A.T. v. Sweden

Application no. 78701/14

WRITTEN SUBMISSIONS ON BEHALF OF

THE AIRE CENTRE (ADVICE ON INDIVIDUAL RIGHTS IN EUROPE),

AMNESTY INTERNATIONAL (AI),

ILGA-EUROPE (THE EUROPEAN REGION OF THE INTERNATIONAL LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASSOCIATION),

THE INTERNATIONAL COMMISSION OF JURISTS (ICJ) AND

THE UK LESBIAN & GAY IMMIGRATION GROUP (UKLGIG)

INTERVENERS

pursuant to the Section Registrar's notification of 27 April 2015

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19 May 2015

Introduction

1. These submissions are presented on behalf of the AIRE Centre, AI, ILGA-Europe, the ICJ and the UKLGIG, hereinafter "the interveners". They focus on:

A. the obligation to ensure that the risk upon removal be assessed so as to guarantee that the protection of the Convention for the Protection of Human Rights and Fundamental Freedoms ('the Convention' or ECHR) be practical and effective;
B. whether requiring coerced, including self-enforced, suppression of a fundamental aspect of one's identity — as enforced concealment of one's same-sex sexual orientation entails — is compatible with the Convention, in particular, Article 3;
C. whether 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
D. the significance of the EU asylum *acquis* and the case-law of the Court of Justice of the European Union (CJEU), including the joined cases *Minister voor Immigratie en Asiel v X (C-199/12), Y (C-200/12), and Z (C-201/12) v Minister voor Immigratie en Asiel*.[1]

A. A full and *ex nunc* assessment

2. It is this Court's settled case-law that the Contracting Parties' responsibility under the Convention is engaged under Article 3 where substantial grounds have been shown for believing that the individual concerned would—upon removal from the Contracting Parties' jurisdiction—be exposed to a real risk of treatment contrary to Article 3. As a result, Article 3 entails a *non-refoulement* obligation,[2] accepting no derogation or limitation whatsoever,[3] enjoining the removal of the concerned individual(s),[4] where the real risk of exposure to Article 3 prohibited treatment arises, including, wholly or in part, because of prejudice against their real or purported sexual orientation.[5]

3. In this context — as with any others giving rise to the possibility of arbitrary *refoulement* — the longstanding jurisprudence of this Court has held that, in order to prevent such an eventuality, an assessment is required to ascertain whether there are substantial grounds for believing that, upon removal from the Contracting Parties' jurisdiction, the individuals concerned would face a real risk of serious violations of their human rights. Further, this Court has clarified that such an assessment must necessarily be a rigorous one,[6] entailing consideration of "all the material placed before it or, if necessary, material obtained *proprio motu*".[7] This Court has also held that if, at the time of its consideration of the case, the applicant's removal from the Contracting Party's jurisdiction has yet to be enforced, the

[1] Joined cases *Minister voor Immigratie en Asiel v X (C-199/12), Y (C-200/12), and Z (C-201/12) v Minister voor Immigratie en Asiel*, Judgment (Fourth Chamber), 7 November 2013, hereinafter '*X, Y and Z'*.
[2] The principle of *non-refoulement*, well established in this Court's case-law, was first recognized in the context of Article 3 (see, *Soering v. the UK*, judgment, 7 July 1989, Series A no. 161, §§ 88-91). The *non-refoulement* principle entails an obligation not to transfer (*refouler*) people where there are substantial grounds for believing that they face a real risk of serious violations of human rights in the event of their removal, in any manner whatsoever, from the State's jurisdiction. It dictates that, irrespective of all other considerations, Contracting Parties are not absolved from responsibility "for all and any foreseeable consequences" suffered by an individual following removal from their jurisdiction (*inter alia*, *Soering* §§ 85-86; *Hirsi Jamaa and Others v. Italy* [GC], no. 27765/09, judgment, 23 February 2012, §115; *Saadi v. Italy* [GC], no. 37201/06, judgment, 28 February 2008, § 126).
[3] In its case law, this Court has firmly established and reaffirmed the absolute nature of the prohibition against arbitrary *refoulement* under Article 3 of the Convention. See, inter alia, *Soering* § 88; *Chahal v. the UK*, judgment, 15 November 1996, Reports 1996-V (1996), §§ 80-81; *Ahmed v. Austria,* No. 29564/94, judgment, 17 December 1996, § 41; and *Saadi*, §§ 138 and 141.
[4] *Inter alia*, *Hilal v. the UK*, no. 45276/99, judgment, 6 March 2001, § 59, and *Ahmed*, §§ 38-41.
[5] *Inter alia*, *I.I.N. v. the Netherlands*, no. 2035/04, admissibility decision, 9 December 2004; *F. v. the UK*, no. 17341/03, admissibility decision, 22 June 2004; *A.S.B. v. the Netherlands*, no. 4854/12, strike-out decision, 10 July 2012; *M.K.N. v. Sweden*, no. 72413/10, judgment, 27 June 2013; *M.E. v. Sweden* [GC], no. 71398/12, strike-out decision, 8 April 2015.
[6] *Chahal*, § 96, and *Saadi*, § 128.
[7] *Inter alia*, *H.L.R. v. France* [GC], no. 24573/94, judgment, 29 April 1997), § 37.

