

***E.S. v. Spain***

***Application no. 13273/16***

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WRITTEN SUBMISSIONS ON BEHALF OF  
THE AIRE CENTRE (ADVICE ON INDIVIDUAL RIGHTS IN EUROPE), THE EUROPEAN  
COUNCIL ON REFUGEES AND EXILES (ECRE),  
THE HUMAN DIGNITY TRUST (HDT),  
ILGA-EUROPE (THE EUROPEAN REGION OF THE INTERNATIONAL LESBIAN, GAY,  
BISEXUAL, TRANS AND INTERSEX ASSOCIATION) AND THE INTERNATIONAL  
COMMISSION OF JURISTS (ICJ)

INTERVENERS

*pursuant to the Section Registrar's notification of 7 December 2016*

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16 January 2017

## Introduction

1. The AIRE Centre, ECRE, HDT, ILGA-EUROPE and the ICJ (hereafter, "the interveners")The interveners submit that 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 premise should be that relevant EU asylum law constitutes "national law" for the purposes of the Convention for those Contracting Parties that are EU Member States.<sup>1</sup> The interveners also recall the role of the UN High Commissioner for Refugees (UNHCR) in the supervision of the application of the Refugee Convention.<sup>2</sup> In the exercise of its supervisory mandate, in 2012 the UNHCR published a set of Guidelines on claims to refugee status based on sexual orientation and/or gender identity under the Refugee Convention.<sup>3</sup> Furthermore, since pursuant to Article 78 of the Treaty on the Functioning of the EU the EU asylum policy "must be in accordance with the [Refugee] Convention",<sup>4</sup> and given the UNHCR's role as the guardian of the Refugee Convention, the interveners submit that any applicable EU asylum law should, in turn, be interpreted in light of relevant UNHCR guidance, namely, in the context of this Court's determination of the present case, the UNHCR SOGI Guidelines. Therefore, the interveners contend that the UNHCR SOGI Guidelines are highly pertinent to the interpretation of the obligations of the Contracting Parties under the Convention.
2. In light of the above, the interveners' submissions in the present third-party intervention focus on the relevance of: a) the Refugee Convention, as interpreted by a number of domestic courts; and b) the EU asylum *acquis* and the EU Charter of Fundamental Rights, to the determination of the scope and content of *non-refoulement* obligations under Article 3 of the Convention of those Contracting Parties that are also EU Member States. The interveners' submissions will address the following: i) enforced concealment of one's same-sex sexual orientation constitutes persecution under refugee law and is incompatible with the Convention, in particular, Article 3; ii) the criminalization of consensual same-sex sexual conduct gives rise to a real risk of Article 3 prohibited treatment, thus triggering *non-refoulement* obligations under that provision of the Convention; and iii) the risk of persecution based on sexual orientation in Senegal.

### **i) Enforced concealment of one's same-sex sexual orientation**

3. In the context of refugee claims based on sexual orientation, some courts, refugee-status determination authorities and academics have referred to concealment of one's sexual orientation as "discretion" or "restraint".<sup>5</sup> As the reality is that people will be required to "hide", "deny" or "restrain"

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<sup>1</sup> The EU asylum *acquis* is the *corpus* of law comprising all EU law adopted in the field of international protection claims. See, in particular, 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), hereafter the recast Qualification Directive. In addition, under Article 18, the EU Charter of Fundamental Rights guarantees the right to asylum "with due respect for the rules of the Geneva Convention" and its 1967 Protocol (hereafter the Refugee Convention and its 1967 Protocol).

<sup>2</sup> 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.

<sup>3</sup> 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).

<sup>4</sup> Treaty on the Functioning of the EU, Article 78(1).

