 available at p. 83: <http://www.unhcr.org/refworld/pdfid/500516fa2.pdf>, *Finland: Supreme Administrative Court Decision of 13 January 2012*, KHO:2012:1, available at: <http://www.unhcr.org/refworld/docid/4f3cdf7e2.html>; *Austria*: Independent Federal Asylum Senate (UBAS) 28.09.1998, 203.430/0-IX/26/98; UBAS 27.01.1999, 203.912/0-VIII/24/98, available in German at: www.ris.bka.gv.at/ubas; *Germany*: AC Sigmaringen, judgment of 26 April 2010, available at: www.asyl.net/fileadmin/user_upload/dokumente/18013.pdf.

⁵⁷ The term “intersex” or “disorders of sex development” (DSD) refers to a condition in which an individual is born with a reproductive or sexual anatomy and/or chromosome pattern that does not seem to fit typical notions of being male or female. These conditions may be apparent at birth, may appear at puberty, or may only be discovered in a medical examination. Individuals with these conditions were previously referred to as “hermaphrodites”, however this term is considered outdated and should not be used unless the applicant uses it.

orientation is considered an innate and unchangeable characteristic or a characteristic so fundamental to human dignity that the person should not be compelled to give it up or conceal it.⁵⁸ This position has been affirmed in a number of jurisdictions,⁵⁹ including by the Supreme Court of the United Kingdom in its 2010 decision of *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*.⁶⁰

3.2.6. Decision-makers should avoid reliance on stereotypes or assumptions, including in relation to visible markers, or a lack thereof. These can be misleading in establishing an applicant's membership of a particular social group. Not all LGBTI individuals look or behave according to stereotypical notions. In addition, although an attribute or characteristic expressed visibly may reinforce a finding that an applicant belongs to an LGBTI social group, it is not a precondition for recognition of the group.⁶¹ In fact, a group of individuals may seek to avoid manifesting their characteristics in society precisely to avoid attracting persecution.⁶² The "social perception" approach requires neither that the common attribute be literally visible to the naked eye nor that the attribute be easily identifiable by the general public.⁶³ Further, "social perception" does not mean to suggest a sense of community or group identification as might exist for members of an organization or association. Thus, members of a social group may not be recognizable even to each other. It is furthermore not

An intersex person may identify as male or female, while their sexual orientation may be lesbian, gay, bisexual, or heterosexual. UNHCR is aware of two separate cases where the German Federal Office for Migration and Refugees at first instance recognized two inter-sex applicants as refugees.

⁵⁸ As indicated in UNHCR's definition of particular social group in para. 3.1.3 above, where the identity of the applicant is still evolving, he or she describes their sexual orientation as fluid or he or she expresses confusion or uncertainty about his or her sexuality, these characteristics are in any event fundamental to his or her evolving identity and relevant for the identification of membership of a particular social group.

⁵⁹ See e.g., *Geovanni Hernandez-Montiel v. Immigration and Naturalization Service*, US, 225 F.3d 1084, A72-994-275, (9th Cir. 2000), 24 August 2000, available at: <http://www.unhcr.org/refworld/docid/3ba9c1119.html>; later affirmed by *Morales v. Gonzales*, US, 478 F.3d 972, No. 05-70672, (9th Cir. 2007), 3 January 2007, available at: <http://www.unhcr.org/refworld/docid/4829b1452.html>; *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada, Supreme Court, 30 June 1993, available at: <http://www.unhcr.org/refworld/docid/3ae6b673c.html>; *Appellants S395/2002 and S396/2002 v. Minister for Immigration and Multicultural Affairs*, [2003] HCA 71, Australia, High Court, 9 December 2003, available at: <http://www.unhcr.org/refworld/docid/3fd9eca84.html>; *Refugee Appeal No. 74665*, New Zealand, Refugee Status Appeals Authority, 7 July 2004, available at: <http://www.unhcr.org/refworld/docid/42234ca54.html>.

⁶⁰ *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, UK, [2010] UKSC 31, Supreme Court, 7 July 2010, at paras. 11, 14, 78, available at: <http://www.unhcr.org/refworld/docid/4c3456752.html> ("*HJ and HT*").

⁶¹ *Judgment No. 634565 /08015025, C*, France, CNDA, 7 July 2009, summary available at Contentieux des réfugiés: Jurisprudence du Conseil d'État et de la CNDA - Année 2009, 26 October 2010, available at: <http://www.unhcr.org/refworld/docid/4dad9db02.html>, pp. 58–59, recognizing as a refugee a Tunisian who had neither claimed nor manifested his homosexuality openly; *Germany*: AC Frankfurt/Oder, judgment of 11 November 2010, VG 4 K 772/10.A, available at:

http://www.asyl.net/fileadmin/user_upload/dokumente/18015.pdf; *Bundesrepublik Deutschland v. Y (C-71/11), Z (C-99/11), C-71/11 and C-99/11*, CJEU, 5 September 2012, available at: <http://www.unhcr.org/refworld/docid/505ace862.html>, CJEU ruled that the national authorities cannot reasonably expect the applicant to abstain from religious practices to avoid persecution, at para 81(2); UNHCR Public Statement, available at: <http://www.unhcr.org/refworld/docid/4dfb7a082.html>.