material time for the risk assessment will be that of the proceedings before this Court.[8]

4. In light of the above, the interveners submit that a full and *ex nunc* evaluation of risk at the date of the Court's judgment is required to ensure that the protection of Convention rights be practical and effective. Overlooking a change of circumstances over time would render these rights theoretical and illusory.[9] If, following a full, rigorous, *ex nunc* evaluation of the Article 3 risk upon removal, the risk is assessed as real, its enforcement would violate the absolute prohibition on exposing people to a real risk of Article 3 prohibited treatment,[10] and, *mutatis mutandis*, in respect of a real risk of Article 2 violations.[11]

B. Coerced, including self-enforced, suppression of a fundamental aspect of one's identity, is incompatible with the Convention, in particular, Article 3

5. In this section, the interveners submit that, in the context of enforcing removals, requiring coerced, including self-enforced, concealment of someone's same-sex sexual orientation or identity – as a way, purportedly, to mitigate the real risk of their being exposed to Article 3 prohibited treatment – is incompatible with the Convention obligations. Such coerced concealment constitutes pain and suffering amounting to proscribed treatment under Article 3.

6. Indeed, requiring coerced, including self-enforced, suppression of one's same-sex sexual orientation or identity, including through forcing the individual concerned to adopt, and/or conform to, and effectively manufacture, a heterosexual or asexual lifestyle, heterosexual or asexual orientation and identity in order to avoid persecution is inconsistent with the human rights and fundamental freedoms enshrined in the Convention, including one's right to identity. Requiring individuals to conceal a fundamental aspect of their identity is contrary to the inalienability of human dignity and is tantamount to expecting individuals to abstain from, *e.g.,* exercising their rights to respect for private and family life,[12] freedom of expression[13] and freedom of assembly and association.[14] Furthermore, it constitutes

[8] *Inter alia*, *Saadi*, § 133. "[I]t is the present conditions which are decisive and it is therefore necessary to take into account information that has come to light after the final decision taken by the domestic authorities", *Salah Sheekh v. the Netherlands*, no. 1948/04, judgment, 11 January 2007, § 136.

[9] In *El-Masri v. "the former Yugoslav Republic of Macedonia"*, no. 39630/09, judgment, 13 December 2012, the Grand Chamber reiterated that "the Convention is an instrument for the protection of human rights and that it is of crucial importance that it is interpreted and applied in a manner that renders these rights practical and effective, not theoretical and illusory", § 134.

[10] See *Soering*, § 88; *Chahal*, §§ 80-81; *Ahmed*, § 41; and *Saadi*, §§ 138 and 141.

[11] *Inter alia*, *Bader and Kanbor v. Sweden*, no. 13284/04, judgment, 8 November 2005. With respect to the application and carrying out of capital punishment in Iran as a result of convictions on charges arising from real or imputed engagement in consensual sexual relations, the interveners draw the Court's attention to the *Question of the Death Penalty: Report of the Secretary General*, UN Doc. A/HRC/27/23, 30 June 2014, which notes that Iran is among the 10 States that "continue to impose and carry out the death penalty in connection with actual or purported engagement in consensual sexual acts, such as 'adultery' and 'sodomy'", § 32 and § 34.

[12] See, *Dudgeon v. the UK*, 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.

[13] In *Smith and Grady v. the UK* the Court affirmed that it "would not rule out that the silence imposed on the applicants as regards their sexual orientation, together with the consequent and constant need for vigilance, discretion and secrecy in that respect with colleagues, friends and acquaintances as a result of the chilling effect of the Ministry of Defence policy, could constitute an interference with their freedom of expression", *Smith and Grady*, nos. 33985/96 33986/96, judgment, 27 September 1999, § 127.

