

B and C v. the Switzerland

Application no. 889/19

**WRITTEN SUBMISSIONS ON BEHALF OF
ILGA-EUROPE (THE EUROPEAN REGION OF THE INTERNATIONAL
LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASSOCIATION), THE
EUROPEAN COUNCIL ON REFUGEES AND EXILES (ECRE) AND THE
INTERNATIONAL
COMMISSION OF JURISTS (ICJ)**

INTERVENERS

pursuant to the Deputy Section Registrar's notification of 27 November 2019

18 December 2019

1. In interpreting the scope and content of the Contracting Parties' obligations under the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter: "the Convention" or ECHR), this Court's case-law has consistently considered that Convention rights are not applied in a vacuum,¹ but fall to be interpreted in light of, and consistently with, other applicable international law standards and obligations,² including under treaty and customary international law.³ The interveners also recall the role of the UN High Commissioner for Refugees⁴ (UNHCR) in the supervision of the application of the 1951 UN Convention Relating to the Status of Refugees and its 1967 Protocol.⁵ In the exercise of its supervisory mandate, in 2012 UNHCR published a set of Guidelines on claims to refugee status based on sexual orientation and/or gender identity under the Refugee Convention.⁶ Given UNHCR's role as the guardian of the Refugee Convention, the interveners submit that any applicable ECHR provisions should be interpreted in light of relevant UNHCR guidance, and that, in the context of this Court's determination of the present case, the UNHCR SOGI Guidelines are highly pertinent to the interpretation of the Contracting Parties' ECHR obligations. Bearing in mind the relevance of the Refugee Convention, as interpreted by a number of domestic courts, to the determination of the scope and content of *non-refoulement* obligations under Article 3 ECHR, the interveners' present submissions focus on: i) how criminalization of consensual same-sex sexual conduct gives rise to a real risk of Article 3 ECHR prohibited treatment, thus triggering *non-refoulement* obligations; ii) how enforced concealment of one's same-sex sexual orientation constitutes persecution under refugee law and is incompatible with the ECHR; and iii) the risk of persecution based on same-sex sexual orientation in The Gambia.

i) Criminalization of consensual same-sex sexual conduct

2. Laws criminalizing same-sex conduct are discriminatory and incompatible with human rights law and standards.⁷ Historically, this Court has consistently found that laws criminalizing consensual same-sex activity amount to an unjustifiable interference with an individual's right to private life, including in circumstances where the law had not been applied in practice.⁸ In addition, in *Smith and Grady v. the United Kingdom*, addressing the investigation and administrative discharge of armed forces personnel as a result of the implementation of an absolute policy against the participation of homosexuals in the armed forces, this Court observed that it "would not exclude that treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority of the nature described above could, in principle, fall within the scope of Article 3".⁹ In *Identoba and Others v. Georgia*, this Court reiterated that "**discriminatory treatment as such can in principle amount to degrading treatment within the meaning of Article 3** where it attains a level of severity such as to constitute an affront to human dignity. More specifically, **treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority may, in principle, fall within the scope of Article 3**".¹⁰
3. In the wake of this Court's seminal ruling in *Dudgeon v. the United Kingdom* – recognizing the harm caused by the mere existence of laws criminalizing consensual same-sex sexual conduct – UN human rights Treaty Bodies and independent experts have repeatedly urged States to repeal laws criminalizing homosexuality.¹¹ Further, they have called attention to the ways in which the criminalization of consensual same-sex sexual conduct legitimizes prejudice and exposes people to hate crimes and police abuse, and have recognized that it can lead to torture and other ill-treatment.¹² Laws and regulations directly or indirectly criminalizing consensual same-

¹ *Öcalan v. Turkey* [GC], no. 46221/99, judgment, 12 May 2005, § 163.

² *Demir and Baykara v. Turkey* [GC], no. 34503/97, judgment, 12 November 2008, § 67; *Al-Adsani v. the UK* [GC], no. 35763/97, judgment, 21 November 2001, § 55.

³ *Al-Adsani* § 55; *Waite and Kennedy v Germany* [GC], no. 26083/94, judgment, 18 February 1999; *Taskin v Turkey*, no. 46117/99, 10 November 2004.

⁴ UNHCR is mandated by the UN General Assembly to provide international protection to refugees and to supervise the application of treaties relating to refugees, pursuant to its 1950 Statute. UNGA, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), Annex, § 8(a). Further, UNHCR's supervisory responsibility is also reflected in the preamble to and in Article 35 of the Refugee Convention and Article II of its 1967 Protocol.

⁵ The 1951 Convention Relating to the Status of Refugees, 189 United Nations Treaty Series 137, entered into force 22 April 1954 (hereafter: the Refugee Convention), as amended by the Protocol Relating to the Status of Refugees, 606 United Nations Treaty Series 267, entered into force 4 October 1967 (hereafter: 1967 Protocol).

⁶ The UNHCR Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 23 October 2012, HCR/GIP/12/01, (hereafter: the UNHCR SOGI Guidelines).

⁷ UNHCR highlights, "the criminalization of same-sex relations can create or contribute to an oppressive atmosphere of intolerance and generate a threat of prosecution for having such relations", UNHCR SOGI Guidelines, § 27.

⁸ *Dudgeon v. the United Kingdom*, 22 October 1981, Series A no. 45; *Norris v. Ireland*, 26 October 1988, Series A no. 142; and *Modinos v. Cyprus*, 22 April 1993, Series A no. 259.

⁹ *Smith and Grady*, nos. 33985/96 33986/96, judgment, 27 September 1999, § 121.

¹⁰ *Identoba and Others v. Georgia*, (no. 73235/12), judgment, 12 May 2015, § 65.

¹¹ E.g., Human Rights Committee, *Toonen v Australia* (Communication 488/1992, 4 April 1994), UN Doc. CCPR/C/50/D/488/1992.

¹² E.g., see *Born Free and Equal, Sexual Orientation and Gender Identity in International Human Rights Law*, Office of the High Commissioner for Human Rights, HR/PUB/12/06, 2012, p. 33; and the Report of the UN Special Rapporteur on the question of

sex sexual orientation or conduct provide State actors with the means to perpetrate human rights violations, and enable non-State actors to persecute individuals on account of their real or imputed sexual orientation with impunity.¹³ As a result of criminal sanctions, people may be threatened with arrest and detention based on their real or imputed sexual orientation and may be subjected to baseless and degrading physical examinations, purportedly to “prove” their same-sex sexual orientation.¹⁴ This Court has also found that pernicious legal, administrative, policy and/or judicial measures that were *in themselves* discriminatory – whether or not enforced – or that were implemented in a discriminatory manner, violated the ECHR and caused their victims to experience fear and distress.¹⁵ This approach recognizes the potential for persecution arising from the mere existence of these laws, even in the absence of a recent record of prosecutions and imprisonments, whether arising from misfeasance of State actors outside due process or – frequently – from the abuses of non-State actors, whose own discrimination and discriminatory violence are legitimized by the existence of discriminatory penal sanctions, and against whom the State does not offer protection. In *Dudgeon*, the Commission in fact noted the possibility of such laws making it more likely that police and private actors would commit acts of extortion and other crimes as well as engage in discriminatory treatment,¹⁶ instead of, or at times in addition to, prosecution.