⁶² UNHCR, *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department - Case for the first intervener (the United Nations High Commissioner for Refugees)*, 19 April 2010, available at: <http://www.unhcr.org/refworld/docid/4bd1abbc2.html>, para. 26 ff; *Gatimi et al. v. Holder, Attorney General*, US, No. 08-3197, (7th Cir. 2009), 20 August 2009, available at: <http://www.unhcr.org/refworld/docid/4aba40332.html>.

⁶³ See, e.g., UNHCR, *Valdiviezo-Galdamez v. Holder, Attorney General. Brief of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of the Petitioner*, 14 April 2009, available at: <http://www.unhcr.org/refworld/docid/49ef25102.html>.

necessary that members of the group or their common characteristics be publicly known in a society. The determination rests simply on whether a group is “cognizable” or “set apart from society” in a more general, abstract sense.⁶⁴

3.2.7. Individuals may be subject to persecution due to their actual or perceived sexual orientation and/or gender identity. Their sexual orientation and/or gender identity may be attributed to the applicant by the State or a non-State agent of persecution, even if they are not in fact LGBTI, and based on this perception they may be persecuted as a consequence. For example, women and men who do not fit stereotyped appearances and roles may be perceived as LGBTI. It is not required that they actually be LGBTI.⁶⁵

4. Acts of persecution within the meaning of the 1951 Convention and Article 9 of the Qualification Directive, including whether laws criminalizing same-sex relations are persecutory⁶⁶

4.1. Acts of persecution within the meaning of the 1951 Convention and Article 9 of the Qualification Directive⁶⁷

4.1.1. Although the concept of “persecution” is not expressly defined in the 1951 Convention, it can be considered to involve serious human rights violations, including a threat to life or freedom, as well as other kinds of serious harm.⁶⁸ In addition, lesser forms of harm may cumulatively constitute persecution.⁶⁹ Various acts or omissions which, taken separately, do not amount to persecution, may have the combined effect of seriously violating one or several of the applicant’s human rights. This would be considered persecution on “cumulative grounds”. Discrimination is a common element in the experiences of many LGBTI individuals. Discrimination will amount to persecution where measures of discrimination, individually or cumulatively, lead to consequences of a substantially prejudicial nature for the person concerned.⁷⁰ Assessing whether the cumulative effect of

⁶⁴ For further information on the “social perception” approach, see: UNHCR, *UNHCR Statement on the Application of Article 1A(2) of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol to Victims of Trafficking in France*, 12 June 2012, available at: <http://www.unhcr.org/refworld/docid/4fd84b012.html>.

⁶⁵ UNHCR, Guidelines on Gender-Related Persecution, at para. 32; UNHCR, “Advisory Opinion by UNHCR to the Tokyo Bar Association Regarding Refugee Claims Based on Sexual Orientation”, 3 September 2004, at para. 5, available at: <http://www.unhcr.org/refworld/docid/4551c0d04.html>. See also, *Kwasi Amanfi v. John Ashcroft, Attorney General*, US, Nos. 01-4477 and 02-1541, (3rd Cir. 2003), 16 May 2003, available at: <http://www.unhcr.org/refworld/docid/47fdfb2c1a.html>, which concerned an applicant who claimed persecution on account of imputed homosexuality.

⁶⁶ This section corresponds to Question #3 referred to the Court. UNHCR will address Question #3 before addressing Questions #2(a) to (c), in order to (i) provide its interpretation of the concept of persecution, and whether criminalization of consensual same-sex behaviour between adults constitutes persecution, before addressing the question of whether it can be expected that LGBTI individuals conceal their sexual orientation or exercise discretion in order to avoid persecution and (ii) avoid repetition in explaining certain key concepts.

⁶⁷ See also UNHCR, *UNHCR statement on religious persecution and the interpretation of Article 9(1) of the EU Qualification Directive*, 17 June 2011, available at: <http://www.unhcr.org/refworld/docid/4dfb7a082.html>, at Section 4.1.

⁶⁸ J. Hathaway, *The Law of Refugee Status*, Butterworths, Toronto, 1991, pp. 104-105 and 112, approved in *Horvath v. Secretary of State for the Home Department*, UK House of Lords (Judicial Committee), 6 July 2000, available at: <http://www.unhcr.org/refworld/docid/3ae6b6e04.html>.

⁶⁹ UNHCR Handbook and Guidelines, at paras. 53–55.