[14] *Bączkowski and Others v. Poland*, nos. 1543/06, judgment, 3 May 2007; *Alekseyev v. Russia*, nos. 4916/07, 25924/08 and 14599/09, judgment, 21 October 2010; and *Genderdoc-M v. Moldova*, no. 9106/06, judgment, 12 June 2012. Addressing concealment, albeit in a freedom of assembly context, in *Alekseyev* the Court held that, "84. […] There is no ambiguity about the other member States' recognition of the right of individuals to openly identify themselves as gay, lesbian or any other sexual minority, and to promote their rights and freedoms, in particular by exercising their freedom of peaceful assembly." The national margin of appreciation is therefore narrow and the scrutiny applied by the Court is a strict one.

impermissible and unlawful discrimination.[15] As this Court reiterated in *V.C. v Slovakia*, "the very essence of the Convention is respect for human dignity and human freedom."[16] Coerced suppression of one's same-sex sexual orientation or identity 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.[17] In light of the above, the interveners submit that requiring coerced, including self-enforced, suppression of one's same-sex sexual orientation or identity[18] is incompatible with respect for human dignity and human freedom, and thus, with the Convention's very essence.

7. 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**…".[19] Moreover, this Court has held that it is sufficient if the victim is humiliated in his or her own eyes.[20]

8. Thus, in gauging whether the prospective ill-treatment inflicted by concealment will attain the required level of severity for it to be considered inhuman or degrading, this Court considers the nature of the harm involved, taking into account not only the actual harm threatened — *e.g.* the Article 3 prohibited treatment that would befall lesbian, gay and bisexual individuals in certain countries were their sexual orientation discovered — but also the psychological impact of the threatened, prospective harm that concealment entails. In this context, in its case-law, including most recently in *Identoba and Others v. Georgia*, this Court has recognized that, "Article 3 cannot be limited to acts of physical ill-treatment; it also covers the infliction of psychological suffering".[21] Thus, psychological, mental harm may attain such a severity as to fall within the scope of Article 3.[22] Mental pain or suffering reaching the Article 3 threshold also results from the apprehension of prospective physical ill-treatment. 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 private or state actors, imprisonment

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[15] *Sutherland v. the UK*, no. 25186/94, decision of the Commission, 1 July 1997; *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, judgment, 21 December 1999; *EB v France* [GC], no. 43546/02, judgment, 22 January 2008; and *Identoba and Others v. Georgia*, no. 73235/12, judgment, 12 May 2015, § 71.

[16] *V.C. v. Slovakia*, no. 18968/07, judgment, 8 November 2011, § 105.

[17] 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.

[18] Or, *mutatis mutandis*, one's religious conversion, see the written submissions on behalf of the AIRE Centre, ECRE and the ICJ lodged with the Grand Chamber on 10 October 2014 in the case of *F.G. v. Sweden*, no. 3611/11, judgment pending, available at http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/10/SWEDEN-ECHR-amicus-FG-vs-Sweden-Advocacy-Legal-Submission-2014-ENG.pdf.

[19] *Keenan v. the UK*, no. 27229/95, judgment, 3 April 2001, § 110 (**emphasis added**), and *Ireland v. the UK*, no. 5310/71, judgment, 18 January 1978, § 167; *Identoba*, §§ 68-71 and § 79.

[20] See the *Tyrer v. the UK*, judgment, 25 April 1978, Series A no. 26, p. 16, § 32.

[21] *Identoba,* § 65, §§ 70-71 and § 79 where the Court held, "that violence, which consisted mostly of hate speech and serious threats, but also some sporadic physical abuse in illustration of the reality of the threats, rendered the fear, anxiety and insecurity experienced by all thirteen applicants severe enough to reach the relevant threshold under Article 3 read in conjunction with Article 14 of the Convention"; see also, *Gäfgen v. Germany* [GC], no. 22978/05, judgment, 1 June 2010, § 103.

[22] *Denmark, Norway, Sweden and the Netherlands v. Greece* ("the *Greek* case") nos. 3321/67, 3322/67, 3323/67 and 3344/67, Commission's report of 5 November 1969, and *Akkoç v. Turkey*, nos. 22947/93 and 22948/93, §§ 25 and 116-17, which are authorities for the proposition that for a particular act to constitute torture it is not necessary that physical injury be caused. A mere threat of Article 3 prohibited treatment can itself give rise to a violation of that Article, see *Campbell and Cosans v. the UK*, 25 February 1982, § 26; *Gäfgen* § 108, §§ 65-68 and § 86. See also, *inter alia*, the UN Human Rights Committee's General Comment 20 relating to Article 7 of the International Covenant on Civil and Political Rights which states that "[t]he prohibition in article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim." U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), § 5.

and, in extreme cases, execution, may hang over them for the rest of their lives.