4. Thus, the mere existence of laws criminalizing consensual same-sex sexual conduct, including in countries where they have not been recently “enforced”,¹⁷ can give rise to acts of persecution, without necessarily leading to recorded court cases and convictions; it also entails a real risk that the said laws may be enforced in the future.¹⁸ Furthermore, the 2018 Report of the UN Independent Expert on protection against violence and discrimination based on SOGI (UN SOGI Expert) notes “Legislation, public policy and jurisprudence that criminalize same-sex relationships and particular gender identities are per se contrary to international human rights law, fuel stigma, legitimize prejudice and expose people to family and institutional violence and further human rights abuses, such as hate crimes, death threats and torture.”¹⁹

torture and other cruel, inhuman or degrading treatment or punishment, UN Doc.: [A/56/156](#), 3 July 2001, § 20 and, generally, §§ 18-25.

¹³ As the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has noted: “sanctioned punishment by States reinforces existing prejudices, and legitimizes community violence and police brutality directed at affected individuals,” [A/HRC/14/20](#), § 20. The UN Special Rapporteur on extrajudicial executions noted that criminalization increases social stigmatization and made people “more vulnerable to violence and human rights abuses, including death threats and violations of the right to life, which are often committed in a climate of impunity”, [A/57/138](#), § 37.

¹⁴ Non-consensual anal examinations are often used to determine criminal liability against men suspected of homosexuality. UN human rights bodies have long held that such acts are in violation of the prohibition of torture and other ill-treatment. See [A/HRC/16/47/Add.1](#), opinion No. 25/2009 (Egypt), §§ 24, 28-29; Concluding Observations of the Committee against Torture on Egypt ([CAT/C/CR/29/4](#)), §§ 5(e) and 6(k). See also [A/56/156](#), § 24; [A/HRC/4/33/Add.1](#), p. 316, § 317; [A/HRC/10/44/Add.4](#), pp. 86-87, § 61; and [A/HRC/16/52/Add.1](#), p. 276, § 131.

¹⁵ See, *Dudgeon v. the United Kingdom*, no. 7525/76, judgment, 22 October 1981, §§ 40 to 46; *Norris v. Ireland*, no. 10581/83, judgment, 26 October 1988, §§ 38 and 46 to 47; *Modinos v. Cyprus*, no. 15070/89, judgment, 22 April 1993, §§ 23, 24 and 26; and *A.D.T. v. the UK*, no. 35765/97, judgment, 31 July 2000, §§ 26 and 39. See also, *Marangos v. Cyprus*, no. 31106/96, Commission’s report of 3 December 1997, unpublished. See also *Bayev and Others v. Russia*, where this Court recently reiterated that it “has consistently declined to endorse policies and decisions which embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority”, *Bayev and Others v. Russia*, nos. [67667/09](#) and 2 others, judgment, 20 June 2017, § 68.

¹⁶ See the European Commission’s report in *Dudgeon*, cited in the Court’s judgment in the same case, where, in arriving at its conclusion that it saw no reasons to doubt the truthfulness of the applicant’s allegations, the Commission had noted that, “the existence of the law will give rise to a degree of fear or restraint on the part of male homosexuals [...] the existence of the law prohibiting consensual and private homosexual acts [...] provides opportunities for blackmail [...] and may put a strain upon young men [...] who fear prosecution for their homosexual activities”. They reached this conclusion despite their finding that the number of prosecutions in such cases [...] was so small “that the law has in effect ceased to operate”. It appears inevitable to the Commission that the existence of the laws in question will have similar effects. The applicant alleges in his affidavits that they have such effects on him”, Commission’s report, § 94.

¹⁷ It is this Court’s settled case-law that the criminalization of consensual same-sex conduct per se — even in the absence of an actual record of enforcement through an active prosecution policy — violates the Convention. See, in particular, *Modinos v. Cyprus* and *Dudgeon v. the United Kingdom*. As long as statutes are not repealed, there continues to be a real risk of their enforcement and therefore a real risk that individuals would face criminal investigations, charges, trials, convictions and penalties such as imprisonment, because of their real or perceived sexual orientation or gender identity. See, also, the [UNHCR SOGI Guidelines](#), §§ 27, 29.

¹⁸ In *Dudgeon v. the United Kingdom*, this Court observed that, notwithstanding the then apparent paucity or even absence of a record of prosecutions in these types of cases, it could not be said that the legislation in question was a dead letter, because there was no stated policy on the part of the authorities not to enforce the law (§41). In *Modinos v. Cyprus*, this Court reiterated this point by noting that, notwithstanding the fact that the Attorney-General had followed a consistent policy of not bringing criminal proceedings in respect of private homosexual conduct considering that the law in question was a dead letter, the said policy provided “no guarantee that action will not be taken by a future Attorney-General to enforce the law, particularly when regard is had to statements by Government ministers which appear to suggest that the relevant provisions of the Criminal Code are still in force”, *Modinos*, judgment of the Court, § 23.

¹⁹ UNHRC 2018 Report on protection against violence and discrimination based on SOGI, UN Doc. [A/HRC/38/43](#), § 20. See also Interim report of the Special Rapporteur of the Commission on Human Rights on extrajudicial, summary or arbitrary Executions, UN Doc. [A/57/138](#), § 37.

5. Certain Courts, including to some extent, the Court of Justice of the EU (CJEU), have held that the mere existence of a law criminalizing same-sex relations, without “enforcement” or other acts, does not, *per se*, amount to persecution. However, the interveners submit that in its judgment in *X, Y and Z* the CJEU did not conclude that only actual imprisonment on the basis of discriminatory laws constitutes persecution. While this Court may want to note of certain aspects of the *X, Y and Z* judgment, the Luxembourg Court’s finding on criminalization *per se* is not germane to this Court’s determination of the present case, since it pertained exclusively to the CJEU’s construction of one of the limbs of Article 9 of the 2004 Qualification Directive.²⁰ Rather, the CJEU held that: a) imprisonment as a result of laws criminalizing consensual same-sex relations is clearly a persecutory act in view of its discriminatory and disproportionate nature; and b) if homosexual acts are punishable by law, the authorities must carry out an examination of “all the relevant facts concerning that country of origin”.²¹ Thus, the CJEU does not rule out that other factors may be equally relevant. In applying the CJEU judgment the Dutch Council of State confirmed this view. It found that, “*the examination should not only concern the question whether application of these provisions actually leads to the imposition of sentences of imprisonment or other penalties, but also to possible preliminary criminal investigations and the consequences of penalization for the social position of homosexuals, such as the impossibility for homosexuals to request protection from the authorities.*”²² Other judgments from superior courts in Austria,²³ Belgium²⁴, France,²⁵ and Italy²⁶ have found in favour of homosexual applicants based on, *inter alia*, the risk to the individuals concerned arising from the criminalization of consensual same-sex relations and of becoming victims of homophobic crimes, including at the hands of family members, from which there is no effective State protection.
6. The UNHCR’s view is that laws that criminalize SOGI are incompatible with international human rights standards and are discriminatory. “Even if irregularly, rarely or ever enforced, criminal laws prohibiting same-sex relations could lead to an intolerable predicament for an LGB person rising to the level of persecution. Depending on the country context, the criminalization of same-sex relations can create or contribute to an oppressive atmosphere of intolerance and generate a threat of prosecution for having such relations. The existence of such laws can be used for blackmail and extortion purposes by the authorities or non-State actors.²⁷ They can promote political rhetoric that can expose LGB individuals to risks of persecutory harm. They can also hinder LGB persons from seeking and obtaining State protection.”²⁸
7. As the UK Lesbian & Gay Immigration Group has noted, “in many countries where homophobia and biphobia are deeply embedded, it is likely that there will be little or no evidence of the State refusing to provide

²⁰ *X, Y and Z*, CJEU, § 55; ‘Criminalization of same-sex relations’, in ‘Refugee Status Claims Based on Sexual Orientation and Gender Identity: A Practitioners’ Guide’, International Commission of Jurists, Geneva, February 2016, pp. 137-156. The interveners note that Article 9 of the Directive is in any event not applicable to Switzerland.

