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Article

An LGBTQI+ child rights-based approach to eligibility for international protection

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ABSTRACT

This article focuses on the application of the refugee definition provided in article 1(A) of the 1951 Refugee Convention to the special protection needs of LGBTQI+ children. In doing so, it uses the Convention on the Rights of the Child (CRC) as an interpretative tool to adapt the specific requirements established by the Refugee Convention to the special protection needs of LGBTQI+ children applying for asylum. It argues that the child specific protection provided by the CRC should be interpreted to create effective access and specific protection for LGBTQI+ children applying for asylum under Article 1(A) of the Refugee Convention. Owing to the rights protected in the CRC and notably the principle of the best interests of the child, when LGBTQI+ children do not fit the requirement of individualised risk of persecution, they should qualify for complementary protection in light of, or based on, the CRC itself.

Keywords: LGBTQI+ children; children's rights; refugee law; asylum; international protection.

1. INTRODUCTION

International law has established that refugee children crucially need special protection due to their specific vulnerability.[1] In creating such protections, two main international documents are pivotal: the Refugee Convention which provides the definition of refugee as well as a set of specific righs for those entitled to international protection, and the Convention on the Rights of the Child (CRC), which provides for child-specific protections as part of a children's rights-based approach.

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1 Jason M. Pobjoy, *The Child in International Refugee Law* (Cambridge University Press 2017); Jeanette A. Lawrence and others, 'The Rights of Refugee Children and the UN Convention on the Rights of the Child' (2019) 8 Laws 20; *Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14* (Inter-American Court of Human Rights, 19 August 2014); African Charter on the Rights and Welfare of the Child (adopted 11 July 1990, entered into force 29 November 1999) OAU Doc CAB/LEG/24.9/49 (1990), art 23; *Popov v France* (App Nos 39472/07 and 39474/07) (2012) 55 EHRR 19 [91]; *R.M. and Others v France* (App No 33201/11) ECHR 12 July 2016 [71]; *A.B. and Others v. France* (App No 11593/12) ECHR 12 July 2016 [110]; *Abdullahi Elmi and Aweys Abubakar v. Malta* (App Nos 25794/13 and 28151/13) ECHR 22 November 2016 [103]; *S.F. and Others v. Bulgaria* (App No 8138/16) ECHR 7 December 2017 [79]; *R.R. and Others v. Hungary* (App No 36037/17) ECHR 2 March 2021 [49]; *Darboe and Camara v. Italy* (App No 5797/17) ECHR 21 July 2022 [173]; *V.A. v. Switzerland*, Communication No. 56/2018, UN Doc CRC/C/85/D/56/2018 (28 September 2020) [7.3].

The Refugee Convention provides for international protection in the form of refugee status as defined under Article 1(A). Additionally, complementary protection regimes—governed by general human rights law and developed differently by regional and national systems—ensure protection for those who do not meet the requirements for refugee status, but nevertheless cannot be reasonably or realistically sent back to their country of origin (see section 4 of this article).[2] In this context, the refugee definition characterizes a refugee as someone who:

> owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership to a particular social group or political opinion, is outside the country of [their] nationality and is unable, or owing to such fear, unwilling to avail [themselves] of the protection of that country.

This definition brings forth four criteria to be fulfilled in order to establish refugee status: the existence of a well-founded fear, the correlation of that well-founded fear with an established credible risk of future persecution, the overall coherence of the well-founded fear and risk of individualized persecution with one of the grounds enumerated in the definition, and the absence of effective state protection to mitigate the alleged risk of persecutory harm.[3] While the Refugee Convention and its definition were not originally written with children in mind, the development of international children's rights law, culminating in the almost universal ratification of the UN Convention on the Rights of the Child, has made it clear that the interests and specific protection needs of children must be assessed carefully when applying the refugee definition, particularly by means of involving the child. Although the CRC does not provide directly or explicitly for a child-specific right to asylum, its joint reading with the Refugee Convention frames it as a fundamental interpretation tool and source of procedural safeguards adapted to the child refugee claimant.[4]

Nevertheless, the practice of states on child-sensitive assessment of asylum claims does not yet fully embrace the CRC, ultimately leading to the further vulnerabilization of children applying for asylum and making it harder for them to fulfil the refugee definition criteria, and thus to obtain international protection.[5] This vulnerabilization is compounded and exacerbated when the applicant belongs to a minority group, which is the case for LGBTQI+ applicants.[6] In this context, LGBTQI+ children are faced with the compounded hardship of simultaneously being children, LGBTQI+ persons, and migrants.[7] In turn, the misunderstanding or mis-assessment of the specificity of their claims renders international protection *de facto* difficult, if not impossible, to access.[8] In this sense, the age of the applicant comes as an additional vulnerabilizing lens over the difficulties faced by all LGBTQI+ asylum seekers. Such complexities include serious hardship in providing evidence of past persecution,[9] and the impact of stereotypes regarding the behaviour

2 Jane McAdam, 'Complementary Protection' in Cathryn Costello (ed.), *The Oxford Handbook of International Refugee Law* (Oxford University Press eBooks 2021).
3 James C. Hathaway, Michelle Foster, *The Law of Refugee Status* (Cambridge University Press, 2014).
4 Pobjoy (n 1).
5 Kate Halvorsen, 'Asylum Decisions on Child Applicants: Report on 4-Country Pilot Project' (Ministry of Local Government and Regional Development of Norway 2004); Pobjoy (No 1); Warren Binford and others, 'Report on Enforcing the Rights of Children in Migration' (2023) 12 Laws 85.
6 Denise Venturi, 'Beyond the Rainbow? An Intersectional Analysis of the Vulnerabilities Faced by LGBTQI+ Asylum Seekers' (2023) European Journal of Migration and Law 25, 474.
7 Suzan Hazeldean, 'Confounding Identities: The Paradox of LGBT Children under Asylum Law' (2011) University of California Law Review 45, 373.
8 Heaven Crawley, '"Asexual, Apolitical Beings": The Interpretation of Children's Identities and Experiences in the UK Asylum System' (2011) 37 Journal of Ethnic and Migration Studies 1171.
9 UNHCR, 'Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity', (21 November 2008) para 4.

and feelings expected of LGBTQI+ persons on their ability to see their claim believed.[10] Therefore, LGBTQI+ asylum seekers often find themselves both at risk of harm in their country of origin with little to no access to protection due to the endorsement of violence by the authorities, and the role of private persons as actors of persecution such as families, community members, and close ones; and at risk in the country of reception where their claims are often dismissed or mis-assessed due to prejudice and lack of training of decision makers on the vulnerability they face.[11] Awareness has been brought to the specific needs of LGBTQI+ asylum seekers by practitioners and academics, leading to the UNHCR 2008 Guidance Note and subsequent 2012 Guidelines of International Protection No. 9 on asylum claims on grounds of sexual orientation and gender identity. However, the particular situation of LGBTQI+ child asylum seekers has not been given similar attention. Thus, there is a crucial need to inject a child-rights perspective into the analysis of Sexual Orientation, Gender Identity and Expression and Sex Characteristics (SOGIESC) in asylum claims to ensure that LGBTQI+ children see their claims properly assessed and are awarded the necessary protections.

This article aims to provide an overview of such an approach through an analysis of the asylum status determination process for LGBTQI+ children as well as the subsequent assessment of need for complementary protection. To do so, it will first consider how LGBTQI+ children constitute a specific subject of international refugee law with their own specific needs and challenges (section 2). In light of such complexities, this article will then examine each criterion of the Refugee Convention (well-founded fear, persecution, state protection, and grounds for asylum) in light of the specific vulnerability of LGBTQI+ children and their rights under the CRC—notably Articles 2, 3, 8, 12, 19, 22 and 24 (section 3). Finally, it will present an argument for the existence of a right to complementary protection—either on the basis of the Refugee Convention using the CRC as an interpretative tool or based on the CRC directly—where refugee status cannot be reasonably granted (section 4).

2. THE LGBTQI+ CHILD AS A SPECIFIC SUBJECT OF INTERNATIONAL REFUGEE LAW

The recognition of persecution due to SOGIESC as potential grounds for international protection has made clear that violence aimed at LGBTQI+ persons may reach the threshold required to qualify for refugee status.[12] This is also supported by a growing recognition that LGBTQI+ persons are protected by anti-discrimination provisions in all aspects of society. What then differentiates LGBTQI+ children's protection needs from those of LGBTQI+ adults?

When looking at international protection procedures, the development of the legal framework has led to a recentring of the focus from the question of whether LGBTQI+ persons *could* qualify for asylum to the question of whether the persons applying for asylum are *credibly* LGBTQI+.[13]

10 Carmelo Danisi, Moira Dustin, Nuno Ferreira and Nina Held, *Queering Asylum in Europe: legal and social experiences of seeking international protection on grounds of sexual orientation and gender identity* (2021 IMISCOE Research Series, Springer) 259-324.

11 Ibid; Thomas Spijkerboer and Sabine Jansen, 'Fleeing Homophobia: Asylum Claims Related to Sexual Orientation and Gender Identity in the EU' (September 6, 2011) COC Nederland, Vrije Universiteit Amsterdam https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2097783.