<sup>5</sup> 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, "[a]t its baldest, discretion reasoning entailed a 'reasonable expectation that persons should, to the extent that it is possible, co-operate in their own protection', by exercising 'self-restraint' such as avoiding any behaviour that would identify them as gay; never telling anyone they were gay; only expressing their sexuality by having anonymous sex in public places; pretending that their partner is a 'flatmate'; or indeed remaining celibate. This approach subverted the aim of the Refugees Convention – that the receiving state provides a surrogate for protection from the home state – by placing the responsibility of protection upon the applicant: it is he or she who must avoid harm. The discretion approach also varied the scope of protection afforded in relation to each of the five Convention grounds by, for example, protecting the right to be 'openly' religious but not to be openly gay or in an identifiable same-sex relationship. The appearance of discretion reasoning in a decision strongly correlated to failure for lesbian and gay applicants [...] The discretion approach explicitly posited the principle that human rights protection available to sexual orientation was limited to private consensual sex and did not extend to any other manifestation of sexual identity (which has been variously characterised as 'flaunting',

their identity in the course of being “discreet”, “discretion” is a euphemistic misnomer for what is in fact “concealment”. Whatever the term employed, the nub of the issue is that concealing one’s sexual orientation requires the suppression of a fundamental aspect of one’s identity and its expression. In these circumstances, the self-enforced suppression of one’s sexual orientation is not undertaken voluntarily, resulting from full, free, informed consent. Rather, concealment typically results from a 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) and non-State actors that may amount to persecution. Thus, concealing is coerced. In fact, concealment is a typical response,<sup>6</sup> consistent with the existence of a well-founded fear of persecution and, indeed, itself constitutes evidence that one’s fear is well-founded.<sup>7</sup>

4. 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.<sup>8</sup> 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.”<sup>9</sup> Thus, under refugee law, the fact that people 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

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‘displaying’ and ‘advertising’ homosexuality as well as ‘inviting’ persecution). Thus for example in 2001 the Federal Court of Australia held that the Iranian Penal Code prohibiting homosexuality and imposing a death penalty did ‘place limits’ on the applicant’s behaviour; the applicant had to ‘avoid overt and public, or publicly provocative, homosexual activity. But having to accept those limits did not amount to persecution.’ On appeal, the Full Federal Court endorsed the view that ‘public manifestation of homosexuality is not an essential part of being homosexual’. The discretion approach thus has had wide-reaching ramifications in terms of framing the human rights of lesbians and gay men to family life, freedom of association and freedom of expression as necessarily lesser in scope than those held by heterosexual people.”

<sup>6</sup> 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.

<sup>7</sup> 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).

<sup>8</sup> 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.

<sup>9</sup> 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.

future.<sup>10</sup> Individuals should not be required to lie or to exercise restraint about their protected characteristics, be it, for example, one's religious beliefs,<sup>11</sup> or, *mutatis mutandis*, their sexual orientation. Indeed, in its judgment in the three joined cases of *X, Y and Z v. Minister 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".<sup>12</sup> Thus, "an applicant for asylum cannot be expected to conceal his homosexuality in his country of origin in order to avoid persecution".<sup>13</sup> In *X, Y and Z* the CJEU went as far as to hold 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",<sup>14</sup> 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."<sup>15</sup> 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'."<sup>16</sup>

5. Therefore, where upon removal individuals would face a real risk of persecution if their sexual orientation became known, 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."<sup>17</sup>
6. 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 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."<sup>18</sup> In this context, studies have shown that pervasive discrimination has led, in particular, to mental health problems, feelings of self-denial,

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<sup>10</sup> *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.

<sup>11</sup> 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).

<sup>12</sup> 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.

<sup>13</sup> *X, Y and Z*, § 71.

<sup>14</sup> *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."

<sup>15</sup> *X, Y and Z*, § 76.

<sup>16</sup> 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)*).

<sup>17</sup> The *UNHCR SOGI Guidelines*, § 32.

<sup>18</sup> The *UNHCR SOGI Guidelines*, § 33, footnotes in the original omitted.

anguish, depression, psychosocial and psychological distress, shame, isolation and self-hatred.<sup>19</sup> Expert opinion has attested to the severe mental suffering caused by concealing one's sexual orientation.<sup>20</sup>

7. 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)<sup>21</sup> has been found to constitute cruel, inhuman and degrading treatment.<sup>22</sup> Such findings are consistent with refugee law holding that in some cases psychological harm is persecutory.<sup>23</sup> This is of particular concern in the case of rejected asylum-seekers 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.<sup>24</sup>

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<sup>19</sup> *Guidelines for Psychological Practice With Lesbian, Gay, and Bisexual Clients*, American Psychological Association.