⁷⁰ UNHCR Handbook and Guidelines, at paras. 54–55. See also, *Kadri v. Mukasey*, US, Nos. 06-2599 & 07-1754, (1st Cir. 2008), 30 September 2008, available at: <http://www.unhcr.org/refworld/docid/498b0a212.html>. The case was remanded for consideration of the standard for economic persecution, referring to *In re T-Z-*, 24 I

such discrimination rises to the level of persecution is to be made by reference to objective evidence, including country of origin information⁷¹ as well as the overall circumstances of the case, including the age, gender, opinions, feelings and psychological make-up of the applicant.⁷²

4.1.2. It is important to note that not all LGBTI applicants may have experienced persecution in the past (see further below in Part 5 on concealment as persecution). Past persecution is not a prerequisite for refugee status under the 1951 Convention and in fact, the well-foundedness of the fear of persecution is a prospective test, to be based on the assessment of the predicament that the applicant would have to face if returned to the country of origin.⁷³ The applicant does not need to show that the authorities knew about his or her sexual orientation and/or gender identity before he or she left the country of origin.⁷⁴

4.1.3. The wording of Article 9 interpreted in light of the text of the Qualification Directive as a whole leads to a similar interpretation as that outlined above in respect of the interpretation of “persecution” in Article 1A(2) of the 1951 Convention. Article 9(1)(a) of the Qualification Directive refers, in the first instance, to the non-derogable rights of the European Convention on Human Rights (“ECHR”)⁷⁵ as examples of “basic human rights”. This reference is however not exhaustive, as the provision uses the words “in particular”. Article 9(1)(a) does not, therefore, exclude the possibility that violations of other rights – such as non-discrimination or family and privacy rights – can constitute an “act of persecution”. In fact, Article 9(1)(b) recognizes that “an accumulation of various measures”, which may include but are not necessarily limited to violations of human rights, can amount to persecution. Article 9(1)(b), further includes other examples of forms of persecution, *inter alia*:

- (a) acts of physical or mental violence, including acts of sexual violence;
- (b) legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
- (c) prosecution or punishment, which is disproportionate or discriminatory;
- (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment;

& N. Dec. 163 (US Board of Immigration Appeals, 2007), which had found that “[nonphysical] harm or suffering . . . such as the deliberate imposition of severe economic disadvantage or the deprivation of liberty, food, housing, employment, or other essentials of life may rise to persecution”.

⁷¹ Belgium, Council of State, *XX v. CGVS*, Nr. 164.283, 31 October 2010, at: <http://www.asylumlawdatabase.eu/en/case-law/belgium-%E2%80%93-council-state-31-october-2010-nr-164283>; Netherlands, *Vreemdelingencirculaire 2000 (C)*, available in Dutch language at: http://wetten.overheid.nl/BWBR0012288/2/2/25/252/Tekst/geldigheidsdatum_18-03-2010; *Molnar v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 98, Canada: Federal Court, 21 January 2005, available at: <http://www.unhcr.org/refworld/docid/4fe81df2.html>.

⁷² UNHCR Handbook and Guidelines, at paras. 51–53. See for instance *France*, CNDA, 23 décembre 2010, *M. K.*, n°08014099, C, reported in CNDA, *Jurisprudence du Conseil d’Etat et de la Cour nationale du droit d’asile: Contentieux de réfugiés, Année 2010*, 18 May 2012, available at: <http://www.cnda.fr/media/document/CNDA/recueil-2010.pdf>, pp. 83–84, where the judgment refers to rejection by his family leading to social isolation including in terms of access to employment.

⁷³ See e.g. *HJ and HT*; *Bromfield v. Mukasey*, US, 543 F.3d 1071, 1076–77 (9th Cir. 2008); *RRT Case No. 1102877*, [2012] RRTA 101, Australia, Refugee Review Tribunal, 23 February 2012, available at: <http://www.unhcr.org/refworld/docid/4f8410a52.html>, para. 91.

⁷⁴ UNHCR, *Handbook and Guidelines*, at para. 83; *Austria*: E3 314.390-1/2008(Iran), 31.03.2009, available in German at: www.ris.bka.gv.at/AsylGH/.

⁷⁵ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: <http://www.unhcr.org/refworld/docid/3ae6b3b04.html>.

(f) acts of a gender-specific or child-specific nature.

4.1.4. Finally, like the interpretation of persecution under the 1951 Convention, Article 4(3)(c) of the Qualification Directive also notes that “the individual position and personal circumstances of the applicant, including factors such as background, gender and age” are to be taken into account.

4.2. **Sexual orientation and/or gender identity are protected by human rights law**

4.2.1. Article 1 of the Universal Declaration of Human Rights provides that “all human beings are born free and equal in dignity and rights”, and Article 2 declares that “everyone is entitled to all the rights and freedoms set forth in this Declaration”.⁷⁶ All people, including LGBTI individuals, are entitled to enjoy the protection provided for by international human rights law on the basis of equality and non-discrimination.⁷⁷

4.2.2. Although the international human rights treaties do not explicitly recognize a right to equality on the basis of sexual orientation, discrimination on this basis has been held to be prohibited by international human rights law.⁷⁸ For example, the terms “sex” and “other status” contained in the non-discrimination clauses of the main international human rights instruments have been accepted as encompassing sexual orientation and/or gender identity.⁷⁹ International and national courts and tribunals have also found that laws criminalizing same-sex relations violate other human rights, including the right to private and family life.⁸⁰

4.2.3. In the European Union, the Charter of Fundamental Rights of the European Union explicitly prohibits discrimination on the basis of sexual orientation.⁸¹ Articles 10 and 19 of

⁷⁶ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <http://www.unhcr.org/refworld/docid/3ae6b3712c.html>.