²¹ *X, Y and Z*, CJEU, § 58.

²² Afdeling bestuursrechtspraak van de Raad van State 18 Dec. 2013, ECLI:NL:RVS: 2013:2422, § 8.2.

²³ In respect of the Gambia, for example, the Federal Administrative Court, No W159 2112334-1, 9 June 2017, “Homosexual acts are subject to serious penalties in the Gambia. Whilst there are no reports of regular convictions it cannot be assumed that the penalties are not applied at all. On the other hand, the extremely homophobic climate amongst the population must be taken into account and the fact that even without formal convictions, deaths, arbitrary killings and attacks by private individuals are to be expected... In summary if the applicant was returned to the Gambia he is at a high risk of interference with his person due to his belonging to a particular social group of homosexuals.”, original judgment.

²⁴ Conseil du Contentieux des Etrangers, Judgments No. 134 833 of 9 December 2014; No. 50 966 of 9 November 2010 and No. 36 527 of 22 December 2009.

²⁵ Two cases concerning the Gambia, the Marseille Administrative Court of Appeal, No. 17MA00296, 22 June 2017; and the French National Court for Right of Asylum (CNDA), 28 August 2017, Mme H. No. 17018542 referring to the criminal offences and the hostile climate “Considérant que l’article 144 du code pénal gambien punit toute personne ayant une «relation sexuelle contre-nature» d’une peine maximale de quatorze ans de prison ; qu’une loi promulguée le 9 octobre 2014 a introduit dans ce code une infraction d’« homosexualité aggravée » éventuellement passible d’une peine de prison à perpétuité ; (...) que l’ensemble de ces éléments conduit à estimer qu’en raison du regard que portent sur elles la société environnante et les institutions, les personnes homosexuelles en Gambie doivent être regardées comme constituant un groupe social au sens de l’article 1er, A, 2 de la convention de Genève; (...) il résulte de ce qui précède que M. H. craint avec raison, au sens des stipulations précitées de la convention de Genève, d’être persécuté en cas de retour dans son pays en raison de son appartenance au groupe social des personnes homosexuelles en Gambie, sans pouvoir se prévaloir de la protection des autorités ; que dès lors, il est fondé à se prévaloir de la qualité de réfugié”.

²⁶ Two cases concerning the Gambia, Venice Court, 16 June 2016, No. 7823/2015; and Court of Appeal of Trieste, 25 July 2019, No. 541.

²⁷ In *Peiris v Canada*, the claimant, a homosexual man from Sri Lanka was forced out of his home after coming out to his family. He founded an association that aimed to educate others about homosexuality. The group was the target of an attack where members were beaten and threatened. After reporting the incident, the police threatened to imprison the claimant and the other members of the association under Sri Lankan anti-sodomy laws. The Federal Court of Canada found that there was a direct link between the police persecution and the claimant’s sexual orientation. Even though the State law banning sodomy was rarely enforced, evidence showed that authorities often used it to blackmail homosexuals. *Peiris v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1251, 134 ACWS (3d) 137.

²⁸ The UNHCR SOGI Guidelines, § 27, the UNHCR SOGI Guidelines, § 29 (footnotes omitted); see RRT Case No. 1102877, [2012] RRTA 101, Australia, Refugee Review Tribunal, 23 February 2012, §§ 89, 96; and RRT Case No. 071862642, [2008] RRTA 40, Australia: Refugee Review Tribunal, 19 February 2008.

protection, because few people, if any, would consider seeking such protection in the first place. In fact, the greater the risk of persecution on the grounds of sexual orientation, the more difficult it may prove to obtain such evidence".²⁹ The UN SOGI Expert has also stressed that, "a major challenge in data collection is underreporting, which stems from a multitude of reasons. In countries where same-sex sexual conduct is criminalized, where laws and policies are used to discriminate against LGBTI and gender non-conforming persons, or where stigma and prejudice are rampant, the probability that victims will dare to report abuses is very low, owing to fear of prosecution, stigma, reprisals or victimization, unwillingness to be "outed", or lack of trust".³⁰ This suggests that the absence of data on the implementation of criminal law may in itself be evidence of oppression and threats suffered by LGBTI persons. It further highlights the difficulties in making an individualized and rigorous assessment of whether the laws criminalizing same-sex relationship are implemented, in particular where there is no LGBTI organization in the country, nor there is framework for regular and impartial monitoring of the issue.

8. In light of the above, **the interveners submit that the existence of laws criminalizing consensual same-sex sexual conduct discloses dispositive evidence of a real risk of Article 3 prohibited treatment,³¹ thus triggering the prohibition on exposing the individual concerned to the same under that provision of the Convention.** In the alternative, this Court should consider that laws criminalizing consensual same-sex sexual conduct raise a serious doubt as to whether LGBTI individuals who engage in or are suspected of engaging in such conduct would face treatment, including criminalization solely on the basis of sexual orientation or gender identity, contrary to their fundamental rights. In those circumstances: (i) there is a strong presumption that such laws engender a real risk of Article 3 prohibited treatment, and, therefore, (ii) the burden lies on the State to rebut that presumption by dispelling the doubt, thus proving conclusively the absence of such a risk.³²

ii) Enforced concealment of one's same-sex sexual orientation

9. In the context of refugee claims based on sexual orientation, some courts, refugee-status determination authorities and academics have referred to concealment of sexual orientation as "discretion" or "restraint".³³ As the reality is that people will typically be required to "hide", "deny" or "restrain" their identity in the course of being "discreet", "discretion" is an inappropriate and euphemistic misnomer for what is in fact "concealment" or "deceit". Whatever the term employed, concealing one's sexual orientation requires the suppression of a fundamental aspect of one's identity. The free expression of a fundamental aspect of one's identity is, in itself, a critical element of the right to identity. Therefore, where there is evidence of some risk of persecution to persons because of their real or imputed same-sex sexual orientation, the self-enforced suppression of that orientation is not a properly 'voluntary' act, which can be equated with a decision entered into on the basis of full, free, informed consent. Rather, concealment presumptively results from a genuine, subjective fear of adverse consequences, such as physical or psychological harm or both, whether at the hands of the State (e.g. by way of prosecution and imprisonment for engagement in consensual same-sex acts) or of non-State actors. In these circumstances, **concealing should presumptively be considered to be coerced.** Where there is at least some evidence of persecutory treatment of individuals who are open about their same-sex sexual orientation, **concealment is a typical response,³⁴ clearly probative of a subjective fear of persecution, consistent with the existence of an objectively well-founded fear of persecution**

²⁹ UK Lesbian & Gay Immigration Group (UKLGIG), 'Applying HJ (Iran) and HT (Cameroon) to asylum claims based on sexual orientation', 2018, § 17.