<sup>20</sup> See, e.g., Dr Meyer's expert opinion provided to this Court in the case *Bayev v. Russia*, no. 67667/09, case communicated on 16 October 2013 (judgment pending). His opinion stated: "[...] concealing one's lesbian or gay identity is itself a significant stressor for at least three reasons. First, people must devote significant psychological resources to successfully conceal their LGB identities. Concealing requires constant monitoring of one's interactions and of what one reveals to others. Keeping track of what one has said and to whom is very demanding and stressful, and it leads to psychological distress. Among the effects of concealing are preoccupation, increased vigilance of stigma discovery, and suspicion, which, in turn, lead to mental health problems [...] Second, concealing has harmful health effects by denying the person who conceals his or her lesbian or gay identity the psychological and health benefits that come from free and honest expression of emotions and sharing important aspects of one's life with others [...] Third, concealment prevents LGB individuals from connecting with and benefiting from social support networks and specialized services for them. Protective coping processes can counter the stressful experience of stigma [...] LGB people who need supportive services, such as competent mental health services, may receive better care from sources in the LGB community [...] But individuals who conceal their LGB identities are likely to fear that their sexual identity would be exposed if they approached such sources [...] LGB people who conceal their gay identity have been found to suffer serious health consequences from this concealment", Declaration of Ilan H. Meyer, in *Bayev v. Russia*, May 2014, §§ 64-67. Furthermore, in "*Minority Stress and Physical Health Among Sexual Minorities*", David J. Lick, Laura E. Durso and Kerri L. Johnson note, "[...] LGB individuals who live in stigma-rich environments may also face health concerns because they conceal their sexual identity in order to prevent future victimization [...] Such concealment [...] is associated with a host of psychological consequences in the long-term, including depressive symptoms [...] poor self-esteem and elevated psychiatric symptoms [...] and psychological strain [...] findings from the general population indicate that such heightened distress hinders physical functioning [...] In fact, several previous studies uncovered associations between sexual orientation concealment and physical health outcomes among HIV-positive gay men, linking concealment to increased diagnoses of cancer and infectious diseases [...] dysregulated [sic] immune function [...] and even mortality [...] Collectively, these findings suggest that LGB individuals who live in stigmatizing environments may face frequent victimization that leads them to conceal their sexual orientation, with negative implications for longterm health", and "[t]hus, fears of discrimination stemming from previous experiences with antigay stigma may lead LGB adults to avoid healthcare settings or to conceal their sexual orientation from medical providers, resulting in a low standard of care that contributes to long-term physical health problems [...]", see Lick et al in *Perspectives on Psychological Science* 2013 8: 521 DOI: 10.1177/1745691613497965, at p. 531 and 533, respectively. Apu Chakraborty et al in *Mental health of the non-heterosexual population of England*, *British Journal of Psychiatry* (2011) 198, 143-134 corroborate 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.

<sup>21</sup> 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.

<sup>22</sup> 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.

<sup>23</sup> 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.

<sup>24</sup> 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**).

8. It should also be recalled that even if the people concerned do attempt to conceal their sexual orientation/identity, there remains a possibility of discovery against their will,<sup>25</sup> for example by accident, rumours, growing suspicion, use of social media,<sup>26</sup> assumptions about people who have not married and who do not have children.<sup>27</sup> With respect to the risk of discovery, the UNHCR SOGI Guidelines emphasize: “[i]t 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 lifetime. 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. It is also important to recognize that even if LGBTI individuals conceal their sexual orientation or gender identity they may still be at risk of exposure and related harm for not following expected social norms (for example, getting married and having children [...]). The absence of certain expected activities and behaviour identifies a difference between them and other people and may place them at risk of harm.”<sup>28</sup> In addition, it is the imputation of sexual orientation/identity by the persecutor and consequential risk of persecutory treatment that matters.<sup>29</sup> A person could take as many precautionary steps as possible and yet still be labelled and persecuted.
9. In light of the above, and given the aforementioned relevance of the Refugee Convention and relevant UNHCR guidance in interpreting the ECHR,<sup>30</sup> with respect to the enforcement of removals, the interveners submit in conclusion 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 Convention’s obligations. Such coerced concealment constitutes pain and suffering amounting to proscribed treatment under Article 3. 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* (*mutatis mutandis M.S. v Belgium*)<sup>31</sup> and thus violate Article 3.