⁷⁷ UN Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity*, 17 November 2011, available at: <http://www.unhcr.org/refworld/docid/4ef092022.html>.

⁷⁸ “[D]iscrimination’ as used in the Covenant [on Civil and Political Rights] should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”, UN Human Rights Committee, CCPR General Comment No. 18: Non-discrimination, 10 November 1989, available at: <http://www.unhcr.org/refworld/docid/453883fa8.html>, para. 7.

⁷⁹ The UN Human Rights Committee held in 1994 in the landmark decision *Toonen v. Australia* that the International Covenant on Civil and Political Rights (adopted by the UN General Assembly on 16 December 1966, hereafter “ICCPR”) prohibits discrimination on the grounds of sexual orientation, see CCPR/C/50/D/488/1992, 4 April 1994, available at: <http://www.unhcr.org/refworld/docid/48298b8d2.html>. This has subsequently been affirmed by several other UN human rights treaty bodies, including also recognition that gender identity is among the prohibited grounds of discrimination. See e.g. OHCHR, *Report on Sexual Orientation and Gender Identity*, at para. 7.

⁸⁰ For example, see European Court of Human Rights, *Dudgeon v. UK*, Application No. 7525/76, 22 October 1981, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57473>; *Norris v. Ireland*, Application No. 10581/83, ECtHR, 26 October 1988, <http://www.unhcr.org/refworld/docid/48abd5a2d.html>. See also UN Human Rights Committee, *Toonen v. Australia* (above note 79), which found that such laws violated Articles 17 and 26 of the International Covenant on Civil and Political Rights.

⁸¹ European Union, *Charter of Fundamental Rights of the European Union*, 7 December 2000, Official Journal of the European Communities, 18 December 2000 (2000/C 364/01), available at: <http://www.unhcr.org/refworld/docid/3ae6b3b70.html>, Article 21. Gender identity is not explicitly mentioned but since the list of grounds is not exhaustive, it is open for the inclusion of other grounds that give rise to differential or discriminatory treatment. Other regional human rights instruments also prohibit discrimination on

the TFEU provide that the European Union shall aim to combat discrimination based on, *inter alia*, sex and sexual orientation, and may take appropriate action to combat such discrimination.⁸² The European Court of Human Rights (“ECtHR”) has also held that sexual orientation is a prohibited ground of discrimination under Article 14 of the ECHR, and that laws criminalizing same-sex relations were contrary to the ECHR.⁸³ The ECtHR has also found violations of Article 14 on the basis of alleged discrimination on grounds of sexual orientation, in conjunction with Article 8 of the ECHR, the right to respect for private and family life.⁸⁴ The principle of non-discrimination on the basis of sexual orientation has also been recognized in a number of Council of Europe instruments,⁸⁵ and many European countries have explicitly prohibited discrimination in employment, goods and services. Moreover, of particular relevance to the issues raised in this case, consensual same-sex relations have been de-criminalized in all European countries since 2003.⁸⁶

4.3. Laws criminalizing same-sex relations

4.3.1. Many LGBTI applicants come from countries of origin in which consensual same-sex relations between adults are criminalized, such as Senegal, Sierra Leone and Uganda, the

the basis of sexual orientation. See, e.g. Organization of American States, *Human Rights, Sexual Orientation, and Gender Identity*, AG/RES. 2653 (XLI-O/11), 7 June 2011.

⁸² TFEU, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:083:0047:0200:en:PDF>.

⁸³ ECtHR, *Mouta v. Portugal*, Application No. 33290/96, judgment of 21 December 1999; *Norris v. Ireland*, Application no. 10581/83, ECtHR, 26 October 1988, available at: <http://www.unhcr.org/refworld/docid/48abd5a2d.html>; *Modinos v. Cyprus*, Application no. 7/1992/352/426, ECtHR, 23 March 1993, available at: <http://www.unhcr.org/refworld/docid/402a21a04.html>. However, as early as 1981 the Court had found in *Dudgeon v. United Kingdom*, Application No. 7525/76, that discrimination in the criminal law regarding consenting relations between same-sex adults in private was contrary to the right to respect for private life in Article 8 ECHR. In 2010, the ECtHR also mentioned transsexuality (although not gender identity) as a prohibited ground of discrimination under Article 14 of the ECHR: ECtHR, *P.V. v. Spain*, Application No. 35159/09, judgment of 30 November 2010, at para. 30. In the specific case no violation of the provision was found.