³⁰ UNHRC 2018 Report on protection against violence and discrimination based on SOGI, UN Doc. A/HRC/38/43, § 64.

³¹ Cf., *Ülke v. Turkey*, no. 39437/98, judgment, 24 January 2006. *Mutatis mutandis*, disclosing evidence satisfying the objective limb of the "well-founded fear" test in Article 1A(2) of the Refugee Convention.

³² In *F.G. v. Sweden*, the Grand Chamber of this Court reiterated that where the Contracting Party is made aware of facts that could expose an applicant to an individual risk of ill-treatment, regardless of whether the applicant chooses to rely on such facts, it is obliged to assess this risk *ex proprio motu*. It also affirmed that if a Contracting State is made aware of facts that could plausibly expose the asylum seeker to a risk of ill-treatment in breach of Arts. 2 and 3 of the Convention, considering the absolute nature of the rights therein protected, the State authorities have the obligation to carry out an *ex nunc* assessment of that risk of their own motion using all means at their disposal to produce necessary evidence in support of the application.

³³ See, e.g., *From Discretion to Disbelief: Recent Trends in Refugee Determinations on the Basis of Sexual Orientation in Australia and the United Kingdom*, Jenni Millbank, January 19, 2009, International Journal of Human Rights, Vol. 13, No. 2/3, 2009, pp. 2-4,

³⁴ On this point, in *HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department*, [2010] UKSC 31, UK Supreme Court, 7 July 2010, Lord Roger noted this effect in practice: "[u]nless he were minded to swell the ranks of gay martyrs, when faced with a real threat of persecution, the applicant would have no real choice: he would be compelled to act discreetly. Therefore the question is whether an applicant is to be regarded as a refugee for purposes of the Convention in circumstances where the reality is that, if he were returned to his country of nationality, he would have to act discreetly in order to avoid persecution", § 59. See also Lord Dyson's speech in *HJ (Iran)* where he held that distinguishing between "requiring" the asylum-seeker to act discreetly on return and [...] making a finding that the asylum-seeker will in fact act discreetly on return [...] is an unrealistic distinction. Most asylum-seekers will opt for the life of discretion in preference to persecution. This is no real choice. If they are returned, they will, in effect, be required to act discreetly", § 123.

and, indeed, itself constituting evidence of the objective well-foundedness of a subjective fear of persecution.³⁵

- 10.** Effectively requiring individuals to conceal their sexual orientation – whether through adoption or manufacture of heterosexual or asexual lifestyle, purportedly in order to avoid persecution – is inconsistent with the Refugee Convention’s human rights and humanitarian purpose. It is incompatible with respect for human dignity since it negates each person’s capacity for, and freedom to develop, an emotional and sexual attraction for other individuals, regardless of gender, and to choose to engage in consensual sexual conduct with them.³⁶ On this point, the UNHCR SOGI Guidelines affirm “[t]hat an applicant may be able to avoid persecution by concealing or by being ‘discreet’ about his or her sexual orientation or gender identity, or has done so previously, is not a valid reason to deny refugee status. As affirmed by numerous decisions in multiple jurisdictions, a person cannot be denied refugee status based on a requirement that they change or conceal their identity, opinions or characteristics in order to avoid persecution. LGBTI people are as much entitled to freedom of expression and association as others.”³⁷ In this regard, the 2017 Yogyakarta Principles +10 include additional obligations relating to Principle 23 on the right to seek asylum, setting out that States must ensure that no person is denied asylum on the basis that they may conceal or change their sexual orientation (...) in order to avoid persecution.³⁸ Thus, under refugee law, the fact that individuals may have previously concealed their same-sex sexual orientation is not a valid reason to refuse them refugee status, nor is the possibility that they could or would suppress their identity/status in the future.³⁹ The UNHCR reiterated in 2019 that “[w]hen individuals are forced to conceal their sexual orientation, or are persecuted or discriminated against on the basis of their sexual orientation, it is a human rights violation of such magnitude as to trigger a need for international protection”; and “[t]he fact that applicants may be able to avoid persecution by concealing or by being “discreet” about their sexual orientation or gender identity, or have done so previously, is not a valid reason to deny refugee status. A person cannot be denied refugee status based on a requirement that they change or conceal their identity, opinions or characteristics in order to avoid persecution”.⁴⁰
- 11.** Individuals should not be required to lie or to exercise restraint about their protected characteristics, be it, for example, one’s religious beliefs,⁴¹ or, their sexual orientation.⁴² Indeed, in its judgment in *X, Y and Z v. Minister*

³⁵ In *HJ (Iran)*, Lord Roger also noted, “threatened with serious harm if they [i.e. gay men and lesbian women] live openly, then most people threatened with persecution will be forced to take what steps they can to avoid it. But the applicant’s country of nationality does not meet the standard of protection from persecution which the Convention envisages simply because conditions in the country are such that he would be able to take, and would in fact take, steps to avoid persecution by concealing the fact that he is gay. On the contrary, the fact that he would feel obliged to take these steps to avoid persecution is, prima facie, an indication that there is indeed a threat of persecution to gay people who live openly”, § 65 (emphasis added).

³⁶ The *2010 Update report of the EU Agency for Fundamental Rights on Homophobia, Transphobia and Discrimination on Grounds of Sexual Orientation and Gender Identity* observes that, “sexual orientation is a personal characteristic protected under the ECHR, not a shameful condition to be hidden. Any failure to appreciate the specific burden of forced invisibility and of the duty to hide a most fundamental aspect of one’s personality such as sexual orientation or gender identity, is a severe misconception of the real situation of LGBT people”, p. 56.

³⁷ The *UNHCR SOGI Guidelines*, § 31, footnotes in the original omitted. In *Sadeghi-Pari v Canada*, the Federal Court of Canada held that requiring a person to conceal or suppress their sexual orientation amounts to persecution: “[c]oncluding that persecution would not exist because a gay woman in Iran could live without punishment by hiding her relationship to another woman may be erroneous, as expecting an individual to live in such a manner could be a serious interference with a basic human right, and therefore persecution”, *Sadeghi-Pari v Canada (Minister of Citizenship and Immigration)*, 2004 FC 282, 37 Imm LR (3d) 150, § 29. See also case: No. 103 722 of 29 May 2013 where the Belgian Council for Alien Law Litigation held, *inter alia*, in an asylum case concerning Senegal that “sexual orientation constitutes a fundamental characteristic of the human identity which a person cannot be demanded to abandon or dissimulate”, § 6.8.3.7 (translation from French original); in case 1 A 1824/07 of 13 November 2007, VG Oldenburg, the Constitutional Court of Lower Saxony in Oldenburg, rejected the requirement of concealment, § 41; and the Dutch Council of State decision in case No. 201109928/1 of 18 December 2013.

³⁸ The Yogyakarta Principles plus 10, 2017.

³⁹ *RRT Case No. 1102877* [2012] RRTA 101, Australia, Refugee Review Tribunal, 23 February 2012, “[b]ased on the applicant’s past conduct, the Tribunal is of the view that he would be able to avoid the harm he fears by being discreet. However, the Tribunal cannot require a protection visa applicant to take steps and modify his conduct to avoid persecution (*Appellant S395/2002 v MIMA* (2003) 216 CLR 473). The applicant had acted discreetly in the past because of the threat of harm. As noted by the High Court, in these cases it is the threat of serious harm with its menacing implications that constitutes the persecutory conduct”, § 96; see also *RRT Case No. 071862642* [2008] RRTA 40, Australia: Refugee Review Tribunal, 19 February 2008.