9. In light of the above, the interveners submit that coerced, including self-enforced, concealment of one's sexual orientation in an attempt to avoid persecution creates "feelings of fear, anguish and inferiority capable of humiliating or debasing" the victims. In this context, the interveners draw the Court's attention to the expert opinion of Dr Meyer in the case of *Bayev v. Russia*.[23] His expert opinion in that case attested to the severe mental suffering caused by concealing same-sex sexual orientation.[24]

10. There is a further reason why coerced, including self-enforced, suppression of one's sexual orientation or gender identity to avoid persecution is incompatible with the Convention obligations under Article 3. As the United Nations High Commissioner for Refugees has noted, there is no guarantee that such concealment will be successful, particularly as it is likely to be for an indefinite, perhaps life-long, period. Moreover, the risk of discovery may not be confined to the conduct of the individual. "There is almost always the possibility of discovery against the person's will, for example, by accident, rumours or growing suspicion […] 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)."[25]

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[23] *Bayev v. Russia*, no. 67667/09, case communicated on 16 October 2013, judgment pending.

[24] Dr Meyer's area of social epidemiological expertise is the effects of social stress related to prejudice and discrimination on the health of lesbian, gay, and bisexual (LGB) populations. The interveners commend to the Court the following paragraphs of that opinion:
"[…] 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 (http://bjp.rcpsych.org/content/bjprcpsych/198/2/143.full.pdf) 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.

[25] United Nations High Commissioner for Refugees HCR/GIP/12/09, 23 October 2012, Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees - §32.

11. In any event, the suppression of a fundamental aspect of one's identity, such as one's sexual orientation, is not a course of action undertaken voluntarily, resulting from full, free informed consent. If there is a real risk of Article 3 treatment, concealment is the typical response.[26] Where, therefore, in the context of enforced removals, the individuals concerned would face a real risk of physical harm amounting to Article 3 prohibited treatment upon discovery of their same-sex sexual orientation, coerced concealment of such sexual orientation or identity is a direct and foreseeable consequence of their forcible removal. In addition, coerced concealment entails a real risk of mental, psychological suffering falling within the scope of Article 3 of the Convention.

12. In conclusion, the interveners submit that enforcing removals on the basis that the individuals concerned would be expected to conceal their sexual orientation or identity – purportedly to sufficiently mitigate the risk of Article 3 prohibited treatment upon return – would constitute arbitrary *refoulement* (*mutatis mutandis M.S. v Belgium*)[27] and thus violate Article 3.

C. Criminalization of consensual same-sex sexual conduct

13. As noted by the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, "[c]riminal laws are enacted by the State to regulate conduct perceived as threatening, dangerous, or harmful to an individual, to other individuals or society. Such laws represent the strongest expression of the State's power to punish and are among its most intentional acts."[28] In this context, 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.[29] In the pivotal case of *Dudgeon* both this Court and the Commission did not doubt "the fear and distress that he [i.e. the applicant] has suffered in consequence of the existence of the laws in question."[30] The 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.[31]

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[26] In *HJ (Iran) and HT (Cameroon) v. SSHD* [2010] UKSC 31, the UK Supreme Court noted this effect in practice: "Unless 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.

[27] 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.

[28] Interim report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/66/254, 3 August 2011, § 11. Karon Monaghan QC has further observed that, "[c]riminal laws, are connectedly *both* normative and punitive. They tell society what is acceptable and tell individuals what is not acceptable – they operate as a legal and social imperative not to do something, or, to be someone and license society to express its disapproval through stigmatisation, prejudice and discrimination. Laws criminalising homosexuality cause shame, damage to self-esteem, fear and psychological damage, and utterly eat away at a person's human dignity, personality and therefore humanity, and may affect their enjoyment of State protection", Case Comment: AG's Opinion in X, Y and Z v Minister voor Immigratie, Integratie en Asiel (C–199/12, C–200/12 and C–201/12), 24 July 2013.

[29] *Dudgeon*; *Norris*; *Modinos*; *A.D.T.* and *Marangos*, cited above at footnote 12.

[30] *Dudgeon*, judgment of the Court, § 40. In arriving at its conclusion that it saw no reasons to doubt the truthfulness of the applicant's allegations, the Commission, in turn, 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 effected 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, (**emphasis added**).