⁸⁴ *Dudgeon v. United Kingdom* (1982), available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57473>; *Smith and Grady v. United Kingdom* (1999), available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58408>, *Salgueiro da Silva Mouta v. Portugal* (1999), available at: http://www.idhc.org/esp/documents/Identidad/TEDH/SALGUEIRO_PORTUGAL.pdf, *Sutherland v. United Kingdom* (1998), available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59354>, *Karner v. Austria*, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61263>, (2003), *EB v. France* (2008), available at: http://www.asil.org/pdfs/ilib080125_1.pdf, *Schalk and Kopf v. Austria* (2010) available at: http://www.menschenrechte.ac.at/uploads/media/Schalk_und_Kopf_gg_OEsterreich_Urteil_01.pdf.

⁸⁵ Council of Europe's Committee of Ministers Recommendation CM/Rec (2010) on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted on 31 March 2010, available at: <https://wcd.coe.int/ViewDoc.jsp?id=1606669>, Recommendation 1915 (2010) of the Parliamentary Assembly on Discrimination on the basis of sexual orientation and gender identity; adopted on 29 April 2010, available at: <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta10/erec1915.htm>, Resolution 1728 (2010) of the Parliamentary Assembly on Discrimination on the basis of sexual orientation and gender identity, adopted on 29 April, available at: <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/ERES1728.htm>. In addition, Article 4 (3) of the Council of Europe Convention on violence against women and domestic violence, 11 May 2010, CETS No. 210, available at: <http://www.conventions.coe.int/Treaty/EN/Treaties/Word/210.doc> prohibits discrimination on the basis of both sexual orientation and gender identity.

⁸⁶ Council of Europe, *Discrimination on grounds of sexual orientation and gender identity in Europe*, September 2011, ISBN 978-92-871-7257-0, available at: <http://www.unhcr.org/refworld/docid/4eb8f53f2.html> at pp. 22-24. See also, UNHCR, *Summary Report, Informal Meeting of Experts on Refugee Claims relating to Sexual Orientation and Gender Identity*, 10 September 2011, available at: <http://www.unhcr.org/refworld/docid/4fa910f92.html>.

countries of origin of the applicants in the underlying cases before the Dutch Council of State. Where prosecution and harsh punishments are imposed, such as the death penalty, prison terms,⁸⁷ or severe corporal punishment, including flogging, their persecutory character is particularly evident.⁸⁸

4.3.2. Assessed in its overall context, the existence of criminal prohibitions on same-sex relations could also lead to an intolerable predicament for an LGBTI individual rising to the level of persecution.⁸⁹ Even if the relevant laws are irregularly or rarely, if ever, enforced, laws criminalizing same-sex relations can create or contribute to an oppressive atmosphere of intolerance and generate a threat of prosecution for having such relations. The existence of such laws can be used for blackmail and extortion purposes by the authorities or non-State actors, as well as promote political rhetoric that can expose LGBTI individuals to risks of persecutory harm. They can also hinder LGBTI individuals from seeking and obtaining State protection.⁹⁰

4.3.3. Even in countries where consensual same-sex relations are not criminalized by specific provisions, other laws, for example, public morality or public order laws (e.g. loitering), may be selectively applied and enforced against LGBTI individuals in a

⁸⁷ Note that in Uganda (Case C-199/12), Section 145 of the Penal Code prescribes for 7 years imprisonment for “unnatural offences”; in Sierra Leone (Case C-200/12), Article 61 of the Offences Against the Person Act criminalizes “buggery and bestiality” and prescribes a punishment of life imprisonment; and in Senegal (Case C-201/12), Article 319:3 of the Code Pénal of Senegal criminalizes “improper or unnatural acts with a person of the same sex” and prescribes 1-5 years of imprisonment and a fine.

⁸⁸ See e.g. *Arrêt n° 50 966, Belgium*, Conseil du Contentieux des Etrangers, 9 November 2010, available at: <http://www.unhcr.org/refworld/docid/4dad967f2.html>, concerning a lesbian from Senegal found that a prison term for homosexual conduct of 1–5 years and fines from 100 000 to 1 500 000 francs CFA and the fact that society was homophobic were sufficient grounds to constitute persecution in the circumstances of the case, para. 5.7.1. Similarly in *Arrêt n° 50 967, Belgium*, Conseil du Contentieux des Etrangers, 9 November 2010, available at: <http://www.unhcr.org/refworld/docid/4dad97d92.html>, concerning a gay man from Senegal; *Italy: Trib Milano 195/2012*.