⁴⁰ UN High Commissioner for Refugees (UNHCR), ‘*Resettlement Assessment Tool: Lesbian, Gay, Bisexual, Transgender and Intersex Refugees*’, May 2019, page 3.

⁴¹ See, e.g., the 5 September 2012 judgment of the Grand Chamber of the CJEU in the Joined Cases C-71/11 and C-99/11 *Bundesrepublik Deutschland v Y and Z* where the Court held that, in determining an application for refugee status the national authorities cannot reasonably expect the applicant to abstain from the manifestation or practice of certain religious acts in order to avoid exposure to persecution (§§ 79-80).

⁴² In 2003, the High Court of Australia held that, “[i]t would undermine the object of the Convention if the signatory countries required [individuals] to modify their beliefs or opinions or to hide their race, nationality or membership of particular social groups before those countries would give them protection under the Convention”, *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, High Court of Australia, 9 Dec. 2003, [2003] HCA 71, § 41. Similar rulings were made by the New Zealand Refugee Status Appeals Authority (Refugee Appeal No. 74665, 7 July 2004); the United States Court of Appeals for the Ninth Circuit (*Nasser Mustapha Karouni v. Alberto Gonzales*,

voor *Immigratie en Asiel*, the CJEU affirmed that “requiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person’s identity that the persons concerned cannot be required to renounce it”.⁴³ Thus, “an applicant for asylum cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution”.⁴⁴ In *X, Y and Z* the CJEU held that, even if through concealing the applicant *may* avoid the risk of persecution, “[t]he fact that he could avoid the risk by exercising greater restraint than a heterosexual in expressing his sexual orientation is not to be taken into account in that respect”,⁴⁵ and that “[w]hen assessing an application for refugee status, the competent authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation.”⁴⁶

12. The interveners submit that in *X, Y and Z* the CJEU made it clear that in the risk assessment the authorities must not take into account the possibility of concealment; that it is never tolerable for homosexuals to conceal their identity; and that national authorities may not take account of the possibility that homosexual applicants may avoid persecution by acting discreetly.⁴⁷ Concealment of homosexuality amounts to renouncing it and is contrary to the Directive 2004/83/EC and its recast.⁴⁸ In *X, Y and Z*, the CJEU emphasizes that the refugee protection regime is meant to enable persons to exercise their fundamental freedoms openly. On the question of concealment, in their Joint Separate Opinion appended to the judgment of the Grand Chamber of this Court in the case of *F.G. v. Sweden*, Judges Ziemele, De Gaetano, Pinto de Albuquerque and Wojtyczek observed, “[a]s the United Kingdom Supreme Court ruled in a case where the claim for asylum was based on homosexuality, using a convincing historical allusion, to hold otherwise would countenance the return of Anne Frank to Nazi-occupied Netherlands, had she managed to escape from there, on the basis that she could have hidden in the attic and therefore could have successfully avoided the possibility of Nazi detention. The Supreme Court held that such a position would be ‘absurd and unreal’.”⁴⁹ Consistent with this line of authorities, in its decision in the case of *I.K. v. Switzerland*,⁵⁰ this Court held that because sexual orientation constitutes a fundamental aspect of an individual’s identity and awareness, those claiming international protection based on their sexual orientation cannot be required to hide it.⁵¹
13. Therefore, where upon removal individuals would face a real risk of persecution if their sexual orientation became known (or was otherwise imputed to them), that is sufficient to warrant recognition of refugee status irrespective of any concealment/modification/avoidance action they could or would take. Indeed, consistent with the principles canvassed above, the UNHCR SOGI Guidelines advise that: “the question thus to be considered is what predicament the applicant would face if he or she were returned to the country of origin. This requires a fact-specific examination of what may happen if the applicant returns to the country of nationality or habitual residence and whether this amounts to persecution. The question is not, could the applicant, by being discreet, live in that country without attracting adverse consequences.”⁵²
14. Furthermore, as the UNHCR SOGI Guidelines note: “[b]eing compelled to conceal one’s sexual orientation and/or gender identity may also result in significant psychological and other harms. Discriminatory and disapproving attitudes, norms and values may have a serious effect on the mental and physical health of LGBTI individuals and could in particular cases lead to an intolerable predicament amounting to persecution. Feelings

Attorney General, No. 02-72651, 7 March 2005); and the Federal Court of Canada (*Atta Fosu v. Canada (Minister of Citizenship and Immigration)*, 8 Oct. 2008, [2008] FC 1135).

⁴³ Joined Cases C-199/12, C-200/12, C-201/12 *X, Y and Z v. Minister voor Immigratie en Asiel*, CJEU, Fourth Chamber, 7 November 2013, § 70.

⁴⁴ *X, Y and Z*, § 71.

⁴⁵ *X, Y and Z*, §§ 72-75; see also the Dissenting Opinion of Judge Power-Forde in *M.E. v. Sweden*, European Court of Human Rights (Fifth Section), no. 71398/12, 26 June 2014, “[t]he fact that the applicant could avoid the risk of persecution in Libya by exercising greater restraint and reserve than a heterosexual in expressing his sexual orientation is not a factor that ought to be taken into account”; and “[s]uch a requirement of forced reserve and restraint in order to conceal who one is, is corrosive of personal integrity and human dignity”.

⁴⁶ *X, Y and Z*, § 76.

⁴⁷ As stated above, the CJEU held that, “requiring members of a social group sharing the same sexual orientation to conceal that orientation is incompatible with the recognition of a characteristic so fundamental to a person’s identity that the persons concerned cannot be required to renounce it”, *X, Y and Z*, § 70. This Court has also recognized that one’s sexual orientation is not simply a matter of privacy and that the Convention protects the right to express it publicly (*Baczkowski and others v. Poland*, no. 1543/06, 48 EHRR, §§ 68, 100 and 101; and *Alekseyev v. Russia*, no. 4916/07, ECHR, 21 October 2010, §§ 86-88 and 109-11).

⁴⁸ This is in harmony with Lord Rodger’s observation in *HJ (Iran)* that it is “objectionable to assume that any gay man can be supposed to find even these restrictions [i.e. living discreetly] on his life and happiness reasonably tolerable” and that, therefore, he does not need to show that his homosexuality plays a particularly prominent part in his life (*HJ (Iran)* §§ 77, 79).

⁴⁹ Joint Separate Opinion of Judges Ziemele, De Gaetano, Pinto de Albuquerque and Wojtyczek, *F.G. v. Sweden*, [GC] App. no. 43611/11, 23 March 2016, § 6, p. 64, footnotes omitted (case referred to is *HJ (Iran)*).

⁵⁰ *I.K. v. Switzerland*, decisions on admissibility, no. 21417/17, 19 December 2017.

⁵¹ “[L]a Cour estime que l’orientation sexuelle constitue un aspect fondamental de l’identité et de la conscience d’un individu et qu’il ne saurait dès lors être exigé de personnes déposant une demande de protection internationale fondée sur leur orientation sexuelle qu’elles dissimulent cette dernière”, *I.K. v. Switzerland*, § 24.