[31] *Dudgeon*, judgment of the Court, § 41. In this context the Court had further noted that "Moreover, **the police investigation** in January 1976 **was, in relation to the legislation in question, a specific measure of implementation - albeit short of actual prosecution - which directly affected the**

14. In the wake of *Dudgeon*, 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.[32] 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.[33] Extensive research has shed light on the ways in which 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 and/or gender identity with impunity.[34] 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. 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.[35]

15. This Court has found that pernicious legal, administrative, policy and/or judicial measures *in themselves* discriminatory – whether or not enforced – or that were implemented in a discriminatory manner, violated the Convention and caused their victims to experience fear and distress.[36] 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. 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,[37] instead of, or at times in addition to, prosecution. Thus, the mere existence of laws criminalizing consensual same-sex sexual conduct can give rise to acts of persecution, without necessarily leading to recorded court cases and convictions. Indeed, in light of the case-law mentioned above, the interveners submit that the existence of laws criminalizing consensual same-sex sexual orientation or conduct, including in countries where they have not been recently enforced, gives rise to a real risk that they may be enforced in the future.[38]

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applicant in the enjoyment of his right to respect for his private life (see paragraph 33 above). As such, **it showed that the threat hanging over him was real**." *Ibid* (**emphasis added**). In *Modinos* the 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 (**emphasis added**).

[32] E.g., Human Rights Committee, *Toonen v Australia* (Communication 488/1992, 4 April 1994), UN Doc. CCPR/C/50/D/488/1992). 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, page 31, 2012.

[33] E.g. Born Free and Equal; Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, A/56/156, 3 July 2001, § 20 and, generally, §§ 18-25.

[34] The Special Rapporteur on health noted that "sanctioned punishment by States reinforces existing prejudices, and legitimizes community violence and police brutality directed at affected individuals," A/HRC/14/20, § 20. The 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.

[35] UN human rights bodies have long held that such acts are in violation 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, § 317; A/HRC/10/44/Add.4, § 61; and A/HRC/16/52/Add.1, § 131.

[36] See, *Dudgeon*; *Norris*; *Modinos*; *A.D.T.* and *Marangos*, cited above at footnote 12.

[37] See the Commission's report in *Dudgeon*, cited above at footnote 30.

[38] See, in particular, *Modinos* and *Dudgeon*. 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, UN High Commissioner for Refugees, "Guidelines on International

Recent country examples demonstrate that a lack of implementation of domestic criminal law does not guarantee that enforcement of the relevant criminal provisions will not resume in future.[39]

16. In *Henaf v France*,[40] this Court held that, "having regard to the fact that the Convention is a 'living instrument which must be interpreted in the light of present-day conditions' […] certain acts which were classified in the past as 'inhuman and degrading treatment' as opposed to 'torture' could be classified differently in future. It takes the view that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies" […]. As that statement applies to the possibility of a harsher classification under Article 3, it follows that certain acts previously falling outside the scope of Article 3 might in future attain the required level of severity."[41]

17. Further, in *Cyprus v. Turkey*,[42] the Court first recalled that in *Abdulaziz, Cabales and Balkandali v. the UK*, it had accepted that a complaint of discriminatory treatment could give rise to a separate issue under Article 3. Having then recalled that the Commission in the *East African Asians v. the UK* had observed a special importance attached to discrimination based on race, and that to publicly single out a group for differential treatment on racial grounds might constitute a special affront to human dignity capable of constituting degrading treatment, the Court then held that the conditions under which the Karpas Greek-Cypriot population had been condemned to live were "debasing and violate[d] the very notion of respect for the human dignity of its members", and therefore "the discriminatory treatment attained a level of severity which amounted to degrading treatment".[43] 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, the 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".[44]

18. In light of the foregoing, the interveners urge the Court to find that the existence of laws

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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", HCR/GIP/12/09, 23 October 2012, §§ 27, 29.

[39] E.g., according to sections 155 and 157 of the Zambian Penal Code Act of 1995, Chapter 87, same-sex sexual activity is illegal in Zambia. Until 2013 the law had however been largely unenforced. In May 2013 police in Kapiri Mposhi arrested Phil Mubiana and James Mwansa, both aged 21, on charges of having sex "against the order of nature". The arrest of the two men took place just weeks after a human rights activist was arrested in the capital, Lusaka, after he appeared on television supporting LGBTI rights. The arrests appear to be a direct response to increasingly homophobic statements made by political and religious leaders since the election of President Michael Sata in September 2011. Malawi is another example where an apparent practice of non-enforcement of criminal provisions was abruptly reversed. In January 2010, Steven Monjeza and Tiwonge Chimbalanga were prosecuted for holding a wedding ceremony in December 2009. The two individuals were reportedly subjected to torture and other ill-treatment while in custody. They were later sentenced to 14 years' hard labour for "gross indecency", though subsequently pardoned following engagement of the United Nations with the then Malawian president. Prior to this case, there had been no recent reports of prosecutions using the colonial era law banning same-sex sexual activity. For more information, see Observations by Amnesty International and the International Commission of Jurists on the case *X, Y and Z v Minister voor Immigratie, Integratie en Asiel* (C-199/12, C-200/12 and C-201/12) following the Opinion of Advocate General Sharpston of 11 July 2013, 2 October 2013, available at http://www.icj.org/wp-content/uploads/2013/10/Observations-by-AI-and-ICJ-on-X-Y-and-Z-CJEU-ref-2-OCT-2013-FINAL-with-index-number-and-logos.pdf.