⁸⁹ *HJ and HT*, at paras. 75-76 per Lord Rodger; *Italy: Sentenza n. 15981 del 2012*, Italy: Corte di Cassazione, 20 September 2012, available at: <http://www.unhcr.org/refworld/docid/5062c59f2.html>, concerning a gay man from Senegal, where the Court maintained that as a consequence of criminalisation “persons with a homosexual orientation in Senegal are forced to violate criminal law, exposing themselves to severe penalties, as to gain the opportunity of living their sexual orientation freely. This results in a serious interference in the private life of homosexual Senegalese citizens, which seriously prejudice their right to respect for private life”, and at para. 5 the Court considers “such violation of a fundamental right [to respect for private life] automatically affects the condition of homosexual persons, leading to a situation of persecution which alone may justify the grant of protection required”; *Ireland: S.A v Minister for Justice*, at paras .18-19; *France: CNDA, 1^{er} juillet 2008, K, n° 571904*, available at: <http://www.unhcr.org/refworld/pdfid/4dad9d6f2.pdf>; *Finland: Supreme Administrative Court Decision of 13 January 2012*, KHO:2012:1, available at: <http://www.unhcr.org/refworld/docid/4f3cdf7e2.html>; *Austria: Independent Federal Asylum Senate (UBAS) 28.09.1998, 203.430/0-IX/26/98 (Iran)*, available in German at: www.ris.bka.gv.at/ubas. Though the authorities in his country of origin were aware of the applicant’s orientation without persecuting him for his sexual orientation, he was granted asylum on grounds that the existence of the law renders persecution rather likely; *Poland: Mere existence and execution of the law together with individual situation; X. v. The Head of the Office for Foreigners* (unofficial English translation of the Polish original), Poland: Refugee Board, 25 July 2012, p. 4, available at: <http://www.unhcr.org/refworld/docid/5037a3892.html>.

⁹⁰ Where the country of origin maintains laws criminalizing consensual same-sex relations, it would be unreasonable to expect that the applicant first seek State protection against harm based on what is – in the view of the law – a criminal act. In such situations, it should be presumed, in the absence of evidence to the contrary, that the country concerned is unable or unwilling to protect the applicant. For judicial recognition and confirmation of this principle, see also, ECtHR, *Dudgeon v. United Kingdom*, Appl. No. 7525/76, 22 October 1981, available at: <http://www.unhcr.org/refworld/docid/47fdfaf7d.html>.

discriminatory manner, making life intolerable for the claimant, and thus amounting to persecution.⁹¹

4.3.4. Assessing the “well-founded fear of being persecuted” on the basis of a person’s sexual orientation in such cases needs to be fact-based, focusing on both the objective individual and the contextual circumstances of the case. The legal system in the country concerned, including any relevant legislation, its application, interpretation and actual impact on society as well as the applicant needs to be examined.⁹² The word “fear” refers not only to persons to whom such laws have already been applied, but also to individuals who wish to avoid the risk of the application of such laws to them. Where there is no conclusive country of origin information upon which it is possible to determine if and how the laws are actually enforced, a pervading and generalized climate of homophobia in the country of origin could be evidence indicative that LGBTI persons are nevertheless being persecuted or are at risk thereof.⁹³

5. Concealment of sexual orientation and/or gender identity in order to avoid persecution⁹⁴

5.1. Questions referred to the Court by the Dutch Council of State

5.1.1. UNHCR therefore notes that the key issue to be assessed by the Court in relation to Questions 2(a) to (c) of the questions referred by the Dutch Council of State is therefore not “which homosexual activities fall within the scope of the Directive?”; but rather: what nature and form of harm would the applicant face upon return to his or her country of origin because of his or her sexual orientation and/or gender identity and will this predicament be severe enough to amount to persecution.

5.1.2. UNHCR will address together Questions 2(a) and (b), regarding the expectation that an LGBTI applicant would conceal his or her sexual orientation in order to avoid persecution, - as the questions raise similar issues of behaviour modification in order to avoid persecution.

5.2. “Avoiding” persecution through concealment of one’s sexual orientation or exercising discretion

5.2.1. LGBTI individuals frequently keep aspects and sometimes large parts of their lives secret. Many LGBTI asylum applicants will not have lived openly as LGBTI in their country of origin and some may not have had any intimate relationships. Many suppress their sexual orientation and/or gender identity to avoid the severe consequences of discovery, including the risk of incurring harsh criminal penalties, arbitrary house raids, discrimination, societal disapproval, or exclusion from the family.

⁹¹ See e.g. *RRT Case No. 1102877*, [2012] RRTA 101, Australia, Refugee Review Tribunal, 23 February 2012, at paras. 89, 96, available at: <http://www.unhcr.org/refworld/docid/4f8410a52.html>; *RRT Case No. 071862642*, [2008] RRTA 40, Australia: Refugee Review Tribunal, 19 February 2008, available at: <http://www.unhcr.org/refworld/docid/4811a7192.html>.

⁹² UNHCR, Handbook and Guidelines, at para. 45.

⁹³ See: UNHCR, *UNHCR's Comments on the Practice of Phallometry in the Czech Republic to Determine the Credibility of Asylum Claims based on Persecution due to Sexual Orientation*, April 2011, at pp. 2-3, available at: <http://www.unhcr.org/refworld/docid/4daeb07b2.html>; United Kingdom: Home Office, *Sexual Orientation Issues in the Asylum Claim*, 6 October 2011, at p. 12, available at: <http://www.unhcr.org/refworld/docid/4eb8f0982.html>.