#### ii) Criminalization of consensual same-sex sexual conduct

10. Laws criminalizing same-sex conduct are discriminatory and incompatible with human rights standards.<sup>32</sup> Where people risk capital punishment, prison terms or corporal punishment,<sup>33</sup> such as flogging, the persecutory character is “particularly evident.”<sup>34</sup> However, generally, asylum Courts,

<sup>25</sup> 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.

<sup>26</sup> 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.

<sup>27</sup> 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.

<sup>28</sup> The *UNHCR SOGI Guidelines*, § 32 (footnotes in the original omitted).

<sup>29</sup> 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. 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.

<sup>30</sup> See in particular § 1 above.

<sup>31</sup> This Court has found Contracting Parties liable in cases of constructive *refoulement*, e.g., *M.S. v. Belgium*, no. 50012/08, judgment, 31 January 2012, §§ 121-125.

<sup>32</sup> E.g., the UN Working Group on Arbitrary Detention has concluded that detaining someone under laws criminalizing consensual same-sex sexual activity in private breaches international law, Working Group on Arbitrary Detention *Opinion 22/2006* (Cameroon), A/HRC/4/40/Add.1, adopted (2007) pp. 91-94.

<sup>33</sup> The CJEU has accepted that the application of a term of imprisonment upon conviction for offences criminalizing consensual homosexual acts would also amount to persecution, see *X, Y and Z*, where the CJEU held that: “the criminalisation of homosexual acts alone does not, in itself, constitute persecution. However, a term of imprisonment which sanctions homosexual acts and which is actually applied in the country of origin which adopted such legislation must be regarded as being a punishment which is disproportionate or discriminatory and thus constitutes an act of persecution”, § 61.

<sup>34</sup> The *UNHCR SOGI Guidelines*, § 26.

and the 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.<sup>35</sup> Conversely, judgments from superior courts in Belgium<sup>36</sup> and Italy have found in favour of Senegalese homosexual applicants based on, *inter alia*, the risk to the individuals concerned arising from Senegal’s 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. In particular, the Italian Court of Cassation considered whether the existence of laws criminalizing homosexuality in Senegal was a valid reason for granting international protection. It reasoned that the fact that the Senegalese Penal Code criminalizes homosexual acts with penalties of up to five years’ imprisonment constituted *per se* a deprivation of the fundamental right to live freely one’s sexual and emotional life. Consequently, homosexuals were forced to violate the Senegalese criminal law, exposing themselves to severe penalties if they wanted to live their emotional and sexual life freely. The Court held that this was a violation of the right to private life, embedded in the Italian Constitution, the ECHR and the EU Charter on Fundamental Rights. The criminal law placed homosexuals in a situation of objective persecution, and this justified the granting of protection. The criminalization of consensual same-sex sexual conduct in Senegal was *per se* considered to be a serious and unlawful interference with private life and deemed to severely compromise individual freedom.<sup>37</sup>

11. The interveners submit that this Court, in interpreting ECHR provisions that are coterminous with provisions in the EU Charter of Fundamental Rights, is bound by Luxembourg Court’s interpretation of the said provisions only insofar as considering them a floor and not a ceiling in human rights protection. Thus, while this Court should take note of certain aspects of the CJEU’s judgment in *X, Y and Z*, the Luxembourg Court’s abovementioned finding on criminalization *per se* is not germane to this Court’s determination of the present case, since it pertains exclusively to the CJEU’s construction of one of the limbs of Article 9 of the 2004 Qualification Directive.
12. Under refugee law, prosecution may amount to persecution if the criminal law is enforced or punishment meted out in a disproportionate or discriminatory manner.<sup>38</sup> Historically, issues arising as