12 UNHCR, 'Guidelines on International Protection: "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', UN doc HCR/GIP/12/01 (23 October 2012); Regulation (EC) 2024/1347 of the European Parliament and of the Council of 14 May 2024 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, amending Council Directive 2003/109/EC and repealing Directive 2011/95/EU of the European Parliament and of the Council, ELI: http://data.europa.eu/eli/reg/2024/1347/oj, Article 10(d).

13 Spijkerboer and Jansen (n 11); Irene Manganini, 'The Refugee Status Determination of Transgender Asylum-Seekers: a Queer Critique' (2020) The Global Migration Research Paper Series, 24; Moira Dustin, Nuno Ferreira, 'Improving SOGI Asylum Adjudication: Putting Persecution Ahead of Identity' (2021) 40 Refugee Survey Quarterly 315; Danisi, Dustin, Ferreira and Held (n 10).

In this context, decision makers in asylum cases have had the hard job of determining whether a claimant is truthful in their account and is thus *truly* LGBTQI+ and deserving of protection on that ground. While all LGBTQI+ persons applying for international protection may face hardship in seeing their identity recognized and believed,[14] this is exacerbated in the case of children. LGBTQI+ children have often been seen as a paradox in themselves, where a child cannot be LGBTQI+ and an LGBTQI+ person cannot be a child.[15]

When dealing with minority rights, and particularly the rights of LGBTQI+ persons, it is fundamental to highlight that the legal framework surrounding them is a direct translation of the views of the surrounding society on their identities. Therefore, to provide a truthful account of the ways in which children's SOGIESC claims to asylum are approached by decision makers, it is indispensable to reflect on the social factors that may influence their judgment.[16] When it comes to LGBTQI+ children, decision makers risk being affected by their personal views on sexuality, gender, the LGBTQI+ community as a whole, as well as on children and child-appropriate behaviour.[17] Since the assessment of LGBTQI+ asylum claims are largely centred around credibility—the assessment of whether the claim is truthful, thus of whether the applicant is 'really' LGBTQI+—the decision maker is forced to make a personal assessment of the applicant based on the information with which they are provided. In this context, although decision makers are expected to be impartial, it is hard to separate their personal impression of the applicant, and of the truthfulness of their application, from the factual evidence which is then no longer the centre of the claim. We note for instance that decision makers tend to question the competence of children when describing their story, questioning the general credibility of the applicant as a narrator when pieces of the story appear vague.[18] This is exacerbated by the lack of clear international, regional, and often national guidelines on how such assessments should be carried out. Although human rights bodies have advised that case workers should strive to avoid all stereotypes when assessing credibility in SOGIESC-based claims, clichés remain influential through the internalized prejudicial views of decision makers which reflect the society around them.[19] In this sense, we can say that 'societal resistance to homosexuality has led to a situation where the subject [themselves] is no longer in control of the definition and must evidence [their] sexuality in all kinds of contexts'[20] in order to fit the expectations of the decision maker and obtain asylum status. In this context, it is difficult for children to establish that they truly are LGBTQI+. It is nonetheless fundamental that LGBTQI+ children's identities and expressions be recognized to ensure they can receive effective protection in line with their specific rights and needs at the intersection of their SOGIESC and age.

To address this intersectional vulnerability properly, it is fundamental to adopt a children's rights-based approach to SOGIESC-based asylum. A children's rights-based approach takes its grounding in the idea that children, like adults, are deserving of all human rights and protections provided in international law. While none of the human rights treaties make clear that the rights they protect are reserved for adults, many rights are often considered prerogatives of adults, such

14 Spijkerboer and Jansen (n 11).
15 Hazeldean (n 7).
16 Hedayat Selim, Julia Korkman, Elina Pirjatanniemi and Jan Antfolk, 'Asylum Claims Based on Sexual Orientation: A Review of Psycho-Legal Issues in Credibility Assessments' (2022) 29 Psychology Crime and Law 1001.
17 An example of this can be found in the belief that consensual sexual activity cannot coexist with the dominating views on children's acceptable behaviour, which seems to impact decision makers' approach to child SOGIESC claims; Daniel Hedlund and Thomas Wimark, 'Unaccompanied Children Claiming Asylum on the Basis of Sexual Orientation and Gender Identity' (2018) 32 Journal of Refugee Studies 257.
18 ibid 266-267.
19 Sabine Jansen and Joel Le Déroff, 'Good Practices Related to LGBTI Asylum Applicants in Europe' (ILGA Europe 2014).
20 Louis Middelkoop, 'Normativity and credibility of sexual orientation in asylum decision making', in Thomas Spijkerboer and Sabine Jansen (eds), *Fleeing Homophobia* (Routledge 2013) 168.

as freedom of expression or the right to privacy,[21] or the right to have a diverging SOGIESC. In this context, it is important to highlight that children are not only protected by the same general human rights provisions as adults, but also may have higher protection needs due to their age and immaturity. Indeed, children, in virtue of their age, often have not reached full autonomy and must depend on adults to exercise their rights. During their emotional and physical development, and thus because of their dependency on adults, children are more vulnerable to rights abuses and require stronger protections. A children's rights-based approach aims at refocusing the discussion on the effective rights and protection needs of children, in their position as children separately from adults. In other words, this approach pushes for the conception and discussion of children as active rights-holders, moving away from the conception of children as appendix to their parents or legal guardians.[22]

In the context of migration and international protection law, this starts by considering children as claimants in their own right. In this sense, when accompanied, children's asylum claims must be examined independently and fully, and must be adjudicated regardless of the decision made in their parent's or accompanying adult's case.[23] As for the question of identity, a children's rights-based approach mandates the recognition that children may experience themselves in terms and ways that are appropriate to their age and maturity without the imputation of adult's preconceived notions of sexuality and gender. In other words, the children's rights-based approach taken in this article also argues that children have a right to claim a diverging SOGIESC and should be supported and accompanied by adults in doing so, with guarantees of protection under the principle of non-discrimination (Article 2 of the CRC).

Taking a children's rights-based approach mandates the use of children's rights. The evident reference in that sense is the United Nations Convention on the Rights of the Child (CRC) which largely serves as a basis for children's rights-based approaches. Then, looking at LGBTQI+ children in migration context specifically, many rights become fundamental such as the right to health (article 24), the right to identity (article 8), protection from all forms of violence (article 19), the right to be heard and involved (article 12), the right to non-discrimination (article 2), the right to life and survival (article 6), and the principle of the best interests of the child (article 3). Nevertheless, as highlighted by the United Nations Committee on the Rights of the Child ('UNCRC') itself, the rights contained in the Convention are interdependent and indivisible so that all rights must be upheld in all contexts. Using the protections and rights provided by the CRC, this article will thus aim to take a children's rights-based approach to eligibility for refugee status under the Refugee Convention and subsequent avenues for complementary protection for the specific claims of LGBTQI+ children.

3. LGBTQI+ CHILDREN'S ELIGIBILITY FOR REFUGEE STATUS UNDER THE REFUGEE CONVENTION

The four criteria of the refugee definition, although interconnected, can be examined separately and warrant specific tests to be fulfilled in order to meet the required thresholds. In this first part, each criterion will be examined in light of the vulnerability of LGBTQI+ children and the special protection to which they are entitled under the CRC and international human rights law more generally.

21 Tara M Collins and Mona Paré, 'A Child Rights-Based Approach to Anti-Violence Efforts in Schools' (2016) 24 The International Journal of Children's Rights.

22 Sheila Varadan, 'The Principle of Evolving Capacities under the UN Convention on the Rights of the Child', (2019) International Journal of Children's Rights 27, 306-338; Ruth Brittle and Ellen Desmet, 'Thirty Years of Research on Children's Rights in the Context of Migration' (2020) 28 The International Journal of Children's Rights 36.

23 UNHCR, 'Guidelines on International Protection: "Child Asylum Claims" under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees' UN Doc HCR/GIP/09/08 (22 December 2009), para 9.

3.1. Well-Founded Fear

The existence of a 'well-founded fear' of being persecuted is the first element of the refugee definition. Customarily, the requirement of well-founded fear is understood to comprise two aspects: an objective risk of harm, combined with a subjective apprehension of the applicant that the harm will occur. This approach has been endorsed by the Office of the United Nations High Commissioner for Refugees (UNHCR) which suggests that the assessment of well-founded fear should focus as much on the existence of a (subjective) 'fear' as on the objective foundation of this fear, making it 'well-founded'.[24] It must be noted that this interpretation, while largely applied in practice, is not without disagreements. Scholars such as Hathaway argue that the subjective element of well-founded fear has been misread from the vague language of the provision and should be interpreted as only mandating accrued attention to the singularity of each case when a human rights approach to persecution was not yet integrated.[25] Nevertheless, this subjective element remains a core part of the practice and is still part of UNHCR's official interpretation and therefore mandates attention and analysis.