[40] *Henaf v. France*, no. 65436/01, judgment of 27 November 2003.

[41] Ibid, § 55.

[42] *Cyprus v. Turkey*, no. 25781/94, judgment of 10 May 2001.

[43] *Ibid*, §§ 305, 306, 309 and 310, respectively.

[44] *Smith and Grady*, cited above at footnote 13, § 121; most recently in *Identoba* 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", *Identoba*, § 65.

criminalizing consensual same-sex sexual conduct discloses evidence of a real risk of Article 3 prohibited treatment,[45] thus triggering *non-refoulement* obligations under that provision of the Convention. In the alternative, at the very least, the Court should find that there is a high presumption that such laws engender such risk and thereby impose the burden on the State to rebut that presumption by proving conclusively the absence of such risk.

D. The EU asylum *acquis* and the CJEU case-law, including the *X, Y and Z* case

19. In this section the interveners submit that this Court, in interpreting ECHR provisions that are coterminous with provisions in the EU Charter of Fundamental Rights, is not bound by the interpretation of the said provisions given by the Luxembourg Court other than considering such interpretations as "a floor and not a ceiling" in the protection of human rights. In light of this, the interveners further submit that this Court should take note of certain aspects of the CJEU's judgment in *X, Y and Z*. However, the CJEU's finding in that case on criminalization *per se* is neither necessarily relevant nor binding on this Court in its 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.

20. The EU asylum *acquis* is relevant to the present case in two ways.[46] First, the rule of law is a fundamental tenet of Convention case-law.[47] As a result, the Convention requires that all measures taken by Contracting Parties that affect an individual's protected rights must be "in accordance with the law". In some circumstances *the law* will be EU law. In this context, in determining whether the Contracting Parties' obligations under the Convention are engaged in any particular case — and, if so, the scope and content of these obligations — this Court has therefore had regard to the EU asylum *acquis* materially relevant to those questions when the Respondent States are themselves legally bound by that *corpus* of law.[48] However, it is not generally the role of this Court to decide whether States have acted in accordance with EU law "unless and in so far as they may have infringed rights and freedoms protected by the Convention."[49] But it is for this Court therefore to consider any EU Respondent Government's obligations under the applicable provisions of EU *acquis* (as interpreted and construed by the CJEU[50]) when assessing whether a Contracting Party's proposed actions will

[45] Cf., *Ülke v. Turkey*, no. 39437/98, judgment, 24 January 2006.
[46] The EU asylum *acquis* is the *corpus* of law comprising all EU law adopted in the field of international protection claims. The EU asylum *acquis* is "a body of intergovernmental agreements, regulations and directives that governs almost all asylum-related matters in the EU". See, Fundamental Rights Agency, Handbook on European law relating to asylum, borders and immigration, Edition 2014, http://fra.europa.eu/sites/default/files/handbook-law-asylum-migration-borders-2nded_en.pdf, pp. 64-65.
[47] The Convention's preamble recalls the rule of law.
[48] See *M.S.S. v. Belgium and Greece* [GC], no. 30696/09, judgment, 21 January 2011, *inter alia,* §§ 57-86 and § 250, where the Grand Chamber analysed the scope and content of the Contracting Parties' obligations under Article 3 of the Convention in the light of relevant provisions of EU law by which the Greek authorities were bound. In *Sufi and Elmi v. the UK*, nos. 8319/07 and 11449/07, judgment, 28 June 2011, *inter alia*, §§ 30-32 and §§ 219-226, the Court had regard to Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted ("the 2004 Qualification Directive"), as well as to a preliminary ruling by the European Court of Justice, as the CJEU was then known, following a reference lodged by the Dutch Administrative Jurisdiction Division of the Council of State (Afdeling Bestuursrechtspraak van de Raad van State) in the case of *M. and N. Elgafaji v. Staatssecretaris van Justitie* asking, *inter alia*, whether Article 15(c) of the Qualification Directive offered supplementary or other protection to Article 3 of the Convention.
[49] See *Jeunesse v. the Netherlands* [GC], no. 12738/10, judgment, 3 October 2014, §§ 110-111, and *Ullens de Schooten and Rezabek v. Belgium*, cited therein.
[50] The CJEU has noted the need for a uniform application of EU law and that its provisions must therefore be given an independent and uniform interpretation throughout the EU. This is the primary role of the CJEU. When the national authorities of an EU Member State apply national measures implementing a Directive in a manner that is at odds with the Directive's object and purpose, including, and *a fortiori*, as construed by CJEU's jurisprudence, Member states are bound to ensure the correct application of the relevant Directive. To this end, administrative bodies may even be required to re-open a decision based on a misapplication of EU law. See *i-21 Germany GmbH and Arcor AG & Co. KG v Bundesrepublik Deutschland*, Judgment of the Grand Chamber in Joined Cases C-392/04 and C-422/04, 19 September 2006, §§ 51-52.