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<sup>35</sup> In *X, Y and Z*, the CJEU held: “[...] the mere existence of legislation criminalising homosexual acts cannot be regarded as an act affecting the applicant in a manner so significant that it reaches the level of seriousness necessary for a finding that it constitutes persecution within the meaning of Article 9(1) of the Directive”, *X, Y and Z*, § 55. However, the concept of persecution calls for an analysis of the seriousness/severity of the violation of the rights that it entails. Erroneously in the interveners’ view, instead of focusing on whether criminalization of consensual same-sex conduct constituted persecution, the CJEU’s focus of enquiry was on whether it could constitute a lawful measure of derogation from certain rights under the ECHR, such as the right to private and family life. It is to be noted that, in any event, any such derogation would be hardly likely to be lawful under the ECHR. In addition, the ruling of the Court, ultimately, was directed to the construction of one of the limbs of Article 9 of the 2004 Qualification Directive. Had the Court reformulated the question to look beyond Article 9(2)(c), it could have addressed persecution stemming from the existence of laws criminalizing consensual sexual conduct or same-sex sexual orientation by reference to Article 9(2)(b) of the Qualification Directive, i.e.: “legal, administrative, police and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner” whether or not there is a recent record of enforcement in the sense of imprisonment resulting from the application of the relevant provisions. 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 of non-State actors against whom the State does not offer effective protection. See also ‘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.

<sup>36</sup> Judgment No. 36 527 of 22 December 2009, *Conseil du Contentieux des Etrangers*; Judgment No. 50 967 of 9 November 2010, *Conseil du Contentieux des Etrangers*; Judgment No. 50 966 of 9 November 2010, *Conseil du Contentieux des Etrangers*; and Judgment No. 134 833 of 9 December 2014, *Conseil du Contentieux des Etrangers*.

<sup>37</sup> *Sentenza n. 15981/12*, Court of Cassation, *sesta sezione civile*, 20 September 2012; and *Sentenza n.16417/2007*, Court of Cassation, *prima sezione civile*, 25 July 2007. See also *Sentenza n. 11003/20*, Tribunale Ordinario di Venezia deposited on 5 July 2016. See also the UN Committee Against Torture decision in *Mondal v. Sweden*, where the Committee found that complainant would be exposed to a real risk of torture on return to his country of origin (Bangladesh) in part due to his homosexuality, CAT/C/46/D/338/2008, 7 July 2011.

<sup>38</sup> Article 9 (2) (c) and (d) of the recast Qualification Directive reads, *inter alia*, as follows: “Acts of persecution [...] (c) prosecution or punishment which is disproportionate or discriminatory; (d) denial of judicial redress resulting in a disproportionate or discriminatory punishment”. Therefore, if an LGBTI person is more likely to be prosecuted for offences connected with ‘morality’, for example, this may be sufficient to amount to persecution. Similarly, if prosecutions are undertaken without adhering to basic standards of procedural fairness or due process in order to achieve a prohibited aim (discrimination against or suppression of homosexuality, for example) the risk of conviction and any subsequent penalty may constitute serious harm. See, Hathaway and Foster, *The Law of Refugee Status*,

a result of the criminalization of sexual orientation have been considered under the ambit of “private life”, rather than under the rubric of non-discrimination, integrity and/or dignity. This Court, for example, 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 in practice the law was not applied.<sup>39</sup> In the wake of this Court’s ruling in *Dudgeon v. the United Kingdom*, recognizing the harm caused by the mere existence of the criminalization of consensual same-sex sexual conduct, UN human rights Treaty Bodies and independent human rights experts have repeatedly urged States to repeal laws criminalizing homosexuality.<sup>40</sup> 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.<sup>41</sup> Laws and regulations that directly or indirectly criminalize consensual same-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.<sup>42</sup> 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.<sup>43</sup> This Court has also found that pernicious legal, administrative, policy and/or judicial measures that were *in themselves* discriminatory – whether or not currently enforced – or that were implemented in a discriminatory manner, violated the ECHR and caused their victims to experience fear and distress.<sup>44</sup> 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 of non-State actors’ abuses, against whom the State does not offer protection. In the case of *Dudgeon v. the UK*, the European 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,<sup>45</sup> instead of, or at times in addition to, prosecution.

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Second Edition, 2014, Cambridge University Press, Chapter 3, 3.4.2 Prosecution, pp. 245-246; and also *Khan v Secretary of State for the Home Department* [2003] EWCA Civ 530.

<sup>39</sup> *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.

<sup>40</sup> E.g., Human Rights Committee, *Toonen v Australia* (Communication 488/1992, 4 April 1994), UN Doc. CCPR/C/50/D/488/1992); see also the 2015 Report of the Office of the United Nations High Commissioner for Human Rights, *Discrimination and violence against individuals based on their sexual orientation and gender identity* (hereafter the 2015 OHCHR SOGI Report), UN Doc. A/HRC/29/23, 4 May 2015, § 15 and § 43, in particular.

