

# SEX, LIES, AND VIDEOTAPE: CONSIDERING THE ABC CASE AND ADOPTING THE DSSH METHOD FOR THE PROTECTION OF THE RIGHTS OF LGBTI ASYLUM SEEKERS

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## I. INTRODUCTION

The United Nations High Commissioner for Refugees (UNHCR) estimated in 2017 that there were 65.6 million displaced people worldwide.<sup>1</sup> By mid-2014, there were 1.2 million asylum seekers worldwide.<sup>2</sup> Among the millions who seek refuge are individuals who face perse-

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1. ISSAC KASAMANI, UNHCR, GLOBAL TRENDS 2016: FORCED DISPLACEMENT IN 2016 1, 2 (2017), <http://www.unhcr.org/5943e8a34.pdf>.

cution in their nation of origin due to their sexual orientation and/or gender identity. LGBTI (lesbian, gay, bisexual, transgender, and intersex) people who apply for asylum are often met with the challenge of proving that they face persecution in their home country if they remain there. As a result, nations that assess refugees have struggled in constructing a process to determine whether a person's claim of being LGBTI is credible.

In 2014, the European Court of Justice (ECJ) decided the *A, B, C v. Staatssecretaris van Veiligheid* case (ABC case).<sup>3</sup> The Court ruled that certain practices were a violation of the right to human dignity under Article 1 and the right to privacy under Article 7 of the Charter of Fundamental Rights of the European Union.<sup>4</sup> The ABC case should be given consideration and reviewed by any jurisdiction in determining the limits for assessing an application of asylum for an LGBTI person. However, the ABC case does not go as far as to provide affirmative measures for nations to take. In this instance, the DSSH method, developed by S. Chelvan, should be adopted by nations that adjudicate applications for asylum on the basis of sexual orientation.

I will begin with a summary of the challenges LGBTI asylum seekers face. I will then discuss instances where the rights of LGBTI asylum seekers have been called into question and will then detail why the ABC case should be considered by other jurisdictions outside of the European Union. Finally, I will argue that the DSSH method is a solution for protecting the rights of LGBTI asylum seekers while ensuring that nations engage in practices that are in accordance with international law; I will also analyze any possible opposition to the method.

## II. BACKGROUND

The modern view of asylum was developed at a time before the international community recognized the problem of discrimination against LGBTI people.<sup>5</sup> Understanding the refugee problem that fol-

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2. See Jie Zong & Jeanne Batalova, *Refugees and Asylees in the United States*, MIGRATION POLICY INSTITUTE (Oct. 28, 2015), <https://www.migrationpolicy.org/article/refugees-and-asylees-united-states-4>.

3. Joined Case C-148/13, C-149/13, & C-150/13, *A, B, C v. Staatssecretaris Van Veiligheid en Justitie*, 2014 EUR-Lex CELEX LEXIS 2406 (Dec. 2, 2014).

4. *Id.* ¶ 64-65.

5. See ELSPETH GUILD & JEAN MONNET, CURRENT CHALLENGES FOR INTERNATIONAL REFUGEE LAW WITH A FOCUS ON EU POLICIES AND EU CO-OPERATION WITH THE UNHCR 1, 6 (Dec. 2013), <http://www.europarl.europa.eu/RegData/etudes/note/join/2013/433711/EXPO->

lowed World War II,<sup>6</sup> the crafting of the Convention on the Status of Refugees,<sup>7</sup> and the attempts to include LGBTI people in the framework<sup>8</sup> are important to having a proper context to understand the challenges that LGBTI people currently face in the world as well as the challenges that governments face in trying to assess credible claims of asylum. This historical backdrop illuminates the evolving nature of refugee status.

#### A. *History of the 1951 Refugee Convention*

World War II lasted from 1939 to 1945.<sup>9</sup> The many years of armed conflict displaced an estimated 60 million people.<sup>10</sup> On continental Europe alone, the anti-Semitic regime of Adolf Hitler had slaughtered an estimated six-million Jews.<sup>11</sup> The Nazis stripped Jews of their citizenship in the years after they rose to power, which meant that many Jews were left stateless after the war.<sup>12</sup> In 1945, representatives from 50 countries gathered in San Francisco for the United Nations Conference on International Organization.<sup>13</sup> The nations represented at the conference drafted the UN Charter and signed it on June 6, 1945.<sup>14</sup> The Charter came into effect in October 1945 when members of the

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DROI\_NT%282013%29433711\_EN.pdf (stating that the modern view of asylum was developed at the end of World War II); Hannah Harris Green, *The Ongoing Legal Plight of LGBTQ Refugees*, JSTOR DAILY (June 22, 2016), <https://daily.jstor.org/very-real-plight-lgbtq-refugees/> (describing how even after the passage of the Refugee Convention protecting individuals with a “well-founded fear of being persecuted” based on membership of a “particular social group,” homosexuals faced discrimination because homosexuality was illegal nearly in all countries).

6. See *Understanding the Global Refugee Crisis*, FACING HIST. & OURSELVES, <https://www.facinghistory.org/resource-library/understanding-global-refugee-crisis> (last visited Feb. 17, 2018).

7. See Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, <http://www.refworld.org/docid/3be01b964.html> [hereinafter Convention Relating to the Status of Refugees].

8. See UNHCR, THE PROTECTION OF LESBIAN, GAY, BISEXUAL, TRANSGENDER AND INTERSEX ASYLUM-SEEKERS AND REFUGEES 1, 5 (2010), <https://data2.unhcr.org/en/documents/download/45897>.

9. Giada Zampano et al., *Migrant Crisis: A History of Displacement*, WALL STREET J. (Sept. 22, 2015), <http://graphics.wsj.com/migrant-crisis-a-history-of-displacement/>.

10. *Id.*

11. *The Holocaust*, HISTORY (2009), <http://www.history.com/topics/world-war-ii/the-holocaust>.

12. See *The Nazis in Power: Discrimination, Obedience, and Opportunities*, FACING HIST. & OURSELVES, <https://www.facinghistory.org/resource-library/decision-making-times-injustice/nazis-in-power-discrimination-obedience-opportunism> (last visited Feb. 17, 2018).

13. *1945: The San Francisco Conference*, UNITED NATIONS, <http://www.un.org/en/sections/history-united-nations-charter/1945-san-francisco-conference/index.html> (last visited Feb. 17, 2018).

14. See U.N. Charter; *History of the United Nations*, UNITED NATIONS, <http://www.un.org/en/sections/history/history-united-nations/index.html> (last visited Feb. 17, 2018).

Security Council ratified it.<sup>15</sup> In 1946, the UN General Assembly passed a resolution to create the International Refugee Organization (IRO).<sup>16</sup> The principal activity of the IRO was the resettlement of refugees from across much of Europe.<sup>17</sup> The UN intended for the IRO to only be in operation until 1950, but it became evident that its work would have to continue as the number of refugees grew over time.<sup>18</sup> The UN's Economic and Social Council called for a study that would investigate the status of refugees and make recommendation of the possibility of conventions.<sup>19</sup>

This became a key document known as the *Study of Statelessness*.<sup>20</sup> The study provided great detail into aspects of the condition of stateless persons/refugees including: international travel, right of entry and sojourn, personal status, family rights, rights of property, exercise of trades or professions, education, relief, social security, right to appear before the courts as plaintiff or defendant, exemption from reciprocity, expulsion and reconduction, taxation and military service.<sup>21</sup> After reviewing the study, the Economic and Social Council appointed a committee to draft a convention that would be submitted to the UN General Assembly.<sup>22</sup> The Convention relating to the Status of Refugees was adopted on July 28, 1951.<sup>23</sup>

In 1951, the UN also established the Office of the UNHCR.<sup>24</sup> In 1967, the UN adopted a protocol to the Convention that expanded the coverage of the Convention to all refugees and not just those who were uprooted because of World War II.<sup>25</sup> Since its creation, 142 countries have signed on to the Convention and Protocol.<sup>26</sup> As signa-

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15. See U.N. Charter; *History of the United Nations*, *supra* note 14.