⁵² The UNHCR SOGI Guidelines, § 32.

of self-denial, anguish, shame, isolation and even self-hatred which may accrue in response an inability to be open about one's sexuality or gender identity are factors to consider, including over the long-term."⁵³ In this context, studies have shown that pervasive discrimination has led, in particular, to mental health problems, feelings of self-denial, anguish, depression, psychosocial and psychological distress, shame, isolation and self-hatred.⁵⁴ Expert opinion has attested to the severe mental suffering caused by concealing one's sexual orientation.⁵⁵ As the 2018 UN SOGI Expert Report notes, LGBTI persons "may internalize the negative attitudes and values of society, which may have a detrimental impact on their mental health and result in self-harm or violence. Studies have shown that the risk for suicide among lesbians and gays may be particularly high for those who experience familial or social abuse and rejection."⁵⁶

15. Psychological, mental harm resulting from fear of exposure to physical harm (i.e. from the apprehension of prospective physical ill-treatment inflicted on oneself or one's loved ones)⁵⁷ has been found to constitute cruel, inhuman and degrading treatment.⁵⁸ Such findings are consistent with refugee law holding that in some cases psychological harm is persecutory.⁵⁹ This is of particular concern if asylum-seekers, whose asylum claims have been rejected, are required to conceal their sexual orientation on return in an attempt to avoid persecution, since fear of discovery and of the resulting physical ill-treatment by State or non-State actors, imprisonment and, in extreme cases, execution, may hang over them for the rest of their lives.⁶⁰
16. It should also be recalled that even if the people concerned do attempt to conceal their sexual orientation/identity, there remains a strong probability of discovery against their will,⁶¹ for example by accident, rumours, growing suspicion, use of social media,⁶² assumptions about people who have not married and who do not have children.⁶³ In addition, it is the imputation of sexual orientation/identity by the persecutor and consequential risk of persecutory treatment that matters.⁶⁴ A person could take as many precautionary steps as possible and yet still be labeled and persecuted.

⁵³ The UNHCR SOGI Guidelines, § 33, footnotes in the original omitted.

⁵⁴ Guidelines for Psychological Practice With Lesbian, Gay, and Bisexual Clients, American Psychological Association.

⁵⁵ See, e.g., Dr. Meyer's expert opinion provided to this Court in the case *Bayev v. Russia*, (no's 67667/09 44092/12 and 56717/12, 20 June 2017) on the harmful psychological health effects of concealing one's same-sex sexual orientation. See also, "*Minority Stress and Physical Health Among Sexual Minorities*", David J. Lick, Laura E. Durso and Kerri L. Johnson Lick et al in *Perspectives on Psychological Science* 2013 8: 521 DOI: 10.1177/1745691613497965, at p. 531 and 533, respectively; and Apu Chakraborty et al in *Mental health of the non-heterosexual population of England*, British Journal of Psychiatry (2011) 198, 143-134, corroborating international findings that "non-heterosexual individuals are at higher risk of mental disorder, suicidal ideation, substance misuse and self-harm than heterosexual people", p. 147.

⁵⁶ UNHRC 2018 Report on protection against violence and discrimination based on SOGI, UN Doc. A/HRC/38/43, § 61. See also: Kimberly H. McManama O'Brien, Richard T. Liu, Jennifer M. Putney, Taylor A. Burke and Laika D. Aguinaldo, "Suicide and self-injury in gender and sexual minority populations" in *LGBT Health: Meeting the Needs of Gender and Sexual Minorities*, K. Bryant Smalley, Jacob C. Warren, Nikki Barefoot, eds. (Springer Publishing Company, New York, 2017), pp; UNDP, *Leave no one behind*; Karel Blondeel, Sofia de Vasconcelos, Claudia García-Moreno, Rob Stephenson, Marleen Temmerman and Igor Toskin, "Violence motivated by perception of sexual orientation and gender identity: a systematic review", *Bulletin of the World Health Organization*, vol. 96, No. 1, 2018, pp. 29-41

⁵⁷ In *Keenan v. the United Kingdom*, this Court clarified that someone's treatment is capable of engaging Article 3 when it is "such as to arouse feelings of fear, anguish and inferiority capable of humiliating or debasing the victim and possibly breaking their physical or moral resistance [...] or as driving the victim to act against his will or conscience...", *Keenan v. the UK*, no. 27229/95, judgment, 3 April 2001, § 110.

⁵⁸ This Court has recognized, including in *Identoba and Others v. Georgia*, that, "Article 3 cannot be limited to acts of physical ill-treatment; it also covers the infliction of psychological suffering", *Identoba*, no. 73235/12, judgment, 12 May 2015, § 65, §§ 70-71.

⁵⁹ See, *Abay v. Ashcroft*, 368 F.3d 634, United States Court of Appeals for the Sixth Circuit, 19 May 2004, where a mother's psychological trauma due to the risk of her child undergoing female genital mutilation was found to constitute persecutory harm and thus enough to entitle her to protection as a refugee. Psychological, mental harm is capable of constituting persecution for the purposes of the Refugee Convention when it results from coercion. US case law also confirms this clearly: *Fisher v I.N.S.*, 37 F.3d 1371 (9th Cir. 1994) "being forced to conform to, or being sanctioned for failing to comply with, a conception of Islam that is fundamentally at odds with one's own...can rise to the level of persecution", § 45.

⁶⁰ See, *inter alia*, *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, per McHugh and Kirby JJ, "[...] It is the threat of serious harm with its menacing implications that constitutes the persecutory conduct. To determine the issue of real chance without determining whether the modified conduct was influenced by the threat of harm is to fail to consider that issue properly", § 43 (emphasis added).

⁶¹ See, e.g., *Appellant S395/2002 v. Minister for Immigration and Multicultural Affairs; Appellant S396/2002 v. Minister for Immigration and Multicultural Affairs*, §§ 56-58.

⁶² E.g. the Human Rights Watch report, "*We Are a Buried Generation*" *Discrimination and Violence against Sexual Minorities in Iran*, 15 December 2010, documenting internet surveillance of gay chat rooms in Iran and the ensuing human rights violations.

⁶³ The UNHCR SOGI Guidelines, § 32; *SW (lesbians - HJ and HT applied) Jamaica CG* [2011] UKUT 251 (IAC), 24 June 2011, describing the risk of discovery faced by lesbian women in Jamaica, § 107

⁶⁴ In the case of *Dykon v Canada*, the claimant, a citizen of Ukraine, sought refugee status based on the fear of persecution because he was perceived to be a homosexual. The claimant was sexually assaulted by another man and following, and because of, this incident was perceived to be a homosexual. His mother had received threats of extortion as a result of this perception. The Federal Court concluded that there was persecution against the claimant based on his imputed homosexuality. The Federal Court stated that: "it is totally irrelevant ... whether he was in fact a homosexual or not." It is the beliefs of the persecutors that are important, and in this case the individuals responsible for the harassment perceived the claimant to be a homosexual. *Dykon v.*