be "in accordance with the law" under the Convention.[51]

21. The EU asylum *acquis* is relevant for an additional reason. When this Court examines an expulsion case, it will make an *ex nunc* assessment if the expulsion has yet to take place to determine whether, if it took place after its judgment, it would be in violation of the Convention. In light of the above, the interveners submit that, when this Court is called upon to carry out an *ex nunc* assessment, it must take into account, *inter alia*, the applicable EU law. For present purpose, that law will be the relevant provisions of the Recast Qualification Directive (RQD),[52] viewed in the light of the authoritative interpretation by the CJEU of the corresponding provisions of the 2004 Qualification Directive (2004 QD) it replaced.[53] This Court, it is submitted, is required to consider whether the respondent Government's proposed removal would be in accordance with the applicable law in the State in question. This Court would not endorse any measure that would be in flagrant contravention of the rule of law, including the applicable EU law. The Court must additionally ensure compliance with Article 53 of the Convention by ensuring that its approach guarantees at least the protection required under the applicable EU law.

22. The interveners now turn to considering the content of the EU law in question. In April 2012, the cases of *X, Y and Z* were referred to the CJEU because it was unclear whether the 2004 QD required the Netherlands to recognize the asylum seekers in question as refugees.[54] Since 7 November 2013, the date on which the CJEU handed down its judgment in the case, its interpretation of the relevant provisions of the 2004 QD has been applicable to any action taken by EU Member States in this field. In light of this, the interveners submit that this Court may therefore wish to be fully apprised of the content of the applicable EU law that governs the criteria for determining the protection entitlements of those individuals who claim that removal from the Contracting Party's jurisdiction would expose them to a real risk of persecution. The current position in EU law is set out in the CJEU judgment in *X, Y and Z*.

23. In *X, Y and Z*, the CJEU first clarified that the Dutch Council of State essentially asked whether, for the purposes of the 2004 QD, it would be "unreasonable to expect that, in order to avoid persecution, an asylum seeker must conceal his homosexuality in his country of

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[51] *Aristimuño Mendizabal v France*, no. 51431/99, judgment, 17 January 2006, § 69 and §§ 74-79. See also *Suso Musa v Malta* where the Court observed "where a State which has gone beyond its obligations in creating further rights or a more favourable position – a possibility open to it under Article 53 of the Convention – enacts legislation (of its own motion or pursuant to European Union law) explicitly authorising the entry or stay of immigrants pending an asylum application [….] an ensuing detention for the purpose of preventing an unauthorised entry may raise an issue as to the lawfulness of detention under Article 5 § 1 (f). Indeed, in such circumstances it would be hard to consider the measure as being closely connected to the purpose of the detention and to regard the situation as being in accordance with domestic law. In fact, it would be arbitrary and thus run counter to the purpose of Article 5 § 1 (f) of the Convention to interpret clear and precise domestic law provisions in a manner contrary to their meaning", *Suso Musa v Malta*, no. 42337/12, judgment, 23 July 2013, § 97.

[52] 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, the "recast Qualification Directive" referred to hereafter as "RQD". At the time of the domestic proceedings in the present case, the EU law applicable to the determination of entitlement to international protection in any EU Member State was the 2004 Qualification Directive, which has been subsequently superseded by the RQD. However, for present purposes, the relevant provisions, namely, Articles 5, 6, 9 and 10, remain unchanged.

[53] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (the 2004 QD).