<sup>41</sup> 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 torture and other cruel, inhuman or degrading treatment or punishment, UN Doc.: A/56/156, 3 July 2001, § 20 and, generally, §§ 18-25.

<sup>42</sup> 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.

<sup>43</sup> The use of non-consensual anal examinations, often used to determine criminal liability against men suspected of homosexuality, contravenes the prohibition of torture and other ill-treatment. 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.

<sup>44</sup> 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.

<sup>45</sup> 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.

13. Thus, the mere existence of laws criminalizing consensual same-sex sexual conduct, including in countries where they have not been recently enforced,<sup>46</sup> 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.<sup>47</sup> Furthermore, as the 2015 OHCHR SOGI Report notes: “[h]uman rights mechanisms continue to emphasize links between criminalization and homophobic and transphobic hate crimes, police abuse, torture, family and community violence and stigmatization, as well as the constraints that criminalization puts on the work of human rights defenders.”<sup>48</sup> 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.<sup>49</sup> 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.”<sup>50</sup> Moreover, since this Court is bound to consider any EU Respondent Government’s obligations under the applicable provisions of the EU *acquis* when assessing whether a Contracting Party’s proposed actions will be “in accordance with the law” under the Convention, the application of Article 9(3) of the Qualification Directive 2011 is materially relevant to acts of persecution absent any protection.<sup>51</sup>
14. The interveners further note that in *Smith and Grady v. the UK*, which concerned 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”.<sup>52</sup>

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<sup>46</sup> 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.

<sup>47</sup> 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 (para. 41 of the judgment). 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.

<sup>48</sup> The 2015 OHCHR SOGI Report, UN Doc. *A/HRC/29/23*, § 45, which also refers to the Special Rapporteur on freedom of religion or belief noting that these laws may give a pretext to vigilante groups and other perpetrators of hatred for intimidating people and committing acts of violence.

<sup>49</sup> 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 adjudicator found that the claimant’s family rejection and police harassment due to his “lifestyle choice” did not amount to persecution. However, 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.

<sup>50</sup> The *UNHCR SOGI Guidelines*, § 27; “Even where consensual same-sex relations are not criminalized by specific provisions, laws of general application, for example, public morality or public order laws (loitering, for example) may be selectively applied and enforced against LGBTI individuals in a discriminatory manner, making life intolerable for the claimant, and thus amounting to persecution”, the *UNHCR SOGI Guidelines*, § 29 (footnotes omitted); see *RRT Case No. 110287Z*, [2012] RRTA 101, Australia, Refugee Review Tribunal, 23 February 2012, §§ 89, 96; and *RRT Case No. 07186264Z*, [2008] RRTA 40, Australia: Refugee Review Tribunal, 19 February 2008.

<sup>51</sup> Article 9(3) reads “in accordance with point (d) of Article 2, there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1 of this Article **or the absence of protection against such acts**” (emphasis added).

<sup>52</sup> *Smith and Grady*, nos. 33985/96 33986/96, judgment, 27 September 1999, § 121; most recently in *Identoba and Others v. Georgia* (no. 73235/12, judgment, 12 May 2015), this Court reiterated that “discriminatory treatment as

15. In light of the above, the interveners urge the Court to find that the existence of laws criminalizing consensual same-sex sexual conduct discloses dispositive evidence of a real risk of Article 3 prohibited treatment,<sup>53</sup> thus triggering the prohibition on exposing the individual concerned to the same under that provision of the Convention. In the alternative, the Court should find that there is a strong presumption that such laws engender a real risk of Article 3 prohibited treatment, and, therefore, the burden is on the State to rebut that presumption by proving conclusively the absence of such a risk.<sup>54</sup>