17. In light of the above, and given the aforementioned relevance of the Refugee Convention and relevant UNHCR guidance,⁶⁵ **the interveners submit that requiring coerced, including self-enforced, concealment of someone's same-sex sexual orientation – as a way, purportedly, to mitigate the real risk of their being exposed to Article 3 prohibited treatment – is incompatible with the ECHR obligations. Such coerced concealment constitutes pain and suffering amounting to proscribed treatment under Article 3 even if temporary. Indeed, enforcing removals on the basis that the individuals concerned would be expected to conceal their sexual orientation – purportedly to sufficiently mitigate the risk of Article 3 prohibited treatment upon return – would constitute arbitrary *refoulement* and thus violate Article 3. Thus, it is valid to conclude that laws criminalizing same-sex relationships, even if not routinely implemented, essentially require to conceal one's sexual orientation, as they could be used against an LGBTI individual at any time.**

iii) The risk of persecution based on same-sex sexual orientation in The Gambia

18. The interveners draw this Court's attention to a number of recent UN Treaty Bodies' decisions and conclusions, as well as to domestic judicial decisions, that have dealt with the real risk of torture and persecution faced by LGBTI individuals on account of their sexual orientation in The Gambia⁶⁶.
19. Consensual same-sex sexual activity, can give rise to a number of very serious criminal offences in The Gambia, including "unnatural offences";⁶⁷ "aggravated homosexuality";⁶⁸ and "gross indecency",⁶⁹ with penalties ranging from seven years to imprisonment for life. In August 2018, the UN Human Rights Committee (UN HRC) expressed its concern about criminalization of consensual same-sex relationships in The Gambia, and the fact that LGBTI persons reportedly continued to be subject to arbitrary arrest and violence.⁷⁰ The UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment was concerned that, in an overall context of State-sanctioned violence against LGBT persons, the 2014 amendment to the Criminal Code on "aggravated homosexuality" subjects such persons to even greater risk of torture and ill-treatment.⁷¹
20. Furthermore, criminal law provisions promote anti-gay rhetoric in the media and among politicians. According to Freedom House, "social media has seen a proliferation of hate speech, and some topics are still considered taboo, such as issues affecting LGBTI (...) people—though they are sometimes discussed online by pseudonymous users."⁷²
21. In 2015, the UN Committee on Economic, Social and Cultural Rights recommended that The Gambia "repeal or amend all legislation that results or could result in discrimination, prosecution and punishment of people because of their sexual orientation" and take all the necessary steps to combat and prevent discrimination against LGBTI persons, ensuring their enjoyment of all the rights enshrined in the Covenant.⁷³ However, the new administration has not decriminalized consensual same-sex activities, nor indicated that the abusive practices of the past would be abandoned. The US State Department Human Rights report for 2018 indicates: "On July 5 [2018], the country's delegation to the UN Human Rights Council stated that the government had no immediate plans to reverse or change the law".⁷⁴ Human rights activist Gaye Sowe (Director, Institute for Human Rights and Development in Africa) submitted a letter of recommendation to the new government in which he names laws that should be amended or repealed in the light of the human rights violation. He advocated the decriminalization of homosexual acts, which was rejected by the government in contrast to other proposals.⁷⁵ There is also evidence of a lack of willingness or ability on the part of the authorities to effectively protect LGBTI persons from discrimination and homophobic acts and to prosecute such acts. Several sources suggest there is widespread disapproval and societal discrimination towards LGBTI people, which is expressly encouraged by

Canada (Minister of Employment and Immigration), [1995] 1 F.C. 0, 27 September 1994, (1994), 25 Imm LR (2d) 193, 50 ACWS (3d) 1085. See also *Sentenza no. 15023/15*, Tribunal of Genova, 13 May 2016 where the Tribunal found that the applicant had a well-founded fear of persecution based on membership of a particular social group as, although he was not gay, he was perceived as such by his community, his family and the authorities in his country of origin.

⁶⁵ See in particular § 1 above.

⁶⁶ See most recently *CCPR/C/GMB/CO/2*, §§11-12; *A/HRC/29/37/Add. 2*, §§ 78-79 and 97; *CEDAW/C/GMB/CO/4- 5*, §§ 44-45; *E/C.12/GMB/CO/1*, §13; *CRC/C/GMB/CO/2-3* §30(e) and *A/HRC/28/68/Add.4* §107(g).

⁶⁷ Article 144 of the Criminal Code 1965 of Gambia, see Annex.

⁶⁸ Article 144A of the Criminal Code 1965 of Gambia, see Annex.

⁶⁹ Article 147 (2) of the Criminal Code 1965 of Gambia, see Annex.

⁷⁰ OHCHR - Human Rights Committee - *Concluding observations – Gambia, 30 August 2018*, §11.

⁷¹ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mission to the Gambia - *A/HRC/28/68/Add.4*, 16 March 2015, 28th session of the Human Rights Council.

⁷² Freedom House, 'Freedom on the net 2018 – The Gambia', 1 November 2018.

⁷³ CESCR: *Gambia – Concluding Observations (E/C.12/GMB/CO/1)* - 54th Session, 20 March 2015.

⁷⁴ *USSD, Country Report on Human Rights Practices 2018 – Gambia, 13 March 2019*.

⁷⁵ Dr. Franzisca Zanker, contacted by Asylos researcher over email, August 28th 2019. <https://www.arnold-bergsraesser.de/mitarbeiterinnen/zanker-dr-franzisca>

religious authorities such as The Gambia's Supreme Islamic Council.⁷⁶ According to testimonies of The Gambian LGBTI refugees in Senegal it had become even more dangerous for them to stay in The Gambia since the change of government: the danger of so-called "self-justice" had increased because there was no longer any guarantee that the state authorities would pursue LGBTI cases, and so there was a danger that families, neighbours and religious leaders would simply make LGBTI people 'disappear'.⁷⁷

22. A 2019 UK Home Office report on The Gambia reveals that "anti-LGBTI rhetoric by the previous former president Jammeh, prior to his ousting from power in December 2016, in particular, played on and may have magnified existing societal homophobia"⁷⁸. LGBTI persons who openly express their sexual orientation may face discrimination from state actors, and are likely to face strong societal disapproval and discrimination, which, by their nature and repetition, are likely to amount to persecution⁷⁹. Furthermore, "as same-sex sexual acts are prohibited in The Gambia, it would be unreasonable to expect a person identifying as LGBTI, who fears persecution or serious harm by non-state actors, to seek protection from the authorities without themselves facing a risk of prosecution."⁸⁰ Thus "[i]f a person who is LGBTI does not live openly due to the fear of persecution that would follow if they did, then they are also a refugee".⁸¹
23. In relation to The Gambia does not live openly due to the fear of polders indicated that "the impact of the legislation criminalizing same-sex relations and the social stigma created a climate of fear that translated into persons being forced to stay in the closet, and bred a climate of extortion, corruption and further abuse of LGBTI persons".⁸² The Committee on the Rights of the Child was also concerned about the "provisions of the 2014 Criminal Code according to which the new crime of "aggravated homosexuality" carries punishments of up to life in prison, which encourages the persecution and stigmatization of, and discrimination against, lesbian, gay, bisexual, transgender and intersex (LGBTI) persons, including children, and children from LGBTI families. ⁸³ The UN HRC has stated that The Gambia should decriminalize same-sex relationships between consenting adults and take measures to change societal perception of LGBTI persons and protect them from arbitrary arrests and violence.⁸⁴
23. In July 2019, the Court of Appeal of Trieste (Italy) examined the asylum claim of a man fleeing from The Gambia. It held there is no need to investigate an applicant's sexual orientation when he/she self-identifies as a LGBT person and is perceived as such in the country of origin. In this case, if the country of origin criminalizes homosexuality and/or same-sex activities and the applicant's account is internally coherent and in line with the information available on his/her country, the fear of persecution is well-founded and refugee status shall be granted.⁸⁵
24. In August 2017, the French National Court for Right of Asylum (Cour Nationale du Droit d'Asile, CNDA) granted refugee status to a gay man from The Gambia. It considered that "homosexual persons" constituted a social group in The Gambia because of the criminalization of same-sex relationships and the high degree of homophobia in the country. The Court considered that this group was at high risk of being assaulted, humiliated and even murdered. Thus, the Court was satisfied that there was a well-founded fear of persecution and that refugee status should be granted.⁸⁶
25. According to Amnesty International, since 7 November 2017, "state forces have launched a homosexuality investigation, leading to at least eight arrests"⁸⁷. In 2017, "four men plus one 17--old boy were arrested by the National Intelligence Agency and Presidential Guards in Banjul, the capital city, under investigation for crimes

⁷⁶ European Asylum Support Office, EASO Country of Origin Information Report, The Gambia, Country Focus, December 2017, p. 67.