16. See G.A. Res. 62 (I), Refugees and Displaced Persons (Dec. 15, 1946); Gilbert Jaeger, *On the History of the Int'l Prot. of Refugees*, 83 IRRC 727, 732 (2001).

17. *International Refugee Organization (IRO)*, U.N.: ARCHIVES & RECORDS MGMT. SEC., [https://archives.un.org/sites/archives.un.org/files/files/Finding%20Aids/2015\\_Finding\\_Aids/AG-018-007.pdf](https://archives.un.org/sites/archives.un.org/files/files/Finding%20Aids/2015_Finding_Aids/AG-018-007.pdf) (last visited Feb. 17 2018).

18. See Erika Feller, *International Refugee Protection 50 Years On: The Protection Challenges of the Past, Present, and Future*, 83 IRRC 581, 584 (2001).

19. Jaeger, *supra* note 16, at 733.

20. *Id.* at 733.

21. See *id.*

22. See *id.* at 735.

23. See Convention Relating to the Status of Refugees, *supra* note 7; Jaeger, *supra* note 16, at 736.

24. See G.A. Res. 319 (IV), Refugees and Stateless Persons (Dec. 3, 1949); Jaeger, *supra* note 16, at 736 (quoting G.A. Res. 319 (IV), *supra* note 24).

25. Natalie Muller, *Refugee Convention of 1951 Still Crucial Cornerstone of Human Rights*, DEUTSCHE WELLE (July 28, 2016), <http://www.dw.com/en/refugee-convention-of-1951-still-crucial-cornerstone-of-human-rights/a-19429093>.

26. *Id.*

tories, nations are obligated to provide assistance, shelter, and access to education and work for refugees.<sup>27</sup>

The 1951 Convention and 1967 Protocol provide the definition of refugee in the international context.<sup>28</sup> An asylum seeker is a person who has applied for recognition as a refugee.<sup>29</sup> If authorities determine that the applicant meets the definition of a refugee they are granted asylum.<sup>30</sup> The 1951 Convention does not define how states are to determine refugee status.<sup>31</sup> Instead, the establishment of asylum proceedings and refugee status determinations are left to each state party to develop.<sup>32</sup> Over the years, states arrived at interpretations for some of the key language of the convention.<sup>33</sup> There is no universal consensus as to what constitutes “membership in a particular social group.”<sup>34</sup>

### B. LGBTI Asylum History

The world has seen great advancement in the area of civil and human rights for LGBTI people. The latter half of the twentieth century and beginning of the twenty-first century saw the decriminalization of homosexuality in much of the developed world.<sup>35</sup> In addition, same sex couples in many nations may enter into relationships, recognized by the state, as well as enjoy the right to adopt children.<sup>36</sup> However, in much of the world, LGBTI people continue to face harm. In many nations, homosexuality is an offense that can be met with im-

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27. *Id.*

28. Convention Relating to the Status of Refugees, *supra* note 7, art. 1 (Article 1(A)(2) of the Convention defines refugees as owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it).

29. International Justice Resource Center, *Asylum and the Right of Refugees*, <http://www.ijrcenter.org/refugee-law/> (last visited Feb. 17, 2018).

30. *See id.*

31. *See id.*

32. *See id.*

33. *See id.*

34. *Id.*

35. TERENCE BALL ET AL., *POLITICAL IDEOLOGIES AND THE DEMOCRATIC IDEAL* 248 (9th ed. 2014).

36. *See Same-Sex Marriage Around the World; A Global Snapshot*, TQ (May 18, 2017, 7:30 AM), <https://thequeerness.com/2017/05/18/same-sex-marriage-around-the-world-a-global-snapshot/> (last updated Aug. 7, 2017).

prisonment or even capital punishment.<sup>37</sup> In Nigeria, it is illegal for gay people to organize meetings or form clubs.<sup>38</sup> On January 7, 2014, President Goodluck Jonathan signed the Same-Sex Marriage Prohibition Act, which criminalizes all same sex unions and marriages.<sup>39</sup> In Iran, sex between two men is punishable by death.<sup>40</sup> Men can even be flogged for a lesser offense such as kissing.<sup>41</sup> Additionally, the practice of “corrective rape” against lesbians is prevalent even in the first nation to include LGBTI protections in its Constitution, South Africa.<sup>42</sup> Corrective rape is also a phenomenon that occurs in Jamaica.<sup>43</sup> Angelina Jackson, a LGBT rights activist in Jamaica, was raped at gunpoint by a group of anti-gay rapists who posed as lesbians to lure her to a remote trail.<sup>44</sup> When she went to the police, Jackson says that they did not take her claim seriously and were more concerned with the fact that she identified as a lesbian.<sup>45</sup> A lack of response from law enforcement to anti-LGBTI attacks is a frequent concern expressed by LGBTI people living in Jamaica.<sup>46</sup>

As recently as May 2017, reports claimed that the Russian authorities actively persecute gays in Chechnya.<sup>47</sup> A local Russian news-

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37. See Pamela Duncan, *Gay Relationships are Still Criminalized in 72 Countries, Report Finds*, *GUARDIAN* (July 27, 2017, 1:00 AM), <https://www.theguardian.com/world/2017/jul/27/gay-relationships-still-criminalised-countries-report>.

38. See Max Bearak & Darla Cameron, *Here Are the 10 Countries Where Homosexuality May be Punished by Death*, *WASH. POST* (June 16, 2016), [https://www.washingtonpost.com/news/worldviews/wp/2016/06/13/here-are-the-10-countries-where-homosexuality-may-be-punished-by-death-2/?utm\\_term=.78b8544e92fa](https://www.washingtonpost.com/news/worldviews/wp/2016/06/13/here-are-the-10-countries-where-homosexuality-may-be-punished-by-death-2/?utm_term=.78b8544e92fa).

39. Same Sex Marriage (Prohibition) Act, 2013, [http://www.placng.org/new/laws/Same%20Sex%20Marriage%20\(Prohibition\)%20Act,%202013.pdf](http://www.placng.org/new/laws/Same%20Sex%20Marriage%20(Prohibition)%20Act,%202013.pdf); see also Katherine Purvis, *Bisi Alimi on LGBT Rights in Nigeria: 'It May Take 60 Years but We Have to Start Now'*, *GUARDIAN* (Feb 9, 2016, 5:38 AM), <https://www.theguardian.com/global-development-professionals-network/2016/feb/09/bisi-alimi-on-lgbt-rights-in-nigeria-it-may-take-60-years-but-we-have-to-start-now>.

40. ISLAMIC PENAL CODE, art. 108-10 (May 22, 1996) (Iran), [http://mehr.org/islamic\\_penal\\_code\\_of\\_iran.pdf](http://mehr.org/islamic_penal_code_of_iran.pdf); Bearak, *supra* note 38.

41. See *Gay Men in Iran Struggle to Survive*, ISLAMIC ST. IRAN CRIME RES. CTR., <http://isicrc.org/gay-men-in-iran-struggle-to-survive/> (last visited Feb. 22, 2018).

42. See Pumza Filani, *South Africa's Lesbians Fear 'Corrective Rape'*, *BBC NEWS* (June 30, 2011), <http://www.bbc.com/news/world-africa-13908662> (stating that “corrective rape” is when men attempt to “correct” the sexual orientation of lesbian women by raping them).

43. See David McFadden, *Gay Rights Activists in Jamaica Confronting Sexual Violence Against Lesbians*, *CTV NEWS*, <http://www.ctvnews.ca/world/gay-rights-activists-in-jamaica-confronting-sexual-violence-against-lesbians-1.2347877> (last updated Apr. 28, 2015).

44. *Id.*

45. *Id.*

46. *Id.*

47. See Anna Arutunyan, *Rights Groups: Gays Being Rounded up in Chechnya Detention Centers*, *USA TODAY* (Apr. 21, 2017 2:44 PM), <https://www.usatoday.com/story/news/world/2017/04/20/russia-chechnya-lgbt-gay-men/100689962/>.

paper reported that police in Chechnya had rounded up 100 gay men and held them in special detention centers.<sup>48</sup> Chechen leader Ramzan Kadyrov went as far as to deny the existence of gays in Chechnya, saying, “You cannot arrest or repress people who just don’t exist in the republic.”<sup>49</sup> It is within these sorts of hostile and often life threatening environments that LGBTI people pursue asylum claims outside of their home nations.