### iii) The risk of persecution based on sexual orientation in Senegal

16. In Senegal consensual same-sex sexual activity, referred to in the law as an “improper or unnatural act”, is a criminal offence, and penalties range from one to five years’ imprisonment and fines between 100,000 and 1.5 million CFA francs (approximately, between EUR 150 and 2300).<sup>55</sup> The law applies to both men and women. Violence, detention, intimidation, harassment and discrimination against LGBT individuals create a persecutory climate in Senegal. The criminalization of consensual same-sex sexual relations fosters a climate of state-sanctioned homophobia, resulting in abuse, discrimination and violence by state and non-state actors. As 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.”<sup>56</sup> The existence of such laws allows no space for LGBT identity to exist and signals that LGBT individuals have no place in society, thus legitimizing violence and discrimination against them. Furthermore, the laws promote anti-gay rhetoric in the media<sup>57</sup> and among politicians.<sup>58</sup> There is also evidence of a lack of willingness or ability on the part of the authorities to effectively protect LGBT persons from discrimination and homophobic acts and to prosecute such acts.<sup>59</sup>

17. While it is the interveners’ contention that the mere existence of the laws criminalizing consensual same-sex sexual activity is in itself evidence of a real risk of Article 3 prohibited treatment and sufficiently serious as to engage the *non-refoulement* obligations under the Convention, the relevant laws in Senegal are also applied in practice, often in an arbitrary and discriminatory fashion.<sup>60</sup> Section A below documents recent instances of arrests and prosecutions of gay men. Section B provides specific examples of other persecutory acts to which LGBT individuals in Senegal are regularly subjected, including acts of torture or other ill-treatment. These sections provide examples of the persecutory harm suffered by LGBT individuals and are not intended to be all encompassing.

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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”, *Identoba*, § 65.

<sup>53</sup> 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.

<sup>54</sup> In *F.G. v. Sweden*, the Grand Chamber of this Court reiterated that where the Contract 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.

<sup>55</sup> Article 319:3 of the Code Pénal of Senegal, 1965 (‘unnatural acts’) states “Whoever will have committed an improper or unnatural act with a person of the same sex will be punished by imprisonment of between one and five years and by a fine of 100,000 to 1,500,000 francs. If the act was committed with a person below the age of 21, the maximum penalty will always be applied.” [translated from French] *Sénégal: Code Pénal* [Senegal], Loi de base No. 65-60, 21 July 1965.

<sup>56</sup> UNHCR SOGI Guidelines, § 27.

<sup>57</sup> For instance, in a widely-reported case involving conviction and sentencing of two gay men under Article 319, even though the public prosecutor requested a sentence of two years in prison, the court chose to consider the media outcry and imposed a heavier sentence. See: Dan Littauer, *Senegal men jailed for gay sex*, Gay Star News, 24 October 2012.

<sup>58</sup> In May 2016, Senegalese Member of Parliament Mberry Sylla submitted a bill that would specifically criminalize homosexuality in Senegal. This was done in response to reports that the Senegalese officials had earlier argued that the existing provision (Article 319) must be interpreted as a punishment for “unnatural acts committed in public” and alleged — despite clear evidence to the contrary — that nobody has ever been imprisoned for violating it. See: Colin Stewart, *Senegal politician seeks explicit law against homosexuality*, Erasing 76 Crimes, 11 May 2016.

<sup>59</sup> Human Rights Watch, *UPR Submission: Senegal*, February 2013. In May 2015, the Senegalese President reportedly said that: “Never, under my authority, will homosexuality be legalized under the Senegalese sun”. See: Darren Wee, *Senegal president: I will never legalize gay sex*, Gay Star News, 2 March 2016.

<sup>60</sup> Human Rights Watch, *UPR Submission: Senegal* (February 2013).

A. *Risk of arrest and prosecution*

18. A 2012 report from the Canadian Immigration and Refugee Board, recorded several arrests, some leading to prosecutions and convictions.<sup>61</sup> A 2013 US Country Report on Human Rights Practices in Senegal found that LGBT individuals were often faced with arrest.<sup>62</sup> Another report by several Senegalese NGOs stated that a simple complaint or rumour about a person's sexuality were enough for them to be arrested.<sup>63</sup> In February 2014, two men were sentenced to six months' imprisonment for committing "unnatural acts", following their neighbours alerting the police.<sup>64</sup> In 2015, there were at least 18 instances of reported arrests of "alleged homosexuals".<sup>65</sup> Of those, 11 were reportedly arrested following their escape from a lynch mob,<sup>66</sup> and seven men were jailed for 6 months for "unnatural acts", after the mother of one of them had reported them to the police.<sup>67</sup>