3.1.1. Misinterpretation of the well-founded fear elements in LGBTQI+ claims

In claims lodged by LGBTQI+ applicants, the existence of well-founded fear is often minimized by decision makers, making it harder to meet the criterion and thus to obtain effective protection.[26] So far, little research has been done on the exact assessment of LGBTQI+ children's claims, and thus little data is available, but there is no reason to believe that the arguments used to discredit LGBTQI+ adults' claims are not being applied similarly to children. This is made even more likely by the fact that LGBTQI+ children are often faced with disbelief regarding their age due to a general presumption that children cannot be LGBTQI+ and that LGBTQI+ persons cannot be children.[27]

The main arguments used to discredit the well-founded fear of LGBTQI+ are the 'discretion requirement' or 'concealment option', and the 'late disclosure' counterargument.[28]

The first argument, the 'discretion requirement' or 'concealment option', is used to limit the recognition of an objective well-founded fear regardless of the subjective fear presented by the applicant. It follows the idea that, if the applicant were to conceal their LGBTQI+ identity once returned to their country of origin, they would no longer have a well-founded fear of persecution on that basis. This argument has been rejected by multiple human rights bodies—notably in the UK Supreme Court case of *HJ and HT*,[29] as well as UNHCR,[30] and reiterated even recently by the European Court of Human Rights[31]—which have made clear that concealing requires self-enforced suppression of one's sexual identity and/or gender identity, which can qualify as

24 UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, UN doc HCR/IP/4/Eng/Rev.3 (1979, reissued 2019), para 37.

25 James C. Hathaway and William S. Hicks, "Is there a Subjective Element in the Refugee Convention's Requirement of 'Well-Founded Fear'?" (2005) Journal of International Law 26:2, 505-62.

26 Spijkerboer and Jansen (n 11); Manganini (n 13); Nuno Ferreira, 'Better Late Than Never? SOGI Asylum Claims and 'Late Disclosure' Through a Foucauldian Lens' (2023) UCLA Journal of International Law and Foreign Affairs 27, 1.

27 Crawley (n 8); Hazeldean (n 7); see also subsequent section 3.4 of this article.

28 Spijkerboer and Jansen (n 11); Manganini (n 13).
While it will not be discussed in this article, another argument often brought up to discredit SOGIESC-based asylum claims is the possibility of 'internal relocation'. UNHCR (No 9) para 52; Jessica Schultz, 'The European Court of Human Rights and Internal Relocation: An Unduly Harsh Standard?', (2015) Brill Nijhoff eBooks. On the position of the European Court of Human Rights see: *A.A.M. v. Sweden* App no 68519/10 (ECHR, 3 April 2014) para 73; *J.K. and Others v. Sweden* [GC] App no 59166/12 (ECHR 23 August 2016) para 96.

29 *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department* [2010] UKSC 31 [2011] 1 AC 596.

30 Jansen and Le Déroff (n 19).

31 *M.I. v Switzerland* App no 56390/21 (ECHR, 12 November 2024), para 30-33.

inhuman or degrading treatment in itself and that 'a hidden right is not a right'.[32] Concealing one's identity, or attempting to, is very likely to have severe psychological consequences on the individual,[33] which are enhanced on an otherwise already vulnerable child. Nevertheless, the roots of this argument go deep and still influence decision makers. By denying that a child is able to be 'sure' of their diverging SOGIESC, decision makers follow a similar pattern used to dismiss the well-founded fear of being persecuted.

The second argument in dismissive well-founded fear in LGBTQI+ cases is that of 'late disclosure' or *sur place* claims. *Sur place* claims are a possibility enshrined in the Refugee Convention which allow individuals to request asylum on grounds that arose after they left their country of origin. While SOGIESC is rarely considered a new element in asylum claims, meaning that it does not appear during the process of the application, the applicant may decide to disclose their sexual or gender identity publicly at any point of the process. Moreover, the applicant may be aware of their SOGIESC when in their country of origin but the risk of persecution on this account can arise after their flight. They may also have realized their LGBTQI+ identity on arriving in the country of asylum, particularly by being exposed to healthy and safe information regarding such topics which they could not access in their home country. While this topic is widely understudied, it appears from interacting with professionals in the field that this remains particularly relevant in the case of children who are still often freshly discovering their SOGIESC, including at later stages of the asylum procedure. Furthermore, the applicant may not feel confident in sharing such personal details with the authorities, particularly when the state authorities were the source of persecution in their home state, or when they were conditioned to feel ashamed of their identity.[34] Some may not even know that sexual orientation and gender identity are available grounds for international protection.[35] However, the late disclosure of one's SOGIESC is often used by decision makers to undermine the applicant's claim of well-founded fear.[36] This flows from the assumption that if the claimant did not disclose their SOGIESC at first, then they are not experiencing serious fear because of it. This goes as far as the systematic dismissal of any *sur place* claim by LGBTQI+ persons in some countries such as the Netherlands.[37]

3.1.2. The hurdle of subjective apprehension in children's claims

The subjective aspect of well-founded fear can be disproportionately hard for child applicants to establish.[38] The 'well-founded fear' criterion, however, cannot be detached from its subjective element. This is largely supported by UNHCR's interpretation of the Convention[39] as well as subsequent scholars.[40] Establishing subjective apprehension of harm entails the necessity for the applicant to comprehensively articulate their fear in a manner that is both understandable and convincing to the decision maker. Children may often have a harder time doing so, either due to their lack of maturity and education, or owing to fear of the authorities and of disclosing personal feelings. Additionally, as highlighted by Carr, children may not understand the purpose of the

32 UNHCR (No 12) para 25.
33 Ilan H Meyer, 'Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence.' (2003) 129 Psychological Bulletin 674.
34 Sabine Jansen, COC Netherlands, 'Pride or Shame: Assessing LGBTI Asylum Applications in the Netherlands Following the XYZ and ABC Judgments', (COC Netherlands, June 2018), https://www.refworld.org/reference/themreport/2018/en/122503.
35 Spijkerboer and Jansen (No 11); Manganini (No 13).
36 Ferreira (No 26).
37 European Asylum Support Office (EASO), 'Practical Guide: Qualification for international protection' (2018) *EASO Practical Guides Series*.
38 Bridgette Ann Carr, 'Incorporating a 'Best Interests of the Child' Approach into Immigration Law and Procedure' (2009) Yale Human Rights and Development Law Journal, Spring.
39 UNHCR Handbook (n 24), para 38.
40 Hathaway and Foster (n 3).

refugee status determination process and thus not comprehend the importance of sharing such personal feelings with the decision maker or their advocate.[41] In the case of LGBTQI+ child applicants, the requirement of subjective fear may become an obstacle to effective protection for those exact reasons when the child is too young to fully understand the stakes of being 'out' in their country of origin, particularly when they are sent abroad by parents or family members to seek protection. Moreover, children seeking asylum are extremely prone to mental health issues,[42] as are LGBTQI+ children.[43] The combination of those two vulnerabilities makes it extremely likely that LGBTQI+ children applying for asylum will present symptoms of post-traumatic stress disorder, depression, or anxiety, which significantly impacts their ability to express emotions truthfully.[44] In this context, establishing the subjective element of their well-founded fear can be an insurmountable obstacle which will undermine their application regardless of the real risk they may face if returned to their home country.[45]

Faced with this procedural hurdle, decision makers have adopted different avenues to avoid having to depend on the establishment of subjective apprehension in children's claims. The first avenue followed by decision makers to attempt to minimize the impact of the subjective apprehension requirement is to impute the parent's fear to the child.[46] In this sense, where parents (or close ones) are able to articulate a sufficient subjective fear that the child will suffer harm if returned to their country of origin, this may be enough to conclude the existence of a well-founded fear even where the child themself has not been able to express it. This approach is supported by UNHCR.[47] Nevertheless, in the case of LGBTQI+ child applicants, the feared harm is often at the hands of parents and close ones, which may render this method inefficient, or even counter-productive where the parent refuses to recognize the harm the child would face.[48] While this approach may be helpful in claims where the child fears criminalization from state actors or harm at the hands of third parties and the parents are supportive of the child's flight, the risk of negative inference in other cases is too high to ignore.

The second option, also supported by UNHCR,[49] consists of giving child applicants a total exemption from the subjective element of well-founded fear, and thus only expecting the child to establish well-founded fear based on the objective element. This is also supported by state practice which generally shows that the examination of the subjective element of a well-founded fear has been limited in children's cases.[50] Nevertheless, the absence of a formal exemption in international law leaves child applicants subject to the discretionary powers of national policies and decision makers, thus weakening their effective protection and 'inject[ing] a degree of arbitrariness into the refugee status determination that is unacceptable given the extraordinary cost of error'.[51] There is therefore a need to officialize the procedural exemption of subjective fear for child applicants, particularly when they appear too young to articulate such fear or when they

41 Carr (n 38); Stephanie Rap, 'The Right to be Heard of Refugee Children' (2023) Nordic Journal of Migration Research 13, 1, 1-16.
42 M Fazel and A Stein, 'The Mental Health of Refugee Children' (2002) 87 Archives of Disease in Childhood 366; Israel Bronstein and Paul Montgomery, 'Psychological Distress in Refugee Children: A Systematic Review' (2010) 14 Clinical Child and Family Psychology Review 44.
43 Venturi (n 6); Choukas-Bradley, S., Thoma, B.C., "Mental Health Among LGBT Youth", in D.P. Van der Laan and W.I., Wong (eds), *Gender and Sexuality Development, Contemporary Theory and* Research (Springer, 2022). DOI: 10.1007/978-3-030-84273-4_18.
44 Carr (n 38); UNHCR, 'The Heart of the Matter—Assessing Credibility when Children Apply for Asylum in the European Union', (December 2014), https://www.refworld.org/reference/regionalreport/unhcr/2014/en/98211.
45 Pobjoy (No 1).
46 UNHCR, 'The Heart of the Matter—Assessing Credibility when Children Apply for Asylum in the European Union', (December 2014), https://www.refworld.org/reference/regionalreport/unhcr/2014/en/98211.
47 UNHCR (n 23).
48 Pobjoy (n 1).
49 UNHCR (n 3).
50 Pobjoy (n 1).
51 Hathaway and Hicks (n 25).

present signs of mental health issues which would impede their ability to do so. When they are able to articulate subjective fear, it should be used as corroborative evidence in establishing their claim, but no adverse inference should be drawn from such statements.