The core principle of the 1951 Convention on the Status of Refugees is that no one who is determined to be a refugee shall be returned to a nation where they face threats to their life or freedom.<sup>50</sup> While the original convention did not provide language for the protection of sexual minorities,<sup>51</sup> since the 1990s, many countries have interpreted it to include LGBTI people.<sup>52</sup> Article 1A(2) of the Convention states that a person who “owing to well-founded fear of being persecuted for ‘membership of a particular social group’ may be deemed a refugee and granted refugee status.”<sup>53</sup> In recent years, that clause has been interpreted by many states to include the LGBTI community as a particular social group.<sup>54</sup> Interpretation of the term “membership of a particular social group” has varied across jurisdictions for many years.<sup>55</sup> In 2002, the UNHCR presented guidelines that helped to reconcile the varying interpretations around the phrase.”<sup>56</sup>

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48. *Id.*

49. *Id.*

50. Convention Relating to the Status of Refugees, *supra* note 7, art. 33.

51. *See id.* (providing protections for many individuals but staying silent in regards to protecting sexual minorities).

52. *See* Janna Wessels, *Sexual Orientation in Refugee Status Determination*, REFUGEES STUD. CTR. U. OXFORD, WORKING PAPER SERIES NO. 73, Apr. 2011, at 9, <http://www.refworld.org/pdfid/4ebb93182.pdf> (citing Jenni Millbank, *A Preoccupation with Perversion: The British Response to Refugee Claims on the Basis of Sexual Orientation 1989-2003*, 14 SOC. & L. STUD. 115, 116 (2005)).

53. Convention Relating to the Status of Refugees, *supra* note 7, art. 1(A)(2).

54. *See* Millbank, *supra* note 52, at 115.

55. Wessels, *supra* note 52, at 10-11, 14 (the 1993 Canadian case of *Canada v. Ward* suggested three categories of social groups: (1) groups defined by an innate, unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence).

56. UNHCR, Guideline on Int’l Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, ¶ 11, U.N. Doc. HCR/GIP/02/02 (May 7, 2002) (defining membership of a particular social group as “a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights”).

Recognizing a need to affirm the rights of LGBTI people within existing international human rights laws, a group of academics, jurists, and UN independent experts met in Yogyakarta, Indonesia in 2006, resulting in the Yogyakarta Principles.<sup>57</sup> The Yogyakarta Principles apply many of those found in the Universal Declaration of Human Rights<sup>58</sup> and expand the language to include protections for people on the basis of sexual orientation and gender identity.<sup>59</sup> The Yogyakarta Principles are a universal guide for applying international human rights laws for the purpose of protecting LGBTI people.<sup>60</sup> Principle 23 addresses the rights of LGBTI individuals seeking asylum.<sup>61</sup> It broadly declares that individuals should not face harm on the basis of their sexual orientation and that states have a responsibility to protect the individual from harm.<sup>62</sup> In addition to an affirmative guarantee of the right to asylum for LGBTI persons, the Yogyakarta Principles also enumerate obligations of state parties.<sup>63</sup>

While the Principles are not binding within any given jurisdiction, they provide guidance for the interpretation of international human rights treaties and their applicability to LGBTI people. Beyond the Yogyakarta Principles, the UNHCR released a guide for Claims to

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57. 'Yogyakarta Principles' a Milestone for Lesbian, Gay, Bisexual, and Transgender Rights, HUM. RTS. WATCH (Mar. 26, 2007, 8:00 PM), <https://www.hrw.org/news/2007/03/26/yogyakarta-principles-milestone-lesbian-gay-bisexual-and-transgender-rights>. See generally THE YOGYAKARTA PRINCIPLES: PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY (Mar. 2007) [hereinafter YOGYAKARTA PRINCIPLES].

58. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

59. See YOGYAKARTA PRINCIPLES, *supra* note 57, at 10 (stating in Principle 1 that "all human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights.") (emphasis added).

60. See YOGYAKARTA PRINCIPLES, *supra* note 57; 'Yogyakarta Principles' a Milestone for Lesbian, Gay, Bisexual, and Transgender Rights, *supra* note 57.

61. YOGYAKARTA PRINCIPLES, *supra* note 57, at 27 (stating that "[e]veryone has the right to seek and enjoy in other countries asylum from persecution, including persecution related to sexual orientation or gender identity. A State may not remove, expel or extradite a person to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of sexual orientation or gender identity.").

62. *Id.*

63. *Id.* (stating that "states shall: a) Review, amend and enact legislation to ensure that a well-founded fear of persecution on the basis of sexual orientation or gender identity is accepted as a ground for the recognition of refugee status and asylum; b) Ensure that no policy or practice discriminates against asylum seekers on the basis of sexual orientation or gender identity; c) Ensure that no person is removed, expelled or extradited to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman or degrading treatment or punishment, on the basis of that person's sexual orientation or gender identity.").

Refugee Status Based on Sexual Orientation and/or Gender Identity within the Context of Article 1A(2) of the 1951 Convention and the 1967 Protocol related to the Status of Refugees.<sup>64</sup> The UNHCR published these guidelines, which define such terms as “persecution,” under the context of LGBTI asylum seekers.<sup>65</sup> Throughout the guidelines, the UNHCR emphasizes on recognizing that LGBTI asylum seekers’ experiences may differ from case to case and that factors, such as culture and religion, should be considered when adjudicating an asylum application.<sup>66</sup> Not all LGBTI applicants will have experienced persecution in the same way or even at all. The possibility, immediacy, and degree of persecution may be assessed to determine the potential consequences faced by the applicant if they were denied asylum and returned back to their home country.<sup>67</sup>

While the process of applying for asylum varies across nations, each nation has established its own asylum processes. In the case of the European Union, the framework for granting asylum status is given in Directive 2004/83.<sup>68</sup> Article 4 of the Directive outlines the assessment of facts and circumstances necessary to complete the asylum process.<sup>69</sup> It allows members states to: “consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application.”<sup>70</sup>

Directives in the European Union are not self-executing; therefore member states are permitted leeway in applying the directive within their borders.<sup>71</sup>

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64. UNHCR, Guidelines on Int’l Protection No. 9, U.N. Doc. HCR/GIP/12/09 (Oct. 23, 2012).

65. *See id.* ¶ 6 (citing UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, ¶¶ 51-53, U.N. Doc. HCR/1P/4/ENG/REV. 3 (Jan. 1992) [hereinafter UNHCR Handbook]) (defining persecution as “involve[ing] serious human rights violations, including a threat to life or freedom as well as other kinds of serious harm. In addition, lesser forms of harm may cumulatively constitute persecution. What amounts to persecution will depend on the circumstances of the case, including the age, gender, opinions, feelings and psychological makeup of the applicant.”).

66. *Id.* ¶ 3.

67. *Id.* ¶ 18.

68. Council Directive 2004/83, art. 4, 2004 O.J. (L 304) 12, 15 (EC).

69. *Id.*

70. *Id.*

71. *See* Alicia Hinarejos, *On the Legal Effects of Framework Decisions and Decisions: Directly Applicable, Directly Effective, Self-executing, Supreme?*, 14 EUR. L.J. 620, 630 (2008).