B. *Torture and inhuman and degrading treatment and other persecutory acts*

19. International NGOs have documented numerous incidents of human rights abuses against gay men, including torture and other ill-treatment at the hands of the authorities, arbitrary arrests and discrimination in access to justice.<sup>68</sup> In a widely reported incident, 50 men were attacked at a birthday party for their alleged sexuality by a mob armed with slingshots and knives. The police detained the men alleged to be gay, meting out frequent beatings. Newspapers and television outlets disseminated police pictures of the men.<sup>69</sup> In another instance, police arrested and reportedly tortured nine men at the home of the Secretary General of an organization that provided HIV-prevention services. The State never launched an investigation into the reported use of torture. The Senegalese media covered the case extensively for months, and many *imams* and other influential leaders called for the "destruction of homosexuals" in the country. The victims were forced to live semi-clandestinely or flee the country.<sup>70</sup> In July 2015, a well-known journalist was chased by an angry mob and forced to take refuge in a police station. He was later convicted and sentenced for "unnatural acts".<sup>71</sup> In March 2016, a mob burned and ransacked buildings at a University in Dakar in search of a gay student.<sup>72</sup> Media reports have noted the dramatic rise in homophobic persecution and violence in Senegal, in part fuelled by media sensationalism and religious fundamentalism.<sup>73</sup> A Pew Research survey from 2013 found that 96% of the population of Senegal believed that society should not accept homosexuality.<sup>74</sup>

20. The foregoing paragraphs clearly demonstrate that the general situation for LGBT individuals in Senegal is grave. LGBT individuals have suffered and continue to suffer acts of persecution, including torture, other ill-treatment and arbitrary and discriminatory prosecution and disproportionate punishment, which constitute severe violations of their basic human rights. The continued and mere existence of the laws that criminalize consensual same-sex sexual conduct enable, encourage and contribute to the persecutory environment that exists in Senegal and expose LGBT individuals to real risks of persecutory harm.

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<sup>61</sup> Immigration and Refugee Board of Canada, Senegal: The situation of sexual minorities in Senegal, including societal attitudes and whether there is a difference in the treatment of lesbians and gay men; state protection (2010-April 2013), 7 May 2013, SEN104382.E.

<sup>62</sup> Bureau of Democracy, Human Rights and Labor, 'Country Reports on Human Rights Practices for 2013: Senegal (US Department of State 2013).

<sup>63</sup> ADAMA, AIDES Sénégal, *Espoir et Prudence. Contribution conjointe des organisations identitaires des HSH*, October 2013.

<sup>64</sup> Claire Pires, *Two Senegalese Men Sentenced To Six Months In Prison For Being Gay*, BuzzFeed, 2 Feb. 2014.

<sup>65</sup> Amnesty International, Annual Report 2015/16, Senegal, p 315. AFP, Senegal: 11 suspected homosexuals released for lack of evidence, Africa news, 30 December 2016; BBC, Senegal jails seven men for 'gay sex', 21 August 2016.

<sup>66</sup> *Ibid.*

<sup>67</sup> BBC, Senegal jails seven men for 'gay sex', 21 August 2016.

<sup>68</sup> Human Rights Watch, UPR Submission: Senegal, February 2013; see also, Human Rights Watch, Fear for Life: Violence against Gay Men and Men Perceived as Gay in Senegal, November 2010.

<sup>69</sup> *Ibid.*, p. 40-41.

<sup>70</sup> Amnesty International, Senegal: Land of Impunity, 2010, p. 19.

<sup>71</sup> AP, Senegal court sentences journalist to 6 months in jail for acts of homosexuality, 31 July 2015.

<sup>72</sup> Bobby Rae, Mob trash university in hunt for 'gay' man, Pink News, 22 March 2016.

<sup>73</sup> Cary Alan Johnson and Ryan Thoreson, Meanwhile in Senegal, Metro Weekly, 21 January 2010; Camille Belsoeur, Au Sénégal, la presse contribue au sentiment antihomosexuel, Slate Afrique, 21 January 2016.

<sup>74</sup> The Global Divide on Homosexuality: Greater Acceptance in More Secular and Affluent Countries, 4 June 2013.