3.2. 'Being Persecuted'

3.2.1. A child rights-based approach to the 'being persecuted' requirement

The requirement of 'being persecuted', otherwise referred to as 'persecution', is not defined in the Refugee Convention itself. This is a purposeful omission which allows for flexibility in its interpretation so as to encompass all forms of harm that may lead to a need for international protection.[52] Nowadays, the widely accepted definition of persecution is a human rights framework which conceptualizes it as a 'sustained or systemic violation of basic human rights demonstrative of a failure of state protection'.[53] It is then up to decision makers to assess whether the risk of harm presented by the applicant reaches the threshold of a 'sustained violation of basic human rights'. This approach has been predominantly accepted by states, with the strongest example being its codification in the European Union's Qualification Regulation in Article 9.[54] In line with states' obligations under Article 31(3)(c) the Vienna Convention on the Law of Treaties (VCLT), states are thus expected to assess the risk of persecution in light of their human rights obligations as defined in the treaties to which they are party. This includes general treaties such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), as well as specialized human rights treaties including the CRC.[55] The 'being persecuted' requirement should thus be assessed in child cases in a way that ensures child-sensitive safeguards and is in line with the binding child-specific obligations established in the CRC.

Following the human rights approach to persecution and the inclusion of the CRC within the ambit of the Refugee Convention's interpretation, specific attention must be given to children's vulnerabilities and needs when assessing the risk of persecution for the purpose of establishing eligibility for refugee status. UNHCR's Guidelines no 8 on child asylum claims provides that

> [a]ctions or threats that might not reach the threshold of persecution in the case of an adult may amount to persecution in the case of child because of the mere fact that [they are] a child. Immaturity, vulnerability, undeveloped coping mechanisms and dependency as well as the differing stages of development and hindered capacities may be directly related to how a child experiences or fears harm.[56]

In this sense, persecution must be assessed in a child-sensitive way. UNHCR and subsequent state and regional practices have defined two categories: child-specific forms of persecution, and child-related manifestations of persecution.[57] Child-specific forms of persecution refer to types of harm that are inherently specific to children such as child pornography, underage marriage, or female genital mutilation ('FGM'), and child-related manifestations of persecution are similar or identical to forms of harm that adults may suffer but for which the impact on children will be enhanced. The UNCRC has endorsed this approach, and highlighted the crucial importance for

52 OHCHR, *Protocol Relating to the Status of Refugees* ('Refugee Protocol') (1967).
53 Hathaway (n 3) 183.
54 UNHCR Handbook (n 24) paras 51-53; EU Qualification Regulation (n 12), art 9.
55 Jason M. Pobjoy, 'A Child's Rights Framework to Identifying Persecutory Harm' in Jasom M. Pobjoy(ed) *The Child in International Refugee Law* (Cambridge University Press 2017).
56 UNHCR (n 23), para 15.
57 ibid.

states to 'give the utmost attention to such child-specific forms and manifestations of persecution as well as gender-based violence in national refugee status determination procedures'.[58]

This distinction between forms and manifestations of persecution can be equated to a distinction between the rights in the CRC which are child-specific, and thus only exist in the CRC, from those which are otherwise present in global international human rights law treaties.[59] Following this, Pobjoy advances that, although all violations of child rights can constitute persecution, child-specific forms of persecution, being violations of child-specific rights, always have a serious impact on a child and should *de facto* be sufficient to establish persecution for the purpose of refugee status.[60] When it comes to child-related manifestations of persecution, the assessment of harm requires a child-sensitive approach. Such an approach requires the decision maker to look at the facts of the case and adapt their assessment of the severity of the harm suffered in light of the circumstances of the child's case, the child's vulnerability, and the different developmental stages.[61] Although this approach reflects the child-specific nature of persecutory harm, it does not begin to address the practical ways in which the decision maker should assess whether the required threshold for severity has been reached. A large discretion is left to the decision maker which is not affected by the recognition of child-specific approaches to persecution. This new approach merely allows for the acknowledgement of the specific harm suffered by children. This weakens the protection of children, leaves substantial space for abuse, and diminishes children's experiences of harm. From his case law studies, Pobjoy highlights that the practical application of this approach leaves a significant lack of consistency which in turn negatively impacts the ability of children to see the harm they suffer being recognized as amounting to persecution within the meaning of the Refugee Convention.[62]

3.2.2. The need for a specific consideration of LGBTQI+ child persecution

When looking at the case of LGBTQI+ children, the imputation of an adult perspective on the risk of persecution is particularly detrimental to the proper assessment of the child's claims. Asylum claims based on SOGIESC are in practice largely focused on whether or not the decision maker reasonably believes that the applicant is truly LGBTQI+. Since the risk of persecution must be connected to the ground for asylum (thus in these cases to the SOGIESC of the claimant) the assessment of the risk of persecutory harm is often minimized or ignored altogether when the identity of the applicant is questioned.[63] This also applies to child applicants, particularly since they may have a significantly more difficult time getting decision makers to believe that they are 'truly' LGBTQI+ (see section 3.4 below). Moreover, LGBTQI+ identity tends to have the 'effect of symbolically cancelling childhood'[64] due to the idea that only adults can be LGBTQI+. This further limits the capacity of LGBTQI+ children to see their claims assessed properly as children's cases.

When persecution is examined specifically, one of the main issues stems from the fact that persecution of LGBTQI+ persons is often at the hands of private actors. Family members, neighbours, community members, and strangers can be the source of persecutory harm, either directly by inflicting the harm themselves, or indirectly by exposing the applicant to persecutory treatment of the state—for instance, by denouncing the individual to the authorities where LGBTQI+

58 *I.A.M. (on behalf of K.Y.M.) v Denmark*, Communication No 3/2016, UN Doc CRC/C/77/D/3/2016 (25 January 2018) [11.3].
59 Ciara Smyth, 'The Human Rights Approach to 'Persecution' and Its Child Rights Discontents' (2021) 33 International Journal of Refugee Law 238.
60 Pobjoy (n 1).
61 Smyth (n 59).
62 Pobjoy (n 1).
63 Dustin and Ferreira (n 13).
64 Elisabeth Stubberud, Deniz Akin, Stine H, Bang Svendsen, 'A Wager for Life: Queer Children Seeking Asylum in Norway' (2019) Nordic Journal of Migration Research 9, 4, 448; Crawley (n 8).

conduct is criminalized or sanctioned.[65] Harm suffered by LGBTQI+ children at the hands of private actors can take many forms, ranging from psychological, physical, or sexual violence, to forced marriage, denial of healthcare, medical abuse, or 'corrective' or 'conversion' therapy.

When the persecution stems from the state, including in the form of criminalizing laws, persecution might be established when it is clear that the law is being enforced.[66] This should include all applicants identifying (or identified by persecutors) as LGBTQI+, even children. The impact of criminalizing laws on the assessment of a refugee claim is particularly relevant when examining the availability of state protection (see subsequent section 3.3). Nevertheless, the existence of laws criminalizing same-sex conduct, mandating surgical intervention on intersex children, or rendering impossible the access of transgender youth to healthcare, among others, are largely representative of the social environment in the country of origin.[67] Thus, they may be relevant in establishing that the applicant faces a real risk of persecution, in the form of physical violence due to social disapproval of LGBTQI+ identities, or in the form of compounded discriminatory practices which add up to persecutory harm even when not enforced directly by the state.[68] This is also the position of the European Court of Human Rights which stated that any act that 'arouses in [its] victim feeling of fear, anguish and inferiority, capable of humiliating and debasing them' should be considered as 'inhuman and degrading treatment'.[69] Such acts can have a strong(er) impact on children who have a harder time understanding the real consequences of such laws and are less equipped to face the state apparatus. Moreover, such laws can affect them directly. For instance, states which effectively enforce laws criminalizing same-sex conduct will not refrain from applying them equally to teenagers who are caught in the act. When the sentencing is not applied to children directly, the mere existence of such laws as well as the social environment created by the enforcement of criminalizing laws will likely expose the child to attempts at 'correcting' their sexual orientation through harmful practices which in themselves can amount to persecution. They can also be excluded and marginalized from society which creates a barrier to accessing all rights, particularly social, economic, and cultural rights which are fundamental to a child's development, such as access to healthcare and education.