### C. Failures of LGBTI Asylum Adjudication

Along with the duty to assess asylum applications for their credibility, nations must also consider the sensitive nature of LGBTI asylum cases. The question that is often centered in this debate is “How do you prove someone is gay?”<sup>72</sup> Believing that such an inquiry is the goal of the asylum adjudication process has had dire consequences.<sup>73</sup> For example, in recent years, information about the United Kingdom’s assessment of LGBTI asylum seekers has come under scrutiny. In 2014, a confidential document from the UK Home Office was leaked to the press.<sup>74</sup> The documents revealed the questions that an official from the Border Agency asked a bisexual asylum seeker.<sup>75</sup> The questions were of an explicit nature concerning the applicant’s sexual preferences and behaviors: “‘Did you put your penis into x’s backside?’ . . . ‘When X was penetrating you did you have an erection? . . . Why did you use a condom?’ . . . ‘What is it about the way that men walk that turns you on?’”<sup>76</sup> The official from the Home Office asked the asylum seeker these questions over the course of five hours.<sup>77</sup> Following the release of this damning information about the UK Border Agency, the LGBTI rights group Stonewall released a report.<sup>78</sup>

The report found that in the UK, LGBTI asylum seekers often find themselves in scenarios that would not be conducive to a successful disclosure of their experiences to a border agent.<sup>79</sup> Upon arrival to a port of entry, UK border agents attempt to assess the identity of the asylum seeker and determine their credibility.<sup>80</sup> Given the sensitive nature of discussing sexual orientation and/or gender identity, especially as the grounds for seeking asylum, the interview process for an applicant is often times quite tense.

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72. NATHANAEL MILES, *NO GOING BACK: LESBIAN AND GAY PEOPLE AND THE ASYLUM* 14 (Stonewall ed., 2010).

73. *See id.* at 14-16.

74. Diane Taylor & Mark Townshend, *Gay Asylum Seekers Face ‘Humiliation’*, *GUARDIAN*, (Feb. 8, 2014, 4:00 PM), <https://www.theguardian.com/uk-news/2014/feb/08/gay-asylum-seekers-humiliation-home-office>.

75. *See id.*

76. *Id.*

77. *See id.*

78. *See Stonewall’s History*, STONEWALL, <http://www.stonewall.org.uk/about-us/stonewalls-history> (last visited Apr. 19, 2018) (Stonewall is a British organization founded in 1989 whose key priority is the empowerment of and advocacy for LGBTI people in the United Kingdom and abroad. Stonewall conducts research, publishes resources for LGBTI individuals on their rights in areas such as health, education and employment. Stonewall also actively campaign parliament in furtherance of LGBTI civil and human rights).

79. *See MILES, supra* note 72, at 10.

80. *See id.*

The UK Border Agency's *modus operandi* of trying to establish credibility emphasizes detecting inconsistencies and falsehoods during an applicant's interview.<sup>81</sup> This approach is damaging because it fails to consider the cultural experiences of asylum seekers who may be accustomed to keeping their sexual orientation a secret due to the stigma attached to it.<sup>82</sup> Unsurprisingly, Stonewall found that, for many LGBTI applicants, proving one's sexual orientation as the basis for asylum is a challenge.<sup>83</sup> Making things even more difficult, the asylum applicant bears the burden to raise this issue and failure to do so could be held against them.<sup>84</sup>

As part of the process to determine the validity of an asylum claim, UK Border Agents would pose confrontational questions that were highly sensitive and personal in nature to the applicants.<sup>85</sup> Many applicants are survivors of rape, torture, and other forms of sexual violence.<sup>86</sup> An applicant with this type of personal history may be highly uncomfortable discussing the details of their experience as doing so could trigger such traumatic memories.<sup>87</sup> An applicant's apprehension to discuss their experiences is often interpreted by the border agent as evidence of dishonesty and that their claim for asylum is therefore not credible.<sup>88</sup> The Stonewall report found that this type of questioning did not help border agents assess an asylum claim but, in reality, created a barrier to communication between the asylum applicant and the border agent.<sup>89</sup>

As part of the asylum application process, some applicants have taken extraordinary steps to prove that they in fact identify as LGBTI, including the submission of explicit videos and photographs of them-

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81. *Id.*

82. Adeboya, a Nigerian asylum seeker to the UK, when discussing his asylum interview experience said that "[w]here I come from, it's something you don't tell anybody. I found it very hard because I feel like you wouldn't understand and you always take it the wrong way." *Id.* at 10.

83. *Id.* at 14.

84. *Id.*

85. Example of questions posed include: "Can you prove you are a homosexual?", "Why do you choose to be homosexual when it is illegal in your country?", "Why do you think you are a homosexual, you have been married and had children?", and "Can't you be discreet about your homosexuality and thereby avoid being noticed as a gay person?" *Id.* at 15.

86. *Id.* at 16.

87. *See, e.g., id.* at 16 (Chantal, an asylum seeker from Jamaica said that, "You want to forget about your past but then you have to try and think of everything again to explain what you've been through. They ask you, what are your reasons? Tell them the date, the time, everything – but it's buried. If you don't quite remember they say you're telling lies but that's not what you're doing.").

88. *See id.* at 16.

89. *See id.*

selves in sexual situations.<sup>90</sup> Some nations have even gone as far as administering tests in order to assess the credibility of a claim for asylum stemming from LGBTI identity.<sup>91</sup>

In the Czech Republic, authorities used phallometry to determine whether a male<sup>92</sup> applicant had homosexual attractions.<sup>93</sup> Phallometry, which is used to measure sexual arousal, is a mechanical technique that is utilized in both the medical and criminal justice contexts in the Czech Republic.<sup>94</sup> Electrodes are attached to a man's penis and a device measures the response to sexually explicit visual and audio stimuli.<sup>95</sup> The Czech Ministry of the Interior, which evaluates asylum applications, has the authority to call for phallometric testing<sup>96</sup> to assess whether an applicant has a credible claim of homosexuality.<sup>97</sup> In response to the practice in the Czech Republic, the UNHCR asserted that, while assessing the credibility of an application for refugee status is required, determining the validity of every piece of evidence that an applicant presents is "hardly possible."<sup>98</sup> The UNHCR referenced the

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90. See, e.g., Claire Bennett, *What Does an Asylum Seeker Have to do to Prove Their Sexuality?*, THE CONVERSATION (Mar. 5, 2015, 9:00 AM), <http://theconversation.com/what-does-an-asylum-seeker-have-to-do-to-prove-their-sexuality-38407> (Aderonke Apata, a prominent Nigerian LGBT rights activist was initially denied asylum in the UK. The Home Office determined that he claim that she was a lesbian and could face the death penalty in Nigeria if deported was dubious due to the fact that she had previously been in a heterosexual relationship and had children. As Barrister Andrew Bird for the Home Office said, "You can't be heterosexual one day and a lesbian the next day, just as you can't change your race." In an appeal, Apata submitted explicit video footage of her with her girlfriend).

91. *UNHCR's Comments on the Practice of Phallometry in the Czech Republic to Determine the Credibility of Asylum Claims Based on Persecution due to Sexual Orientation*, UN REFUGEE AGENCY (Apr. 2011) [hereinafter *UNHCR's Comments*], <http://www.unhcr.org/4daed0389.pdf>.

92. The corresponding process for women is called "vaginal photoplethysmography" or "VPG." *Id.*

93. *The Practice of Phallometry Testing for Gay Asylum Seekers*, EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS (Sept. 12, 2010), <http://fra.europa.eu/en/news/2011/practice-phallometric-testing-gay-asylum-seekers>.

94. *UNHCR's Comments*, *supra* note 91.

95. *Id.*

96. The Czech national asylum authorities could, upon written consent of the applicant, request a diagnostic from an authorized expert of psychology and sexology about the asylum applicant's sexuality. *Id.*

97. *The Practice of Phallometry Testing for Gay Asylum Seekers*, *supra* note 93.

98. UNHCR comments that,

A person's sexual orientation is not a matter of fact that can be easily identified through evidence. Sexual orientation and gender identity are broad concepts which create space for self-identification. Sexual orientation is far more than sexual conduct or a sexual act and rather is fundamental to a person's identity; who they are, how they live in society and how they express who they are. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.