[54] The CJEU ruling arose from the asylum requests lodged in the Netherlands by three refugee applicants claiming to have a well-founded fear of persecution by reason of their same-sex sexual orientation in their countries of origin where consensual same-sex sexual conduct was and remains criminalized. The Dutch Council of State referred the following questions, among others, to the CJEU: "(a) Can foreign nationals with a homosexual orientation be expected to conceal their orientation from everyone in their [respective] country of origin in order to avoid persecution? (b) If the previous answer is to be answered in the negative, can foreign nationals with a homosexual orientation be expected to exercise restraint, and if so, to what extent, when giving expression to that orientation in their country of origin, in order to avoid persecution? Moreover, can greater restraint be expected of homosexuals than of heterosexuals?", *X, Y and Z*, § 37.

origin or exercise restraint in expressing it" and, if so, whether such restraint "must be greater than that of a heterosexual person."[55] The CJEU then affirmed that the concept of sexual orientation must not be understood as only applying to the private life of the person,[56] but can include acts in his or her public life. Affirming that a requirement of "concealment or discretion" is incompatible with the recognition of a characteristic so fundamental to a person's identity that one cannot be required to renounce it, the CJEU held that, "an applicant for asylum cannot be expected to conceal his homosexuality in his country of origin to avoid persecution."[57]

24. The interveners therefore invite the Court to hold that, in light of the CJEU's judgment in *X, Y and Z*, it would not be "in accordance with the law" for any Contracting Party to the Convention that is also an EU Member State to expel individuals in circumstances where, in the country of proposed destination, their same-sex sexual orientation gives rise to a real risk of persecution amounting to treatment impermissible under Article 3 of the Convention. This prohibition applies equally in circumstances where they could, purportedly, attempt to avoid persecution by concealing their sexual orientation. Nor would such an expulsion comply with the requirements of Article 53 of the Convention.

Post-scriptum

25. As a postscript, the interveners recall that this Court's jurisprudence recognizes that Convention rights are not applied in a vacuum,[58] but fall to be interpreted in the light of and in harmony with other international law standards and obligations,[59] including under treaty and customary international law.[60] In light of this, the interveners note that under refugee law, requiring coerced, including self-enforced, suppression of a fundamental aspect of one's identity, such as one's sexual orientation, has been held inconsistent with the fundamental tenets of the Refugee Convention.[61]

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[55] *Ibid*, § 65.

[56] The CJEU draws attention to the fact that "Article 10(1)(b) of the Directive expressly states that the concept of religion also covers participation in formal worship in public or in private does not allow the conclusion that the concept of sexual orientation, to which Article 10(1)(d) of that Directive refers, must only apply to acts in the private life of the person concerned and not to acts in his public life", *ibid*, § 69.

[57] *Ibid*, §§ 69-71. Further, the Court held that "It follows that the person concerned must be granted refugee status, in accordance with Article 13 of the Directive, where it is established that on return to his country of origin his homosexuality would expose him to a genuine risk of persecution within the meaning of Article 9(1) thereof. The 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", *ibid*, § 75. The CJEU's analysis and its answers of the above-mentioned questions in *X, Y and Z* are based on and entirely consistent with its judgment of 5 September 2012 in the joined cases C-71/11 and C-99/11, *Bundesrepublik Deutschland v Y and Z* where the Court had observed that none of the relevant rules required consideration "of the possibility open to the applicant of avoiding the risk of persecution by abstaining from the religious practice in question and, consequently, renouncing the protection which the Directive is intended to afford the applicant by conferring refugee status." (*Bundesrepublik Deutschland v Y and Z*, § 78) In light of this, in that case too the CJEU had gone on to hold that "where it is established that, upon his return to his country of origin, the person concerned will follow a religious practice which will expose him to a real risk of persecution, he should be granted refugee status…. The fact that he could avoid that risk by abstaining from certain religious practices is, in principle, irrelevant". (*Bundesrepublik Deutschland v Y and Z*, § 79).

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

[59] *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.

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

[61] UNHCR's Guidelines on International Protection No. 9, §§ 30-33; see also *HJ (Iran)*; Supreme Administrative Court Decision of 13 January 2012, KHO:2012:1, Finland: Supreme Administrative Court, 13 January 2012, http://www.refworld.org/docid/4f3cdf7e2.html; and A v. The State (Immigration Appeals Board), HR-2012-667-A (Case No. 2011/1688), Norway: Supreme Court, 29 March 2012, available at: http://www.refworld.org/docid/50084d772.html. As much applies, *mutatis mutandis*, to the concealment of one's religious belief, see, UNHCR's Guidelines on International Protection No. 6: Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, HCR/GIP/04/06, 28 April 2004, § 13; or of one's political opinion, see *RT (Zimbabwe) and others (Respondents) v SSHD (Appellant)*; *KM (Zimbabwe) (FC) (Appellant) v SSHD* [2012] UKSC 38, § 26.