To provide effective protection for LGBTQI+ children, there needs to be a strong assessment of the risk of being persecuted which does not depend solely on whether the applicant is believed to be LGBTQI+ by the decision maker. Indeed, while identity may be complicated, if not impossible, to undoubtedly prove, the existence of a risk of persecution is a tangible concept. Moreover, in cases where past persecution is part of the evidence, the nexus of the risk of persecutory harm to the ground for asylum can be established through the intention of the persecutor – although often hard to establish with certainty. In this sense, if the persecutor believes the applicant to be LGBTQI+ when committing or threatening harm to them, then a real risk of persecution may be established regardless of whether the child themself identifies as LGBTQI+.[70]

When considering child-related manifestations of persecution, or types of harm that are also found in adult cases, the examination of the risk of persecutory harm must be done in a child-sensitive manner. In this sense, considering a holistic approach to the CRC, the decision maker must consider all rights contained in the CRC, including social, economic, and cultural rights which may be just as relevant in establishing a risk of being persecuted, particularly when

65 UNHCR (n 9).
66 Spijkerboer and Jansen (n 11); Joined Cases C-199/12, C-200/12 and C-201/12 *X, Y, Z v Minister voor Imigratie en Asiel* [2013] ECLI:EU:C:2013:318, para 56.
67 Bush, K., 'Anti-Queer Policy as it Translates to Violence Against the LGBT Community' *University of New Hampshire Scholar's Repository, Honors and Capstones* 2023. https://scholars.unh.edu/honors/780; The Trevor Project, 'New Poll Emphasizes Negative Impacts of Anti-LGBTQ Policies on LGBTQ Youth', 2023, https://www.thetrevorproject.org/blog/new-poll-emphasizes-negative-impacts-of-anti-lgbtq-policies-on-lgbtq-youth/ accessed 3 June 2025.
68 UN Free & Equal (UNFE), *Fact Sheet: Refugee and Asylum* (2014).
69 *Soering v UK* App no 14038/88 (ECHR, 7 July 1989) para 100.
70 UNHCR (n 9).

violation of those rights stems from discriminatory practices.[71] Thus, when assessing the risk of persecution in such cases, decision makers should have a keen eye to the impact of the feared harm on the child both in the short and long term. We must therefore do away with the hierarchical classification of rights first put forward in Hathaway's human rights approach to persecution which prioritizes non-derogable civil and political rights, and ensure that all violations of rights within the CRC are considered.[72] In LGBTQI+ children's cases this will, for example, allow for the recognition of the serious impact of discrimination on the ability of those children to develop equally, for instance by accessing inclusive education or life-saving healthcare. Furthermore, decision makers should also take into consideration the fact that the essence of the rights of the CRC may inherently prescribe a lower threshold of severity in order for the criterion to be reached.[73] The rights in the CRC may then provide for a stronger protection than the child-sensitive reading of general human rights provisions, and should be the basis for establishing a violation of rights amounting to persecution.

When looking at child-specific forms of persecution, or the types of harm that are inherently specific to children, there is a strong need to see forms of harm suffered by LGBTQI+ children specifically recognized in order to facilitate their asylum claims on such grounds. For instance, the forced participation in conversion therapy in all its forms, including 'corrective' rape, should be sufficient to establish a serious risk of future harm. In the past decade, we have seen a recognition of FGM as a child-specific form of persecution which may give rise to international protection.[74] However, intersex genital mutilations (IGM), although having a comparable impact on intersex children, has not been given the same recognition. This largely stems from the fact that most states have not banned IGM within their own borders and continue to encourage such practices despite its qualification as torture by the UN Committee against Torture[75] and multiple human rights organizations.[76] In practice, the absence of official recognition of such forms of harms as child-specific forms of persecution by international bodies does not preclude decision makers from considering them as such on a case-by-case basis. Nevertheless, the absence of recognition adds a level of uncertainty and dependency on the decision maker's willingness to recognize them as sufficient ground. The recognition of LGBTQI+ child-specific forms of persecution by bodies such as UNHCR or regional human rights courts specifically in the context of asylum would significantly enhance the ability of those children to solidify their claims and thus effectively access refugee status by creating legal clarity and foreseeability.

Finally, the assessment of the existence of a risk of persecution must be effectuated in light of the general information available regarding the situation in the country of origin of the applicant.[77] The issue arising here when looking at LGBTQI+ claims, and even more in those lodged by children, stems from the regular unavailability or inaccuracy of country of origin information relating to the treatment of LGBTQI+ persons. State practice shows that the lack of decisive country of origin information relating to sexual orientation and gender identity for instance, is often used by decision makers as a sign that there is no sufficient ill-treatment occurring in the

71 UNHCR (n 12).
72 Smyth (n 59).
73 Pobjoy (n 55).
74 See for instance: UNHCR, 'Guidance Note on Refugee Claims relating to Female Genital Mutilation' (May 2009); *I.A.M. (on behalf of K.Y.M.) v Denmark*, Communication No 3/2016, UN Doc CRC/C/77/D/3/2016 (UNCRC 25 January 2018) para 11.4; *J.O. Zabayo v Netherlands*, Communication No 2796/2016, UN Doc CCPR/C/133/D/2796/2016 (OHCHR 13 October 2021) para 9.3.
75 See for example: Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 'Concluding Observations on the Seventh Periodic Report of France' UN Doc CAT/C/FRA/CO/7 (9 June 2016), para 34-35.
76 See for example: OII Europe, 'IGM' (2021) https://www.oiieurope.org/igm/ accessed 6 June 2025; ILGA Europe, 'Call to Criminalize Intersex Genital Mutilation in Europe' (2023) https://www.ilga-europe.org/news/call-to-criminalise-intersex-genital-mutilation-in-the-eu/ accessed 6 June 2025.
77 UNHCR Handbook (n 24), para 42; EU Qualification Regulation (n 12).

country of origin.[78] As children's LGBTQI+ identities are taboo in many societies and lack examination by international bodies, the probability of having reliable country of origin information regarding their real lived experiences is low. The absence of country of origin information cannot be taken to mean an absence of harm, particularly in the case of children for whom the consequences of harm are often tenfold, and for whom the impact of having their claims denied based on a weak analysis of country of origin information would therefore be disastrous. At most, country of origin information that does not corroborate the applicant's claim should be taken as only part of the negative evidence, and should be systematically complemented by additional evidence and critically scrutinized by the authorities. The benefit of the doubt[79] should be given to the child applicant whose story does not perfectly align with the known general country of origin information, focusing the assessment of their claim on the concrete forms of harm they fear.

3.3. Unavailability of State Protection or Unwillingness of the State to Provide It

The establishment of the risk of persecutory harm must consider the real availability of protection from the state authorities. In this sense, the 'well-founded fear of being persecuted' can only be satisfied when the state does not provide protection to the individual, either explicitly or implicitly, or when the applicant cannot be reasonably expected to reach out to the state to obtain protection. In this sense, persecution is understood as both a risk of serious harm and the failure of the state to protect the individual against said harm.[80] Two conditions can be applied to assess state protection: (1) the actor providing the protection should take 'reasonable steps' to prevent harm, among others through an 'effective legal system', and (2) the claimant should have access to the protection.[81] The reference to 'reasonable steps' does not equate to a mere examination of the state's willingness to provide protection, but should be a comprehensive assessment of the real protection available to the applicant. State protection should only be deemed sufficient to mitigate the need for international protection when it objectively lowers the risk of harm so that the fear of being subjected to harm is no longer 'well-founded'.[82] The assessment of the realistic availability of state protection must be future oriented, meaning that it must be available to the applicant presently or in the future in the event of a return, regardless of past events. An applicant who has benefited from state protection in the past but presents evidence that they cannot do so anymore would satisfy the criterion.

In the case of LGBTQI+ claimants, the unavailability of state protection can often be drawn from the existence of criminalizing or discriminatory laws. A claimant cannot be reasonably expected to reach out to the state for protection when the state itself is the actor of persecution. When the harm is committed by private actors, the claimant can also not expect to obtain protection from a state which would side with their persecutor, or has a history of ignoring complaints and requests for assistance from certain social groups. The state's inaction, such as the failure to respond to requests for assistance, can be sufficient to infer the failure of state protection.[83] Certain states have established good practices for LGBTQI+ claimants, such as the Netherlands, Germany, or Italy, which no longer require that the applicant has attempted to obtain state protection when the state criminalizes same-sex conduct.[84] When applying this framework to children's claims, one must take into consideration the added hardship for children in approaching state authorities to request assistance. Pobjoy highlights that, following this, a 'child cannot be expected to approach

78 Spijkerboer and Jansen (n 11).
79 The principle of the benefit of the doubt refers to the requirement that, where the applicant has made a genuine effort to substantiate their claim, and the general credibility of their claim has been established, elements lacking evidence due to circumstances beyond their control should not be used to completely discard their application. UNHCR Handbook (n 24); UNHCR, 'Beyond Proof: Credibility Assessment in EU Asylum Systems' (May 2013).
80 Hathaway (n 39).
81 EU Qualification Regulation (n 11), art 7.2.
82 Hathaway (n 3).
83 UNHCR (n 12), paras 37-39.
84 Spijkerboer and Jansen (n 11).

the state for protection if it would be impractical, futile or otherwise unreasonable for them to do so.'[85] This should be explicitly stated in international and national guidelines in order to facilitate the assessment of LGBTQI+ children's claims effectively.