⁷⁷ Agathe Menetrier, interviewed by Asyls researcher over skype, September 2, 2019. <https://www.eth.mpg.de/menetrier>

⁷⁸ UK Government, "The Gambia: Sexual orientation and gender identity or expression", Country Policy and Information Note, August 2019, §. 2.4.8

⁷⁹ Ibid, § 2.4.12

⁸⁰ Ibid, § 2.5.2

⁸¹ Ibid, § 2.4.11

⁸² Report of the Office of the United Nations High Commissioner for Human Rights, Summary of Stakeholders' submissions on the Gambia, 16 August 2019, A/HRC/WG.6/34/GMB/3, § 21

⁸³ CRC/C/GMB/CO/2-3, § 29(e).

⁸⁴ CCPR/C/GMB/CO/2, §§ 11-12. See also A/HRC/29/37/Add. 2, §§ 78-79 and 97, and CEDAW/C/GMB/CO/4- 5, §§ 44-45.

⁸⁵ Court of Appeal of Trieste, 25 July 2019, No. 541.

⁸⁶ CNDA, 28 August 2017, Mme H. No. 17018542. "*Considérant que les déclarations du requérant lors de l'audience ont permis de tenir pour établie son orientation sexuelle; (...) qu'il a évoqué de manière personnalisée ses deux relations et la découverte de son homosexualité par son demi-frère aîné et par son père qui l'ont surpris au cours d'un rapport sexuel et ont voulu le battre ; qu'il a fui la Gambie par crainte pour sa sécurité ; qu'ainsi, (...) il résulte de ce qui précède que M. H. craint avec raison, au sens des stipulations précitées de la convention de Genève, d'être persécuté en cas de retour dans son pays en raison de son appartenance au groupe social des personnes homosexuelles en Gambie, sans pouvoir se prévaloir de la protection des autorités ; que dès lors, il est fondé à se prévaloir de la qualité de réfugié*".

⁸⁷ Amnesty International UK, "Gambia's latest anti-gay Bill", 12 January 2018.

of homosexuality.” They were “being held in a secret location without access to a lawyer, and [were] at high risk of being tortured. Three women were also arrested in Banjul on 13 November 2017. They said they were beaten in detention and threatened with rape by security forces. (...) All detainees, male and female, were told that if they did not 'confess' to the charges of homosexuality, a device would be forced into their anus or vagina to 'test' their sexual orientation.⁸⁸

26. On 31 May 2018, three survivors of Yahya Jammeh’s HIV and AIDS “treatment programme” filed a legal action in the High Court of The Gambia, seeking compensation for the human rights abuses they reportedly suffered.⁸⁹ However, there was no protest to President Jammeh’s opposition to LGBTI rights in 2014 and still few are willing to speak out.⁹⁰ According to the Westminster Foundation for Democracy country representative: “Unlike other countries such as Uganda and Nigeria, where LGBT communities exist and advocate for themselves despite widespread persecution, there is no such civil society in The Gambia. It is too dangerous. This means someone very brave will have to come forward if the commission is to hear evidence of Jammeh’s LGBT abuses and record them into public memory. If word got out that an activist or LGBT Gambian planned to raise such issues before the commission, [one] would be concerned for their safety... For a long time the situation will remain as it is. Gambians generally are not going to take LGBT issues easily”.⁹¹ The result is that LGBTI Gambians may be the one group whose experience of persecution goes unrecorded and whose rights do not improve in the post-Jammeh era. As a result, the lack of information on the matter does not mean that there were no investigations or prosecutions, rather it suggests the opposite.
27. The foregoing paragraphs clearly demonstrate that the general situation for LGBTI individuals in The Gambia is grave. LGBTI individuals have suffered and continue to suffer acts of persecution, including torture, other ill-treatment and arbitrary and discriminatory prosecution and disproportionate punishment. The mere existence of laws that criminalize consensual same-sex sexual conduct enables, encourages and contributes to the persecutory environment that exists in The Gambia and exposes LGBT individuals to real risks of persecutory harm.

⁸⁸ Ibid.

⁸⁹ “Legal Action Filed Against Gambian Ex-Dictator”, Gambian-based Institute for Human Rights and Development in Africa Website, 31 May 2018.

⁹⁰ Scheinert, Josh, [The Mail & Guardian, 'No Truth for Gambia's Queer People'](#). 15 March 2019..

⁹¹ Scheinert, Josh, [The Mail & Guardian, 'No Truth for Gambia's Queer People'](#). 15 March 2019.

Annex

Provisions in force in The Gambia

Criminal Code 1965 (as amended in 2005 and 2014)

Article 144 of the Criminal Code 1965 of Gambia, as amended in 2005, entitled "Unnatural offences", *inter alia*, provides, that

- "(1) Any person who—
- (a) has carnal knowledge of any person against the order of nature; [...] or
 - (c) permits any person to have carnal knowledge of him or her against the order of nature; is guilty of a felony, and is liable to imprisonment for a term of 14 years.
- (2) In this section- "carnal knowledge of any person against the order of nature" includes-
- (a) carnal knowledge of the person through the anus or the mouth of the person;
 - (b) inserting any object or thing into the vulva or the anus of the person for the purpose of simulating sex; and
 - (c) committing any other homosexual act with the person."

Article 144A of the Criminal Code, as amended in 2014 ('aggravated homosexuality') states:

- "a person commits the offence of aggravated homosexuality where the –
- (a) person against whom the offence is committed is below the age of eighteen years;
 - (b) offender is a person living with HIV;
 - (c) offender is a parent or guardian of the person against whom the offence is committed;
 - (d) offender is a person in authority over the person against whom the offence is committed;
 - (e) victim of the offence is a person with disability;
 - (f) offender is a serial offender; or
 - (g) offender applies, administers or causes to use by any man or woman any drug, matter this with intent to stupefy or overpower him or her, so as to enable any person to have unlawful carnal connection with any person of same sex.
- A person who commits the offence of aggravated homosexuality is liable on conviction to imprisonment for life".

Article 147 (2) of the Criminal Code, as amended in 2005 ('gross indecency) states

"Any female person who, whether in public or private, commits any act of gross indecency with another female person, or procures another female person to commit any act of gross indecency with her, or attempts to procure the commission of any such act by any female person with herself or with another female person, whether in public or private, is guilty of a felony and liable to imprisonment for a term of five years. Section 147(3) further specifies that act of indecency includes any homosexual act"

Source: ILGA World, State Sponsored Homophobia, 2019, p.325.