⁹⁴ This section corresponds to Question #2(a) to (c) referred to the Court.

5.2.2. That an applicant may be able to avoid persecution by concealing or exercising “restraint” with respect to his or her sexual orientation and/or gender identity, or has done so previously, is not a valid reason to deny refugee status. A person cannot be denied refugee status based on a requirement that she or he can change or conceal his or her identity, opinions or characteristics in order to avoid persecution. LGBTI individuals are entitled to freedom of expression and association in the same way as others.⁹⁵ Persecution does not cease to be persecution because those persecuted can eliminate the harm by taking avoiding action.⁹⁶ A proper analysis as to whether a LGBTI applicant is a refugee under the 1951 Convention needs to be based on the premise that applicants are entitled to live in society as the persons they are, and need not hide their identities. Neither heterosexual nor homosexual individuals should be required to conceal their sexual orientation and/or gender identity. In the view of the UK Supreme Court, requiring an applicant to conceal his or her sexual orientation and/or gender identity would be “unacceptable as being inconsistent with the underlying purpose of the Convention since it involves the applicant denying or hiding precisely the innate characteristic which forms the basis of his claim of persecution”.⁹⁷

5.2.3. With this general principle in mind, as noted in paragraph 5.1.1 above, the question thus to be considered is what predicament the applicant would face if he or she were returned to the country of origin. In UNHCR’s view, this requires an objective and fact-specific examination of the nature of the applicant’s predicament and whether this amounts to persecution. The role of the decision-maker is to assess risk (whether the fear of persecution is well-founded) and not demand conduct (pronounce upon what the applicant should do and not do). It is important to note that even if applicants may so far have managed to avoid harm through concealment, their circumstances may change over time and secrecy may not be an option for the entirety of their lifetimes. The risk of discovery may also not necessarily be confined to their own conduct. There is almost always the possibility of discovery against the person’s will, for example, by accident, rumours or growing suspicion.⁹⁸ It is also important to recognize that even if LGBTI individuals conceal their sexual orientation and/or gender identity they may still be at risk of exposure and related harm for not conforming to heterosexual social norms (e.g. getting married and having children). This absence of certain expected activities and behaviour may identify a difference between them and other people and may place them at risk of harm.⁹⁹

⁹⁵ *HJ and HT*, at paras. 11, 14 and 78. See also, *M.A. v. Minister for Justice and Law Reform, and others*, [2010] IEHC 519, Ireland: High Court, 2 December 2010, available at: <http://www.unhcr.org/refworld/docid/4f2a5f992.html>, where the Court held, at para. 19, that: “Homosexuals are entitled to freedom of association with others of the same sexual orientation and to freedom of self-expression in matters that affect their sexuality. It is a breach of fundamental rights to compel a homosexual person to pretend that their sexuality does not exist or that the behaviour by which it manifests itself can be suppressed. Persecution does not cease to be persecution for the purposes of the Convention because those persecuted can eliminate the harm by taking avoiding action”; France: CNDA, 7 juillet 2009, C, n° 634565, available at: <http://www.asylumlawdatabase.eu/sites/asylumlawdatabase.eu/files/aldfiles/634565.pdf>, Finland: *Supreme Administrative Court Decision of 13 January 2012*, KHO:2012:1, available at: <http://www.unhcr.org/refworld/docid/4f3cdf7e2.html>; EU CJ, *Federal Republic of Germany v. Y* (C-71/11), Z(C-99/11).

⁹⁶ See e.g., *S395/2002; Refugee Appeal No. 74665*.

⁹⁷ *HJ and HT*, at para. 76.

⁹⁸ *SW (Jamaica) v. Secretary of State for the Home Department*, CG [2011] UKUT 00251(IAC), UK Upper Tribunal (Immigration and Asylum Chamber), 24 June 2011, paras. 3–4, available at: <http://www.unhcr.org/refworld/docid/4e0c3fae2.html>; *S395/2002*, at paras. 56–58.

⁹⁹ *SW (Jamaica) v. Secretary of State for the Home Department*.

5.2.4. Being compelled to conceal one's sexual orientation and/or gender identity may also result in significant psychological harm. Discriminatory and disapproving attitudes, norms and values may have a serious effect on the mental health of LGBTI individuals and could in particular cases lead to an intolerable predicament amounting to persecution. Feelings of self-denial, shame, isolation and even self-hatred that may accrue in response an inability to be open about one's sexuality and/or gender identity, including over the long-term.