3.4. Grounds for Asylum

LGBTQI+ children may apply for asylum on all grounds, as well as a compounded version of multiple grounds. Nevertheless, many of these children seek international protection directly due to their SOGIESC. In such cases, their application mainly falls under the 'membership of a particular social group' ('MPSG') ground. It is thus necessary to establish that LGBTQI+ children constitute a particular social group within the meaning of Article 1(A)(2) of the Refugee Convention. The establishment of this particular social group is fundamental in establishing the nexus between the act of persecution feared and a receivable ground for asylum. This nexus requirement is a core part of the refugee definition's interpretation mandating that the acts of persecution be tightly linked to one of the accepted grounds: it must then be clearly established that being an LGBTQI+ child is an accepted ground.

3.4.1. SOGIESC as grounds for asylum

Historically, LGBTQI+ persons applying for asylum based on their SOGIESC have qualified for asylum under the 'particular social group' ground. Under the Refugee Convention and the Qualification Regulation in the EU, Membership of a Particular Social Group can be established through two tests:[86] a protected characteristics test, and a social perception test. The protected characteristic test focuses on proving the existence of a common characteristic shared by members of the group which is so fundamental to their identity they could not be asked to deny or conceal it. This is the stance taken by the European Court of Justice ('CJEU') in the *X, Y, Z* case in which it concedes that 'sexual orientation is a characteristic so fundamental to [the claimant's] identity that [they] should not be forced to renounce it'.[87] A similar approach is taken with regards to gender identity.[88] Nevertheless, while trans claimants have succeeded in establishing MPSG, the case law on the matter remains incoherent and points to a fundamental lack of understanding of trans identities by caseworkers.[89] This is particularly the case when assessing a particular social group's existence through the social perception test. Following this approach, a group is considered a particular social group if it is cognizable by the surrounding society. In places where trans and gender-nonconforming individuals are largely invisible, this may be harder to establish. A similar argument can be made for other groups such as bisexual, non-binary, intersex, asexual persons, and others who lack social recognition, and even to gay, lesbian, and bisexual persons in some regions where homosexuality is widely erased. Nevertheless, the recognition of LGBTQI+ persons as a particular social group (or multiple particular social groups) has allowed for a general acceptance that such groups may qualify under the MPSG criteria.

The same reasoning can be followed for LGBTQI+ child applicants. However, there is no explicit recognition of LGBTQI+ children as a particular social group in themselves, rather, they are considered as part of the same group as LGBTQI+ adults. Therein, this is also largely dependent on how decision makers define a 'Particular Social Group', which varies from state to state. While it is possible that the nexus requirement could be fulfilled by considering that LGBTQI+

85 Jason M. Pobjoy, 'Refugee Children', in Cathryn Costello, Michelle Foster, and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (Oxford Academic 9 June 2021) 751.

86 While the UNHCR adopts an alternative approach to these tests, the Court of Justice of the European Union has adopted a cumulative approach in Joined Cases C-199/12 to C201/12 *X, Y, Z, v. Minister voor Immigratie en Asiel* [2013] ECLI:EU:C:2013:720, para 45.

87 ibid para 46.

88 Manganini (n 13).

89 Spijkerboer and Jansen (n 11); Manganini (n 13).

children fall under the adult particular social group, this risks obscuring their specific needs as children as well as the specificity of the persecutory acts that must be considered because they are children. In other words, the definition of LGBTQI+ children as a particular social group of their own can act as an additional safeguard that such claims will be treated specifically as children's claims.

3.4.2. Defining LGBTQI+ children as a 'Particular Social Group'

As of today, there is no clear or explicit recognition of children as a particular social group. Age is not an established ground for asylum under the Refugee Convention. Nevertheless, scholars have been working towards establishing children as a particular social group to secure their protection under refugee law. Pobjoy argues that there are two ways of defining children as a particular social group(s): either solely on the basis of the child's age as a group made up of all children, or as specific groups defined by the child's age plus some other common characteristics.[90]

The first approach agrees with both the immutable characteristic and the social perception approach. Children share a common characteristic in their child status and are generally cognizable as a distinct group in all societies. While one could argue that age, unlike other recognized characteristics, is not fixed over time, it remains impossible for a child to detach themself from their status as a child in order to avoid persecution. Age, in the case of children, must then be considered as a core part of the identity of the child and suffices to reach the shared characteristic approach.

The second approach would lead to the recognition of LGBTQI+ children as a particular social group based both on the child's age and their SOGIESC.[91] This approach strongly fits the common characteristic approach as the members of the particular social group would then share both their child status and an additional characteristic, such as their LGBTQI+ identity. In more practical terms, this approach can also be supported by recent developments at the European level. In 2024, the CJEU rendered a decision which concedes that women may constitute a particular social group solely based on the fact that they share a female identity, and that women victims of domestic violence constitute a particular social group sharing a 'common background that could not be changed'.[92] Following this, LGBTQI+ children could be considered as sharing an additional characteristic of sexual and gender identity diverging from the norm. This is the position taken by the European Union Agency for Asylum in its Guidance on Membership of a Particular Social Group which, although not binding, lists groups of children who may be considered as particular social groups. This list includes 'children who refuse to follow traditional cultural norms and are perceived to be different by the surrounding society'.[93] This has also been seen in developing state practices, notably in the UK Home Office Asylum Guidance.[94] Such a category could encompass children whose sexual or gender identity diverges from the hetero-cisgender norm.

In practical terms, LGBTQI+ children fulfil both the immutable characteristics test and the social perception test as long as the decision maker can accept the social existence of LGBTQI+ children. Nevertheless, it may often be more complicated to establish the social visibility of a group based on SOGIESC when it is made up of children.[95] As we have seen previously, LGBTQI+ applicants may have a hard time disclosing their identity both in their home country and during

90 Pobjoy (n 1).
91 Pobjoy (n 1).
92 Case C-621/21 *WS v Intervyuirasht organ na Darzhavna agentsia za bezhantsite pri Ministerskia savet* [2024] ECLI:EU:C:2024:47, para 49-51.
93 EUAA, 'Guidance on Membership of a Particular Social Group' (*European Union Agency for Asylum*, May 1, 2020) https://euaa.europa.eu/publications/guidance-membership-particular-social-group, accessed 6 June 2025, 23.
94 United Kingdom Home Office, 'Children's asylum claims Version 5.0' (17 December 2024) https://www.gov.uk/government/publications/processing-an-asylum-application-from-a-child-instruction/processing-childrens-asylum-claims-accessible, accessed 6 June 2025, 66.
95 Pobjoy (n 1).

the asylum procedure. Similarly, children may not always feel comfortable sharing their identities with the general public or may be largely more invisibilized when they do so due to their dependency on adults. This is largely supported by the fact that, despite numbers showing that LGBTQI+ children exist systematically all around the world,[96] the topic of LGBTQI+ children is taboo in most societies and remains under researched. In this context, requiring that the group be socially visible as a mandatory requirement to fulfil the MPSG criterion may lead to extensive issues for the claims of LGBTQI+ children. This is particularly due to the fact that decision makers rely largely on country of origin information when assessing the existence of a particular social group through the social perception test.[97] Combined with the absence of reliable or sufficient information regarding LGBTQI+ children in most countries, this creates a strong vulnerabilization of those children during the refugee status determination process. UNHCR has clarified that the establishment of a particular social group does not necessitate an assessment of social visibility, and it is not a requirement defined in UNHCR Guidelines on MPSG.[98] Nevertheless, it remains in practice, and has even been enshrined in the approach of the EU for which the Qualification Regulation makes the establishment of a particular social group dependant on the immutable characteristic and social perception approach cumulatively.[99] In this context, it may be necessary to explicitly limit the examination of the existence of a particular social group made of LGBTQI+ children to the innate characteristic test. Then, following the same reasoning as applied to adults, there should be no obstacles to the recognition of LGBTQI+ children as a particular social group, separate from LGBTQI+ adults or children in general, with particular needs, and requiring special attention in the assessment of their claims.

4. A RIGHT TO COMPLEMENTARY PROTECTION FOR LGBTQI+ CHILDREN

In cases where it is decided that the LGBTQI+ child does not meet the requirements for refugee status, returning the child to the country of origin may still not be in line with protection under the CRC. In this context, the regime of complementary protection, notably following the *non refoulement* obligation as defined under Article 33 of the Refugee Convention, read through a child-sensitive lens using the provisions of the CRC as a benchmark, could provide for the necessary protection.[100] Moreover, and more controversially, the Convention on the Rights of the

96 See for instance: IPSOS, 'LGBT+ Pride 2021 Global Survey: a 27 country Ipsos survey' (2021) https://www.ipsos.com/sites/default/files/ct/news/documents/2021-06/LGBT%20Pride%202021%20Global%20Survey%20Report_3.pdf, accessed 6 June 2025.