*UNHCR's Comments*, *supra* note 91 (first citing HJ (Iran) (FC) and HT (Cameroon) (FC) v. Secretary of the State for the Home Department [2010] UKSC 31 (appeal taken from 2009

Yogyakarta Principles, which prohibits practices such as phallometry.<sup>99</sup> The UNHCR noted that applicants often file for asylum because they face a particularly vulnerable situation in their home country.<sup>100</sup> Intrusive testing, such as phallometry, must be avoided as it may elicit feelings of shame and embarrassment from an applicant, making them less likely to respond to questioning.<sup>101</sup> Ultimately, the UNHCR concluded that using phallometry to assess a person's claim for refugee status violates personal dignity and international human rights laws.<sup>102</sup>

Revelations of the outrageous practices by state authorities regarding the assessment of LGBTI asylum applications demand urgent action and a reckoning by the judiciary. A 2014 case out of the ECJ acts as an affirmation for states that already assess LGBTI asylum claims by establishing acceptable limits for the adjudication process for asylum.<sup>103</sup>

### III. THE ABC CASE

#### A. *About the ABC Case*

The *ABC* case was a consolidation of three different cases involving gay men who challenged the Dutch government's decision to deny their respective applications for asylum.<sup>104</sup> All three men applied for temporary residence permits (asylum).<sup>105</sup> "A" was a gay man from Gambia who applied for asylum in the Netherlands.<sup>106</sup> The Dutch authorities denied his application, but A reapplied for asylum and reflected on his application his willingness to undergo a "test" or

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EWCA Civ 172); then citing *Karouni v. Gonzales*, 399 F.3d 1163 (9th Cir. 2005); then citing *Lawrence v. Texas*, 539 U.S. 558 (2003); then citing *Pretty v. United Kingdom*, 35 Eur. Ct. H.R. 1, App. No. 2346/02, (2002); and then citing *YOGYAKARTA PRINCIPLES*, *supra* note 57, at 11-12).

99. See *UNHCR's Comments*, *supra* note 91 (quoting *YOGYAKARTA PRINCIPLES*, *supra* note 57) ("any form of medical or psychological treatment, procedure, testing, or [confinement] to a medical facility, based on sexual orientation or gender identity [shall be prohibited].").

100. *UNHCR's Comments*, *supra* note 91 (citing *UNHCR Handbook*, *supra* note 65, ¶ 190).

101. *UNHCR's Comments*, *supra* note 91.

102. *Id.* ("Phallometry cannot be considered a sufficiently reliable resource to prove or disprove an applicant's sexuality in the context of asylum claims. Moreover, phallometry is at variance with the applicant's dignity and privacy and may amount to degrading treatment as prohibited by international legal standards.").

103. *Joined Case C-148/13, C-149/13, & C-150/13, A, B, C v. Staatssecretaris Van Veiligheid en Justitie*, 2014 EUR-Lex CELEX LEXIS 2406 (Dec. 2, 2014).

104. *Id.* ¶ 2.

105. *Id.* ¶ 30.

106. See *id.* ¶¶ 22-25; S. Chelvan, *C-148/13, C-149/13 and C-150/13, A, B and C v Staatssecretaris Van Veiligheid En Justitie: Stop Filming and Start Listening – A Judicial Black List for Gay Asylum Claims*, EUR. L. BLOG (Dec. 12, 2014), <http://europeanlawblog.eu/2014/12/12/c-14813-c-14913-and-c-15013-a-b-and-c-v-staatssecretaris-van-veiligheid-en-justitie-stop-filming-and-start-listening-a-judicial-black-list-for-gay-asylum-claims/>.

perform a homosexual act in order to prove his homosexuality.<sup>107</sup> The Dutch authorities denied A's second application in July 2011.<sup>108</sup>

In June 2012, the Dutch government denied the asylum claim of B, an Afghan national, on the ground that his statements concerning his homosexuality were "vague, perfunctory and implausible."<sup>109</sup> The state authorities believed that he should have been able to provide "more details about his emotions and his internal awareness of his sexual orientation."<sup>110</sup>

C was a national of Uganda.<sup>111</sup> When C first applied for asylum in the Netherlands, he did so for reasons other than persecution on the basis of his sexual orientation.<sup>112</sup> When the state authorities first denied his application, he did not challenge the finding, but instead reapplied based on the fear that he would be harmed in his home country because of his homosexuality.<sup>113</sup> C provided a video recording of himself performing "intimate acts with a person of the same sex" to the authorities who carried out the assessment of his application.<sup>114</sup> The authorities denied his application in October 2012 for a lack of credibility.<sup>115</sup> The Staatssecretaris claimed that: (1) C should have declared his fear of persecution for his sexual orientation on his first application; (2) he did not clearly explain "how he became aware of his homosexuality[:]" and (3) that he could not answer questions about any Dutch LGBTI rights organizations.<sup>116</sup>

The three men appealed their respective decisions to the Rechtbank-Gravenhage, the Dutch court of first instance. The court dismissed A and C's appeals as "unfounded" and dismissed B's appeal by concluding that "the Staatssecretaris could have reasonably found the B's statements concerning his homosexuality were not credible."<sup>117</sup> The men subsequently appealed to the Raad van State, an advisory board to the Dutch government and legislature. The men asserted that the questions asked by the Dutch authorities constituted a breach of human dignity and a breach of the right to private life under the Char-

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107. A, B, C, 2014 EUR-Lex CELEX LEXIS 2406, ¶ 24.

108. *Id.* ¶ 25.

109. *Id.* ¶ 26.

110. *Id.*

111. S. Chelvan, *supra* note 106.

112. A, B, C, 2014 EUR-Lex CELEX LEXIS 2406, ¶ 27.

113. *Id.* ¶ 28.

114. *Id.*

115. *Id.* ¶ 29.

116. *Id.*

117. *Id.* ¶ 31-32.

ter of Fundamental Rights of the European Union.<sup>118</sup> The Raad van State referred the cases collectively to the ECJ for a preliminary ruling.<sup>119</sup> The ECJ sought to determine the limits that Directive 2004/83<sup>120</sup> and the Charter of Fundamental Rights impose on member states when assessing the credibility of an asylum applicant's declared sexual orientation and how these methods may differ from other grounds of persecution.<sup>121</sup>

On December 2, 2014, the ECJ delivered its opinion on the ABC case.<sup>122</sup> It held that Directive 2004/83, read in light of the Charter, establishes limits on authorities evaluating an asylum application for fear of persecution due to sexual orientation.<sup>123</sup> However, member states are not obliged to accept declared sexual orientation as fact.<sup>124</sup> The declaration by the applicant is merely a starting point in assessing an application's credibility.<sup>125</sup>

According to the ECJ, member states may consider it an applicant's duty to provide information to substantiate their asylum re-

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118. *Id.* ¶ 35. The Charter of Fundamental Rights of the European Union, promulgated in December 2000, contains political, social, and economic rights for EU citizens under EU law. Article 3 & Article 7 of the Charter, respectively, state that “[e]veryone has the right to respect for his or her physical and mental integrity” and “[e]veryone has the right to respect for his or her private and family life, home and communications.” Charter of Fundamental Rights of the European Union, art. 3 & 7, Dec. 18, 2000, 2000 O.J. (C 364) 1.

119. *A, B, C*, 2014 EUR-Lex CELEX LEXIS 2406, ¶ 43.

120. *See* Council Directive 2004/83, art. 4, 2004 O.J. (L 304) 12, 15 (EC) (“(1) Member States may consider it the duty of the applicant to submit as soon as possible all elements needed to substantiate the application for international protection. In cooperation with the applicant it is the duty of the Member State to assess the relevant elements of the application . . . (3) The assessment of an application for international protection is to be carried out on an individual basis and includes taking into account: (a) all relevant facts as they relate to the country of origin at the time of taking a decision on the application; including laws and regulations of the country of origin and the manner in which they are applied; (b) the relevant statements and documentation presented by the applicant including information on whether the applicant has been or may be subject to persecution or serious harm; (c) the individual position and personal circumstances of the applicant, including factors such as background, gender and age, so as to assess whether, on the basis of the applicant's personal circumstances, the acts to which the applicant has been or could be exposed would amount to persecution or serious harm; (d) whether the applicant's activities since leaving the country of origin were engaged in for the sole or main purpose of creating the necessary conditions for applying for international protection, so as to assess whether these activities will expose the applicant to persecution or serious harm if returned to that country; (e) whether the applicant could reasonably be expected to avail himself of the protection of another country where he could assert citizenship.”).

121. *A, B, C*, 2014 EUR-Lex CELEX LEXIS 2406, ¶ 48.