5.3. Distinctions between “core” and “marginal” areas of sexual orientation

5.3.1. UNHCR rejects the distinction between “core areas of one's sexual orientation” and “marginal areas”. As noted by the Court in its judgment in the joined cases of *Federal Republic of Germany v. Y (C-71/11) and Z (C-99/11)* in the context of a case concerning religious persecution, “it is unnecessary to distinguish acts that interfere with the ‘core areas’ (*forum internum*) of the basic right to freedom of religion, which do not include religious activities in public (*forum externum*), from acts which do not affect those purported ‘core areas’”.¹⁰⁰ A similar view was expressed by the Advocate General in his Opinion in the case, where he noted that there was no support in the Qualification Directive for a distinction between “core” and “marginal” areas of a protected right and that making such a distinction risks introducing an element of arbitrariness into the assessment of a well-founded fear of persecution.¹⁰¹

5.3.2. As noted above, sexual orientation is about a person's identity. This identity may be expressed or revealed in many subtle or obvious ways, through appearance, speech, behaviour, dress and mannerisms; or not revealed at all in these ways. Behaviour and activities may relate to an identity in complex ways, making it difficult to differentiate between core and marginal areas. While a certain activity expressing or revealing a person's sexual orientation may be considered trivial, what is at issue is the consequences that would follow such behaviour. In other words “‘activity’ associated with sexual orientation does not *cause* the persecution, nor does it *form the basis of protection*, it simply reveals or exposes the stigmatized identity.”¹⁰² It is UNHCR's position that the distinction between forms of expression that relate to a “core area” of sexual orientation and those that do not, is irrelevant for the purposes of the assessment of the existence of a well-founded fear of persecution under the 1951 Convention and the Qualification Directive.

6. Conclusion

¹⁰⁰ *Bundesrepublik Deutschland v. Y (C-71/11), Z (C-99/11)*, C-71/11 and C-99/11, above note 60, at para. 62. See also: *RT (Zimbabwe) and others v Secretary of State for the Home Department*, [2012] UKSC 38, UK Supreme Court, 25 July 2012, at paras. 75–76 (Lord Kerr), available at: <http://www.unhcr.org/refworld/docid/500fdacb2.html>; UNHCR statement on religious persecution and the interpretation of Article 9(1) of the EU Qualification Directive, note 65 above and UNHCR, *Secretary of State for the Home Department (Appellant) v. RT (Zimbabwe), SM (Zimbabwe) and AM (Zimbabwe) (Respondents) and the United Nations High Commissioner for Refugees (Intervener) - Case for the Intervener*, 25 May 2012, Case No. 2011/0011, at para. 12(9), available at: <http://www.unhcr.org/refworld/docid/4fc369022.html>.

¹⁰¹ Opinion of Advocate General Bot, *Joined Cases C 71/11 and C 99/11 Federal Republic of Germany v. Y (C 71/11), Z (C 99/11)*, above note 102, at paras. 40–52, available at: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=121723&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=557952>.

¹⁰² Jenni Millbank, *The Right of Lesbians and gay men to live freely, openly, and on equal terms is not bad law: A reply to Hathaway and Pobjoy*, at III. IV. Trivial acts and protected identities, available at: http://www.law.nyu.edu/ecm_dlv4/groups/public/@nyu_law_website_journals_journal_of_international_law_and_politics/documents/documents/ecm_pro_072116.pdf.

6.1. UNHCR proposes the following specific responses to the questions referred to the Court by the Dutch Council of State:

- **Question 1:** In accordance with international refugee law and the plain language of Article 10(1)(d) of the Qualification Directive, LGBTI individuals with international protection needs may constitute a particular social group as referred to in Article 10(1)(d) of the Qualification Directive. The persecution they claim to face may, however, also be linked to other reasons listed in Article 10 of the Qualification Directive, notably political opinion and religion, depending upon the political, religious and cultural context of the claim.
- **Question 2:** A proper analysis as to whether an LGBTI individual is a refugee under the 1951 Convention or the Qualification Directive must start from the premise that applicants are entitled to live openly in society as who they are and need not hide that. The question to be considered in assessing whether an applicant qualifies for refugee status under the 1951 Convention or the Qualification Directive is therefore what predicament the applicant would face if he or she were returned to the country of origin. There is no basis for a distinction between “core” and “marginal” areas of sexual orientation and/or gender identity in the 1951 Convention or the Qualification Directive, and such distinctions should be avoided in assessing a well-founded fear of persecution.
- **Question 3:** The criminalization of consensual same-sex activities between adults through prosecution and punishment does not conform to international human rights standards. Where prosecution and harsh punishments are imposed, such as the death penalty, prison terms, or severe corporal punishment, including flogging, their persecutory character is particularly evident. Assessing the “well-founded fear of being persecuted” in cases needs to be fact-based, focusing on both the individual and the contextual circumstances of the case. Where such information is available, the legal system in the country concerned, including any relevant legislation, its interpretation, application and actual impact on the applicant need to be assessed. A pervading and generalized climate of homophobia could be evidence, for example, to support a claim that LGBTI persons are being persecuted even where the laws themselves are not actually enforced regularly, systematically or at all.

UNHCR
28 September 2012