97 Spijkerboer and Jansen (n 11); Manganini (n 13).

98 UNHCR, 'Guidelines on International Protection No. 2: "Membership of a Particular Social Group" Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees', UN Doc HCR/GIP/02/02 (7 May 2002) para 11.

99 While this is the approach taken by the CJEU in its jurisprudence, it can be argued that such a cumulative approach is not compatible with the EU's own approach. Indeed, EU law states explicitly that the Qualification Directive (and thus the current Qualification Regulation) must be interpreted 'in a manner consistent with the Geneva [Refugee] Convention' (Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/50, art 78(1); Joined Cases C-199/12, C-200/12 and C-201/12 *X, Y, Z v Minister voor Imigratie en Asiel* [2013] ECLI:EU:C:2013:318., paras 39-40) which calls for an 'either or' approach to the tests applied to define particular social groups. Thus in line with this, the legal standing of the Qualification Regulation requirement could be challenged. This has yet to be done in practice, and to be applied in the Court's case law.
See also, International Commission of Jurists, 'X, Y and Z: A Glass Half Full for "Rainbow Refugees"? The International Commission of Jurists' Observations on the Judgment of the Court of Justice of the European Union in X, Y and Z V. Minister Voor Immigratie En Asiel" (International Commission of Jurists 2014) https://www.icj.org/wp-content/uploads/2014/06/CommentaryXYZ-Advocacy-2014.pdf.

100 It is necessary here to acknowledge that the extent to which the UNCRC can be invoked to provide additional protection for child refugees depends on how international treaties are incorporated into domestic legal systems. In monist systems, international treaties automatically become part of domestic law on ratification, meaning courts can directly apply the UNCRC in asylum cases. In dualist systems, treaties require domestic legislation to have legal effect, meaning the UNCRC can only influence refugee protection if it has been expressly incorporated. In this sense, the following analysis may be harder for

Child itself could be interpreted to contain an independent source of complementary protection.[101] Considering the CRC as both an interpretation tool regarding the *non refoulement* obligations of states and a potentially independent source of complementary protection is fundamental to enhancing the effective protection of LGBTQI+ children seeking international protection. This is particularly true due to the large ratification rate of the CRC which may allow for obligations to be upheld for states who are not parties to the Refugee Convention as well as ensure that such obligations are read in a child-specific manner. Moreover, the UNCRC is equipped to act as a monitoring body; notably it may receive individual complaints by virtue of its Third Optional Protocol.[102]

4.1. A child rights-based approach to the non refoulement obligation of states for LGBTQI+ children

Following international human rights law, when refugee status cannot be granted, an option for complementary protection remains which allows for the granting of protection to persons who do not fall within the ambit of the refugee definition but nonetheless cannot be returned in view of *non refoulement* obligations of states.[103] *Non refoulement* refers to the obligation on states under international human rights law to refrain from sending individuals back to a state where there is a risk that they will be exposed to ill treatment or a risk to their life or freedom.[104] This *non refoulement* obligation of states is a human rights or humanitarian obligation that is absolute.[105]

There is no unified system for complementary protection internationally as it remains a consequence of states' human rights obligations rather than an individual right. Therefore, there are multiple diverging approaches in determining what constitutes ill-treatment for the purpose of this protection. Such interpretation has been made on the basis of Article 3 of the UN Convention against Torture and other Inhuman or Degrading Treatment or Punishment (UNCAT) and Article 7 of the ICCPR. Such provisions have largely defined the meaning of *non refoulement* for all applicants. While the recognition of the role of the CRC in establishing a similar guidance regarding the specific case of child applicants is growing, it has so far been mostly overlooked.[106]

Nevertheless, a source of *non refoulement* obligation can be found in the CRC to apply specifically to child applicants. This has been underlined by the UNCRC in its General Comment No 6 in which it states that 'States shall not return a child to a country where there is substantial

applicants to rely on in dualist systems in which the national laws do not fully align with international treaty obligations. See Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 502–505.

101 Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford University Press 2007); Carr (n 38); Jason M Pobjoy, 'The Best Interests of the Child Principle as an Independent Source of International Protection' (2015) 64 International and Comparative Law Quarterly 327; Jane McAdam, 'Seeking Asylum under the Convention on the Rights of the Child: A Case for Complementary Protection' (2006) 14 The International Journal of Children's Rights 251.

102 Such individual complaint mechanism only applies to states which have ratified the optional protocol. UNCRC, *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure* (adopted 19 December 2011, entered into force 14 April 2014) UNGA Res 66/138.

103 Complementary Protection includes other forms of additional protection such as temporary protection. In this sense, it can be argued that complementary protection concerns all forms of protection which do not fall within the ambit of the Refugee Convention. For the purpose of this article, we will only consider the state obligations arising from complementary protection for humanitarian reasons and thus linked to their obligations of *non refoulement* as defined by international treaties such as the CAT, ICCPR and, evidently, the CRC.

104 *OHCHR*, 'The principle of non-refoulement under international human rights law' https://www.ohchr.org/sites/default/files/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf, accessed 6 June 2025.

105 McAdam (n 101).

106 Jane McAdam, 'Seeking Asylum under the Convention on the Rights of the Child: A Case for Complementary Protection' (2006) 14 The International Journal of Children's Rights 251, 251; Jason M Pobjoy, 'The Best Interests of the Child Principle as an Independent Source of International Protection' (2015) 64 International and Comparative Law Quarterly 327; Jason M Pobjoy, 'The *Convention on the Rights of the Child* as a Complementary Source of Protection' in Jason M Pobjoy (ed), *The Child in International Refugee Law* (Cambridge University Press, 2017).

grounds for believing that there is a real risk of irreparable harm to the child'.[107] It can be argued that the *non refoulement* obligation under the CRC is not limited to torture, inhuman or degrading treatment or punishment as under the UNCAT or ICCPR and may provide for a broader frame of protection. This has a twofold consequence on the assessment of (LGBTQI+) children's claims relating to a state's *non refoulement* obligations. First, the conception of real risk must be understood in a child-sensitive manner that does not create undue obstacles to the effective protection of the child. Second, this assessment must determine what irreparable harm means for the child applicant, in light of age and gender considerations.[108]

Looking at the requirement of a 'real risk', multiple approaches exist ranging from a similar conception to the requirements under 'well-founded fear' for refugee status to a broader approach of a 'more likely than not' risk.[109] McAdams and Pobjoy argue that the first approach may be best as the jurisprudence on well-founded fear is already well established. However, it may be argued that, based on the current position of the UNCRC, a different approach focusing on the objective risk of harm rather than the subjective fear of the applicant can be put forward which would award more protection to LGBTQI+ children in need of international protection. Indeed, it can be argued that the mention of 'real risk' should be interpreted in light of the UNCRC's approach in the case of *I.A.M (on behalf of K.Y.M.) v Denmark*. In its decision, the UNCRC advanced that states should apply a 'principle of precaution' whenever 'reasonable doubt exists that the receiving state cannot protect the child'.[110] Following this, it can be argued that the requirement of 'real risk' is limited to an assessment of the absence of 'reasonable doubt' which is largely easier to reach than the current approach to well-founded fear. In the case of LGBTQI+ children, this is particularly relevant due to the previously defined difficulties in establishing well-founded fear due to the perseverance of arguments such as the possibility of concealment or the impact of late disclosure as well as the hurdle of the subjective fear requirement. This is crucial in ensuring a more effective protection of LGBTQI+ children in need of international protection by recentring the assessment of their claim on the objective risk of harm they face on return rather than on the truthfulness or credibility of their identity.

Then, an assessment of the obligation of *non refoulement* on states in relation to children's claims must establish what is included under 'irreparable harm'. In this regard, the UNCRC does not establish an exhaustive list of acts but does require as minimum the consideration of all acts in violation of Article 6 (right to life, survival, and development) and 37 (protection against torture, inhuman or degrading treatment, or punishment) of the CRC as amounting to persecution.[111]

In the context of Article 37 of the CRC, all acts amounting to torture, inhuman or degrading treatment, or punishment shall be considered as amounting to 'irreparable harm'. The use of this provision, read in light of an LGBTQI+ children's rights-based approach, is justified largely by the broader extent of its ambit compared to Article 3 UNCAT or Article 7 ICCPR.[112] What is missing here to make the CRC framework efficient is a clearer interpretation of Article 37(a). Looking at the case of LGBTQI+ children seeking international protection, Article 37(a) should then be interpreted to include a similar approach to harm as defined under 'persecution' for the purpose of refugee status determination. In doing so, it must therefore adopt a similar LGBTQI+ child-sensitive approach which effectively recognizes the specific forms of harm that LGBTQI+ children face as amounting to torture, inhuman or degrading treatment or punishment in the

107 UNCRC, 'General comment No. 6 (2005): "Treatment of Unaccompanied and Separated Children Outside their Country of Origin"', UN Doc CRC/GC/2005/6 (1 September 2005), para 27.
108 ibid.
109 Pobjoy (n 106) 189.
110 *I.A.M. (on behalf of K.Y.M.) v Denmark*, Communication No. 3/2016, UN Doc CRC/C/77/D/3/2016 (25 January 2018), para 118.c.
111 UNCRC (n 107) para 27.
112 Pobjoy (n 106) 194.

sense of Article 37 CRC.[113] In the context of *non refoulement*, this approach is supported by the decision of the UNCRC in the case of *I.A.M (on behalf of K.Y.M.) v Denmark* as well as the decision of the Human Rights Committee in the case of *Zabayo v the Netherlands*. Both cases recognized FGM as a form of harm triggering the *non refoulement* obligations of the state in regard to a child applicant.[114] Similar case law would then be needed to develop a similar approach to LGBTQI+ child specific acts of persecution.