122. *See id.*

123. *Id.* ¶ 49-52.

124. *Id.* ¶ 58.

125. *Id.* ¶ 49.

quest.<sup>126</sup> This may include requiring confirmation of statements made by applicants regarding their declared sexual orientation.<sup>127</sup> However, any assessments meant to determine an applicant's credibility must be in accordance with the Charter.<sup>128</sup> The Court looked specifically at four practices: (1) the use of stereotypes; (2) the questioning of an applicant's sexual practice; (3) the administering of "tests" or allowing applicants to submit photographs and videos; and (4) denying asylum due to an applicant's failure to raise persecution for sexual orientation in their initial claim.<sup>129</sup> The Court found that all of these practices violated the Charter.<sup>130</sup>

First, the Court held that the use of stereotypes is a violation of Article 4(3)(c) of Directive 2004/83.<sup>131</sup> Stereotypical notions about the behavior and experiences of LGBTI people are limiting and do not take into account the varied proclivities, experiences, and knowledge that LGBTI asylum seekers might have before they file an application.

Second, the Court held that questions relating to applicants' sexual practices violate the right to privacy under Article 7 of the Charter.<sup>132</sup> The Court recognized that the Charter permits authorities to interview an applicant regarding their declared sexual orientation.<sup>133</sup> However, questions about sexual practices, especially when such information is divulged to an official, invade upon the privacy rights of asylum applicants.<sup>134</sup>

Third, the Court held that administering tests to prove an applicant's sexual orientation violates the right to human dignity under Article 1 of the Charter.<sup>135</sup> In addition, the Court prohibited the production of evidence to substantiate an applicant's claimed sexual orientation.<sup>136</sup> The Court noted that tests, which sometimes require the submittal of evidence, not only infringe upon human dignity, but, from an evidentiary stance, lack probative value.<sup>137</sup>

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126. *Id.* ¶ 50.

127. *Id.* ¶ 51.

128. *Id.* ¶ 53.

129. *Id.* ¶ 59.

130. *Id.*

131. *Id.* ¶ 9, 60-63.

132. *Id.* ¶ 64; *see* Charter of Fundamental Rights of the European Union, *supra* note 118, art.

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133. *A, B, C*, 2014 EUR-Lex CELEX LEXIS 2406, ¶ 64.

134. *Id.*

135. *Id.* ¶ 65.

136. *Id.* ¶ 72.

137. *Id.* ¶ 65.

Finally, the Court held that under Directive 2004/83, an applicant's failure to raise their declared sexual orientation as grounds for seeking asylum, prompted by a well-founded fear of persecution, should not be held against them.<sup>138</sup> The Court noted that, while the Directive may permit member states to oblige asylum seekers to submit all material necessary to assess the application "as soon as possible," the sensitive nature of sexual orientation claims makes a difference.<sup>139</sup> An applicant fleeing from a nation where their sexual orientation is stigmatized may not feel comfortable divulging their declared identity at first instance.<sup>140</sup>

### B. *Justification for Considering the ABC Case*

The ruling by the ECJ in the ABC case is highly persuasive. Jurisdictions assessing the application of LGBTI persons who possess a well-founded fear of persecution in their nation of origin should consider and give weight to the ABC case ruling. While certain progressive nations have reached a consensus that LGBTI people deserve recognition under the phrase "membership in a social group,"<sup>141</sup> an inconsistency remains as to the limits placed on assessing an LGBTI asylum application.

Prohibiting the use of stereotypes as a factor in the evaluation of an LGBTI asylum seeker's application is consistent with international human rights and human dignity principles. The Yogyakarta Principles bestow upon LGBTI people a sense of dignity.<sup>142</sup> Competent authorities in nations that assess potential LGBTI asylum seekers' applications prevent the violation of international human rights laws by precluding asylum adjudicators from using stereotypes in evaluations. In addition, many nations already recognize that LGBTI people deserve equal treatment in areas including housing, employment, education, and immigration.<sup>143</sup> In such nations, precluding the use of stereotypes in asylum adjudication ensures that nations follow their own domestic laws.

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138. *Id.* ¶ 70.

139. *Id.* ¶ 68-69.

140. *Id.* ¶ 70-71.

141. Convention Relating to the Status of Refugees, *supra* note 7, art. 1(A)(2).

142. YOGYAKARTA PRINCIPLES, *supra* note 57, at 11 (Principle 3 states that "[e]ach person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom.").

143. See *Human Rights Watch Country Profiles: Sexual Orientation and Gender Identity*, HUM. RTS. WATCH (June 23, 2017, 3:00 PM), <https://www.hrw.org/news/2017/06/23/human-rights-watch-country-profiles-sexual-orientation-and-gender-identity>.

Prohibiting adjudicators from asking applicants about their sexual practices furthers the recognition of the dignity of LGBTI people. Researchers emphasize that focusing on the sexual activities of the applicant rather than the persecution they face because of self-identification as a member of a social group misses the mark.<sup>144</sup> Asylum applicants rarely face persecution because they are not caught performing a sexual act; rather, persecution typically arises from asylum seekers' claimed sexual orientations and identities.<sup>145</sup>

Further, nations should either prohibit or tightly limit tests as a means of assessing asylum applications of LGBTI persons. As the ECJ noted, tests to "prove" the sexual orientation of an applicant violate their dignity.<sup>146</sup> In addition, tests for sexual orientation and the submission of video and photographic evidence of sexual orientation do not carry great probative value. Moreover, securing such evidence is overly invasive. The ECJ correctly recognizes that subjecting LGBTI persons to tests on the basis of their sexual orientation or gender identity undermines their human rights.<sup>147</sup> States should intervene when they become aware that this sort of conduct is taking place within their jurisdiction.<sup>148</sup>

Jurisdictions should also consider the negative impact of denying an LGBTI asylum applicant the ability to raise a claim of asylum based on their sexual orientation if they do not raise such a claim at first instance. LGBTI asylum seekers find themselves outside of their home nation, seeking refuge because their original environment threatens their safety and liberty. Adjudicating bodies should consider the various cultural and particularized experiences of an LGBTI asy-

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144. Erin Gomez, *The Post-ABC Situation for LGB Refugees in Europe*, 30 EMORY INT'L L. REV. 475, 487 (2016) (citing Volker Türk, *Ensuring Protection to LGBTI Persons of Concern*, 25 INT'L J. REFUGEE L. 120, 124 (2013)).

145. Cf. Gomez, *supra* note 144 (citing Türk, *supra* note 144).

146. Joined Case C-148/13, C-149/13, & C-150/13, A, B, C v. Staatssecretaris Van Veiligheid en Justitie, 2014 EUR-Lex CELEX LEXIS 2406, ¶ 65 (Dec. 2, 2014).

147. Yogyakarta Principle 18 states that,

No person may be forced to undergo any form of medical or psychological treatment, procedure, testing, or be confined to a medical facility, based on sexual orientation or gender identity. Notwithstanding any classifications to the contrary, a person's sexual orientation and gender identity are not, in and of themselves, medical conditions and are not to be treated, cured or suppressed.

YOGYAKARTA PRINCIPLES, *supra* note 57, at 23.

148. States shall: a) Take all necessary legislative, administrative and other measures to ensure full protection against harmful medical practices based on sexual orientation or gender identity, including on the basis of stereotypes, whether derived from culture or otherwise, regarding conduct, physical appearance or perceived gender norms.

*Id.*

lum applicant.<sup>149</sup> The development of individual sexual orientation does not follow any singular, traditional path with which an asylum official may be familiar.<sup>150</sup> Therefore, authorities must be flexible to this reality.<sup>151</sup>

The likely criticism to the above arguments is in regard to their extraterritorial nature because the ECJ decided the ABC case. The ECJ only has purview over the member states of the European Union and only interprets European Union law. One might imagine a judge in a U.S. federal district court hearing a challenge to the practices of the U.S. Citizenship and Immigration Service wherein an EU court decision is offered as authority. The judge might react by asking, “Why should we care what they say in Europe?” However, it is not a completely strange occurrence for a U.S. court to cite foreign law and cases.<sup>152</sup> As Associate Justice Ginsburg once proclaimed, “I frankly don’t understand all the brouhaha latterly from Congress and even some of my colleagues about referring to foreign law.”<sup>153</sup> In addition, while the Yogyakarta Principles are not binding law in any jurisdiction, the progressive nations that grant asylum to LGBTI people have ratified treaties that call upon them to take action to protect the rights of *all* people.<sup>154</sup>

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149. See Gomez, *supra* note 144, at 476 (citing Nina Haase, *EU Court Examines If ‘gay’ is Grounds for Asylum*, DW (Feb. 24, 2014), <http://www.dw.com/en/eu-court-examines-if-gay-is-grounds-for-asylum/a-17454674>) (“Applicants who have struggled with their sexual identities in their countries of origin will not necessarily fully accept their LGB sexuality immediately upon entering the receiving country and often will still be developing their sexual identities during an asylum application.”).

150. See Gomez, *supra* note 144, at 476 (first citing S. Chelvan, *supra* note 106; and then citing Louis Middelkoop, *Dutch Court Asks Court of Justice to Rule on the Limits of Verification of the Sexual Orientation of Asylum Seekers*, EUR. L. BLOG (Apr. 23, 2013), <http://europeanlawblog.eu/2013/04/23/dutch-court-asks-court-of-justice-to-rule-on-the-limits-of-verification-of-the-sexual-orientation-of-asylum-seekers/>).

151. See Gomez, *supra* note 144, at 476 (first citing S. Chelvan, *supra* note 106; and then citing Middelkoop, *supra* note 150).

152. See generally Stephen Yeazell, *When and How U.S. Court Should Cite Foreign Law*, 26 CONST. COMMENT 59, 61, 73 (2009) (quoting and citing video of Justice Ruth Bader Ginsburg).

153. *Id.* at 73 (quoting and citing video of Justice Ruth Bader Ginsburg).

154. See, e.g., G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); Convention on the Elimination of All Forms of Discrimination Against Women, art. 1, Dec. 18, 1979, 1249 U.N.T.S. 20378; International Convention on the Elimination of All Forms of Racial Discrimination, art 1, Mar. 7, 1966, 660 U.N.T.S. 9464.

#### IV. THE DSSH METHOD

##### A. *Background on DSSH and Chelvan*

While the ECJ's ruling in the ABC case is highly instructive to other jurisdictions on how they should consider interpreting their own asylum laws, it does not provide affirmative alternatives to prevent the type of unlawful practices that have often occurred in asylum proceedings. Thus, the DSSH method provides a "gap filler" to the ABC case.<sup>155</sup> The DSSH method stands as a tool to ensure that competent adjudicators do not breach the limits of the ABC case while assessing applications for asylum from LGBTI persons based on their sexual orientation or gender identity.

S. Chelvan, a barrister from the UK, first developed the DSSH method while pursuing his Law PhD at the Kings College London.<sup>156</sup> Chelvan debuted the method at a conference in April 2011.<sup>157</sup> Chelvan noted that, since a landmark case in 2010 in the UK, advancements occurred in how authorities in the UK viewed LGBTI asylum laws.<sup>158</sup> That year, the UK Supreme Court ruled in favor of the Home Department in the joint case of HJ & HT v. Secretary of State.<sup>159</sup> In that case, an Iranian man and a Cameroonian man brought cases after applying for asylum in the UK.<sup>160</sup> The Court held that the Home Office's unofficial policy of reasonable tolerable discretion was unlawful.<sup>161</sup>

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155. S. Chelvan, *At the End of the Rainbow: Where Next for the LGBTI Refugee?*, REFUGEE STUD. CTR. (Jan. 24, 2014), <https://www.rsc.ox.ac.uk/news/at-the-end-of-the-rainbow-where-next-for-the-lgbti-refugee-s-chelvan>; see also *LGBTI Asylum Claims – the Difference, Stigma, Shame, Harm Model*, RIGHT REMAIN (Aug. 7, 2014), <http://www.righttoremain.org.uk/legal/lgbti-asylum-claims-the-difference-shame-stigma-harm-model/>.

156. See S. Chelvan, *From ABC to DSSH: How to Prove That You are a Gay Refugee*, FREE MOVEMENT (July 23, 2014), <https://www.freemovement.org.uk/from-abc-to-dssh-how-to-prove-that-you-are-a-gay-refugee/>.

157. See *id.*

158. See Mary O'Hara, *Legal Aid Barrister of the Year: 'It's A Very Dangerous to be Gay in'*, GUARDIAN (July 16, 2014, 3:00 PM), <https://www.theguardian.com/society/2014/jul/16/legal-aid-barrister-dangerous-world-gay-asylum-seekers-s-chelvan>.

159. HJ (Iran) (FC) and HT (Cameroon) (FC) v. Secretary of the State for the Home Department [2010] UKSC 31 (appeal taken from 2009 EWCA Civ 172).

160. *Id.*

161. Catherine Baksi, *Legal Hackette Lunches with S. Chelvan*, LEGAL HACKETTE'S BRIEF (Jan. 25, 2016), <https://legalhackette.com/2016/01/25/legal-hackette-lunches-with-s-chelvan/> (explaining the Home Office policy of reasonable tolerable discretion, "[w]here it accepted claimants were gay and would face persecution or death if returned to their home countries, it suggested they could avoid such threats by voluntarily exercising discretion and concealing their sexuality").

After the UNHCR convened a meeting in 2011 in Geneva to discuss LGBTI asylum claims,<sup>162</sup> national governments called for the UNHCR to devise a questionnaire that authorities could use to assess LGBTI asylum application in accordance with international human rights laws and principles.<sup>163</sup> Chelvan rejected this call for a questionnaire because of the arbitrary nature of a numeric-based system.<sup>164</sup> For Chelvan, the key to assessing the application of an LGBTI asylum seeker is difference.<sup>165</sup> For it is difference that makes the asylee the initial target of their persecutor and therefore a member of the particular social group under the language of the 1951 Convention related to the Status of Refugees.<sup>166</sup> Moreover, it is not necessarily a sexual act that brings the LGBTI applicant to the attention of their persecutor, but, rather, a recognition by the persecutor that the asylum applicant does not conform to that society's dominant idea of acceptable sex and gender roles.<sup>167</sup>

### B. *Implementing the DSSH Method*

DSSH stands for “Difference, Stigma, Shame, Harm.”<sup>168</sup> Using this model, the adjudicator poses open ended, narrative-based questions to elicit responses from the asylum applicant. The first stage focuses on difference.<sup>169</sup> The interviewer asks the applicant questions about when they knew they were different than “other boys and girls” and when they knew they fell outside the norms of their gender's behavior.<sup>170</sup> Because an applicant is likely to recognize that they were different from their peers and what the culture in their home country expected of them, this leads to an awareness and discussion of stigma.

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162. See Jesse Bernstein, *Human Rights First Welcomes Attention on LGBTI Refugees – Urges Continued Reforms to Ensure Protections*, HUFFPOST (Oct. 13, 2010, 8:08 PM), [https://www.huffingtonpost.com/human-rights-first/hrf-welcomes-attention-on\\_b\\_762012.html](https://www.huffingtonpost.com/human-rights-first/hrf-welcomes-attention-on_b_762012.html).

163. See Baksi, *supra* note 161.

164. Chelvan, *supra* note 106 (Chelvan noting that “[i]t is not practical, since a questionnaire of 40 questions would result in an applicant who was only able to answer 15 questions ‘correctly’ as ‘not gay’, and an individual who answered 39 questions correctly as having learnt the answers from the internet.”).

165. See *id.*

166. See *id.*

167. William Lee Adams, *Gay Asylum Seekers Forced to ‘Prove’ Their Sexuality*, NEWSWEEK (Sept. 24, 2014, 11:09 AM), <http://www.newsweek.com/2014/10/03/gay-asylum-seekers-forced-prove-their-sexuality-272666.html> (quoting Chelvan as saying, “The majority of individuals are not caught in a sexual act by religious police . . . . It’s the fact that they don’t conform to a heterosexual narrative that makes them identifiable.”).

168. S. CHELVAN, *DSSH MODEL AND LGBTI ASYLUM CLAIMS 28* (Apr. 2014), <https://www.no5.com/cms/documents/DSSH%20Model%20and%20LGBTI%20Asylum%20Claims.pdf>.

169. *Id.* at 29.

170. *Id.* at 35.

The topic of stigma prompts the applicant to discuss issues like when and how they recognized that others disapproved of their identity or conduct. Stigma is tightly connected with regional social/cultural/religious norms.<sup>171</sup> The issue of stigma can also lead to a discussion of when and how asylum applicants learned that the majority of their originating society disapproved of their identity and/or conduct and that society implemented laws and cultural practices to respond to LGBTI people in an oppressive manner.<sup>172</sup>

The stigma attached to the applicant's identity will often lead to feelings of shame around their identity.<sup>173</sup> The shame attached to the stigma may impact the asylum seeker in such a way that leaves them isolated and alienated by the society at large.<sup>174</sup> However, the last phase of the DSSH model is perhaps the most important. The applicant will discuss what events occurred that gave them the well-founded fear of persecution in their home country.<sup>175</sup> The harm might be in the form of violence from a state actor. The state actor might threaten the applicant with torture, detention, or even capital punishment.<sup>176</sup> The persecutor might be a non-state party. In some instances, the threat may come from within the family, such as in the case of honor killings.<sup>177</sup>

In October 2012, the UNHCR formerly endorsed the DSSH method.<sup>178</sup> S. Chelvan presented his findings to the UNHCR in Geneva, which found the arguments compelling.<sup>179</sup> In December 2013, the Migrationvert (the Swedish Migration Board) invited Chelvan to Stockholm to give a presentation to the board.<sup>180</sup> Court lawyers and judges attended Chelvan's presentation.<sup>181</sup> As of 2014, the government of New Zealand chose to adopt the DSSH method as part of its

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171. Chelvan, *supra* note 156.

172. Chelvan, *supra* note 168, at 31.

173. *Id.* at 32.

174. *Id.*

175. *Id.* at 37.

176. *Id.* at 34.

177. See generally Gregg Zoroya, 'Honor killings': 5 Things to Know, USA TODAY (June 9, 2016, 12:35 PM), <https://www.usatoday.com/story/news/world/2016/06/09/honor-killings-united-nations-pakistan/85642786/> (Honor killings are a form of extreme punishment exacted to regain family honor in the wake of what is considered a sexual crime, such as adultery or other sexual impropriety and homosexuality).

178. Sweden – "Changing the Chapter" in *Understanding LGBTI asylum claims*, NO.5 BARRISTERS CHAMBERS (Dec. 4, 2013), <http://www.no5.com/news-and-publications/news/668-sweden-changing-the-chapter-in-understanding-lgbti-asylum-claims/>.

179. *Id.*

180. *Id.*

181. *Id.*

asylum review process.<sup>182</sup> In addition, the governments of Germany, Finland, and Cyprus reviewed the DSSH method for potential adoption by their government agencies.<sup>183</sup>

UN member states that assess the application of LGBTI asylum seekers should adopt the DSSH method. After only just a few short years, the DSSH method enjoys support from a growing list of progressive nations who are committed to providing a refuge for asylum seekers fleeing persecution, while maintaining the integrity of their asylum adjudication process.<sup>184</sup> Given that the UNHCR, which designates a framework for the global community on refugee and asylum policies, adopted the DSSH method,<sup>185</sup> there is great potential for it to be recognized beyond just a handful of nations.

States that have ratified the 1951 Refugees Convention should apply the DSSH method. In order for the DSSH to expand its reach in the future, this paper recommends that ratifying nations draft the DSSH method as an optional protocol. Optional protocols attach to previously established treaties.<sup>186</sup> Optional protocols allow signatories of the treaty that wish to enter into a separate agreement from the treaty to do so.<sup>187</sup> Optional protocols deal with a substantive and/or procedural area of the treaty.<sup>188</sup> An optional protocol would likely be the best option to implement the DSSH method because only a certain number of signatories to the 1951 Convention on the Status of Refugees assess LGBTI asylum seekers for refugee status.<sup>189</sup> For example, nations such as Iran and Russia, both ratifying members to the Convention, have widely reported cases of abuse towards its LGBTI community.<sup>190</sup> The adoption of the DSSH method via an optional pro-

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182. Jasmine Dawson & Paula Gerber, *Assessing the Refugee Claims of LGBTI People: Is the DSSH Model Useful for Determining Claims by Women for Asylum Based on Sexual Orientation?*, 29 INT'L J. REFUGEE L. 292, 294 (2017); S. Chelvan, *supra* note 106.

183. Adams, *supra* note 167.

184. *Id.*; Dawson & Gerber, *supra* note 182, at 294.

185. Sweden – “Changing the Chapter” in *Understanding LGBTI asylum claims*, *supra* note 178.

186. See *What is an Optional Protocol*, U.N. WOMEN, <http://www.un.org/womenwatch/daw/cedaw/protocol/whatis.htm> (last visited Apr. 25, 2018).

187. See *id.*

188. See *id.*

189. See *UNHCR's Views on Asylum Claims based on Sexual Orientation and/or Gender Identity Using international law to support claims from LGBTI individuals seeking protection in the U.S.*, U.N. HIGH COMMISSION FOR REFUGEES (Nov. 4), <http://www.unhcr.org/uk/5829e36f4.pdf>.

190. Emine Saner, *Gay rights around the world: the best and worst countries for equality*, GUARDIAN (July 30, 2013), <https://www.theguardian.com/world/2013/jul/30/gay-rights-world-best-worst-countries>.

protocol would be the diplomatic mechanism that could ensure that the method has the widest reach possible among progressive nations.

While the DSSH method is innovative in its approach to assessing applications for asylum while respecting the rights of applicants, it is nevertheless flawed in some ways that would require addressing prior to an adoption by the UN in an optional protocol. For example, the DSSH method does not provide safeguards to ensure that false narratives cannot pass as credible. While government agencies desire sensitivity towards the experiences of asylum seekers, there is a continued need to protect the integrity of the asylum process. Over time, a system could develop where applicants who do not possess legitimate claims for refugee status are able to slip through the system because they know just the right statements to make in order to seem credible.

Furthermore, opposition to DSSH may rest upon the method's emphasis on a showing of self-identification as LGBTI. If harm is the most crucial step in determining whether states should grant asylum, how significant is it that the applicant actually self-identify as LGBTI or have same sex attractions? For example, a heterosexual man in a nation that has hostile views towards gays could be perceived as gay by his neighbor who then threatens him with violence. Under the DSSH method, this heterosexual man would not likely possess a narrative indicating feelings and experiences of difference, stigma, or shame. However, his perceived homosexuality by his neighbor could pose a grave threat to him. Would this man be granted asylum under the DSSH method? Since refugees by definition must be members of a targeted social group, will social group be expanded to include perceived LGBTI people as a social group? This paper would argue that in that instance, the responsibility falls on the UNHCR and national governments to interpret whether that man's experiences position him as a member of a particular social group, namely, the LGBTI community.

## V. CONCLUSION

Every day across the world, LGBTI people awaken to lives in nations that are, at times, openly hostile towards their very existence and in which their lives may be at risk. The 1951 Refugee Convention and the 1967 Protocol rightly expanded to protect this vulnerable population, allowing them access to the possibility of life and liberty be-

yond the spaces where they confront hate.<sup>191</sup> By giving consideration to the ECJ's ABC case, governments will ensure that they are upholding the values found within their own domestic laws that would give LGBTI refugees freedom whilst also defending international human rights. In addition, the adoption of the DSSH method via an optional protocol is an exciting opportunity for nations that already have a commitment to protecting LGBTI people. By taking the necessary steps, nations can guarantee that they provide LGBTI people the dignity they deserve through a process that acknowledges this social group's vulnerabilities and power.

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191. See Convention Relating to the Status of Refugees, *supra* note 7; UNHCR, THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL 1 (Sept. 2011), <http://www.unhcr.org/en-us/4ec262df9.pdf#zoom=95>.