Nevertheless, the interpretation of 'irreparable harm' is far from limited to acts of violence amounting to persecution. Read in conjunction with Article 6 CRC, this interpretation must extend to all violations of CRC rights which limit the ability of the child to develop themselves adequately. In this regard, the UNCRC extends its interpretation to violation of socioeconomic rights such as the impact of the deprivation of 'food or health services' on children. For LGBTQI+ children this is highly relevant in light of the compounding violations that can occur due to the marginalization and ostracism they may face in their country of origin due to their identity. For instance, if a child is shunned out of their family or community due to their SOGIESC, they will face severe hardship in accessing education as well as health services which are crucial to their survival and development needs. This is made particularly relevant by the clear statement of the UNCRC that the forms of harm considered under this *non refoulement* obligation do not need to occur at the hands of the state and can equally 'originate from non-state actors'.[115] Moreover, the harm faced by LGBTQI+ children does not need to be directly aimed at them for a real risk of irreparable harm to arise.[116] Such harm may be the direct or indirect consequence of general negative attitudes concerning LGBTQI+ persons in the country of origin.

This analysis demonstrates the critical role of the CRC in shaping states' *non refoulement* obligations in cases involving LGBTQI+ children. By adopting a children's rights-based approach, the CRC framework ensures that children's claims are assessed in light of their unique vulnerabilities, rather than being measured against standards designed for adults. This perspective not only reinforces a more inclusive and protective interpretation of *non refoulement* but also highlights the necessity of considering both direct and indirect forms of harm. Although such an approach is rooted in the explicit words of the UNCRC, it may be necessary for a clearer binding approach to be formulated in order to enhance the use of the CRC in proceedings involving complementary protection. Following this, it may be argued that a stronger form of protection for LGBTQI+ children seeking international protection could be read into the CRC directly, effectively creating an independent form of complementary protection relying largely, although not solely, on the concept of the best interests of the child.

4.2. The convention on the rights of the child as an independent source of international protection for LGBTQI+ children

Another approach to the question of complementary protection, which has yet to find support in practice, lies in the possibility to rely on the CRC as an independent source of international protection for children. Mostly supported by Pobjoy, this approach argues that the CRC, through the Best Interests of the Child (BIC) principle may create an obligation for states to provide protection to children regardless of whether they qualify for refugee status pursuant to the Refugee Convention. Thus, ratification of the UNCRC engages states to recognize a 'new category of protected persons'[117] whose claims must be assessed by national asylum authorities.

113 See section 3.2. of this article.
114 *I.A.M. (on behalf of K.Y.M.) v Denmark*, Communication No. 3/2016, UN Doc CRC/C/77/D/3/2016 (25 January 2018), para 11.3; *J.O. Zabayo v Netherlands*, Communication No. 2796/2016, UN Doc CCPR/C/133/D/2796/2016 (13 October 2021).
115 UNCRC (n 107), para 27.
116 ibid.
117 Pobjoy (n 106) 199.

This framework, Pobjoy argues, sees its stronghold in the CRC's core principle of the BIC contained in Article 3 of the Convention. The BIC has been highlighted by the UNCRC as the 'primary consideration' in all matters involving and impacting children. Moreover, it underlined that the BIC must act as an interpretative legal principle and a rule of procedure (which is how it was approached above in order to read the Refugee Convention in a child-sensitive manner), as well as a substantive right of its own.[118] It is thus through its value as a substantive right that it could give rise to an independent source of international protection for children in need of international protection.[119]

While the best interests of the child should always be considered when assessing the claims of children, there could be significant added value in making the BIC, and therefore the CRC, the starting block of this assessment. From a practical standpoint, using the CRC as the source of international protection would assume that the BIC must be the first consideration when deciding on return. Thus, if return is not in the best interests of the child, there should be a strong reservation to sending the child back to their country of origin.[120] This approach is supported by the UNCRC which highlights in its General Comment No. 6 that return of the child 'shall in principle only be arranged if such return is in the best interests of the child'.[121] It flows from this that the considerations which may balance out the best interests of the child in a return decision must be tailored to acknowledge the special status of children under the CRC. Thus, the UNCRC makes clear that only 'rights-based' arguments may be invoked to override the best interests of the child, explicitly excluding interests linked to migration control from such considerations.[122] This approach is not limited to the CRC and has found support within the work of the special rapporteur on the human rights of migrants of the Human Rights Council, as well as UNHCR.[123]

Following this, such claims should have to be assessed within the framework of the CRC. Thus, when receiving claims from child applicants, states should thus be under an obligation to consider the standing of the claim in light of the BIC. The Best Interests Determination (BID) should then follow the guidance of the CRC and be carried out in individualized and context-specific assessments which take into consideration the specific vulnerabilities of the child such as their SOGIESC.[124] Although the UNCRC purposefully does not draw up an exhaustive list of points to be considered when determining the child's best interests, it does emphasize that a rightful BID should aim to ensure the 'full and effective enjoyment of the rights recognised in the Convention and its Optional Protocols, and the holistic development of the child'[125] and thus consider the long-term effect of the return decision.[126] Such a protection framework thus ensures that states place the CRC, and notably the BIC, at the centre of the assessment, going further than the facts of the claim and actively considering the broader context in which the child reached the country of destination. This assessment must thus be done in view of all rights of the CRC.

118 UNCRC, 'General comment No. 14 (2013): on "the right of the child to have his or her best interests taken as a primary consideration" (art. 3, para 1)', UN Doc CRC/C/GC/14 (29 May 2013).
119 McAdam (n 101).
120 Pobjoy (n 106) 199.
121 UNCRC (n 107), para 84.
This is also supported by the UNCRC in its recent cycle of concluding observations. See for instance: UNCRC, 'Concluding observations on the combined fifth and sixth periodic reports of Azerbaijan' (22 February 2023), para 40; UNCRC, 'Concluding observations on the combined fifth and sixth periodic reports of Canada' (23 June 2022), para 42; UNCRC. 'Concluding observations on the combined sixth and seventh periodic reports of the United Kingdom of Great Britain and Northern Ireland' UN Doc CRC/C/GBR/CO/6-7 (22 June 2023), para 50; UNCRC, 'Concluding observations on the combined sixth and seventh periodic reports of Mauritius' (23 February 2023), para 39; UNCRC, 'Concluding observations on the combined sixth and seventh periodic reports of Sweden' (7 March 2023), para 43.
122 UNCRC (n 107), para 20 and 86.
123 UNHRC, 'Report of the special rapporteur on the human rights of migrants', UN Doc A/HRC/15/29 (2010), para 45-49; UNHCR, 'Guidelines on Determining the Best Interests of the Child' (May 2008), p 76.
124 UNCRC (n 118), para 48.
125 UNCRC (n 118), para 82.
126 UNCRC (n 118), para 84.

When considering the claims of LGBTQI+ children to international protection, particularly in light of the obstacles considered previously in this article, recognizing the CRC as an independent source of protection could allow for the creation of a clean slate to assess such claims. In this sense, it would allow for the clear separation of children's SOGIESC claims from those of adults and effectively work towards the recognition of the intersectionality of the harm they face. In this sense, because the BID must consider a broader framework than the refugee status determination under the Refugee Convention, it leaves more space to the consideration of LGBTQI+ child-related concerns. Moreover, the direct use of the CRC as an independent source of international protection ensures that children's claims are assessed in a child-friendly way and empower the UNCRC to uphold a higher standard of protection through its monitoring function. Indeed, by recentring the protection framework around the CRC, this approach effectively ensures that children in need of international protection are actively considered in their status as children before their status as asylum applicants. This allows for a reframing of the state's approach to such claims by reducing their ability to resort to immigration control arguments to deny protection and effectively reverse the burden of proof from the applicant to the state. This option differs from the current regime of complementary protection mainly in creating a separate system with its own enforcement mechanisms, effectively creating a space reserved for children's claims and enhancing the chance that the CRC rights will be systematically and effectively considered and applied.

5. CONCLUSION

The intersection of international refugee law and children's rights highlighted in this study emphasizes the importance of a children's rights-based approach to asylum claims for LGBTQI+ children. Although the 1951 Refugee Convention lays the groundwork for international protection, it did not originally consider the specific vulnerabilities faced by children, particularly those who identify as LGBTQI+. This article illustrates that utilizing the CRC as an interpretative framework enhances the refugee protection system by ensuring that the distinct experiences of harm, persecution, and vulnerability encountered by LGBTQI+ children are adequately considered.

This article has reflected on each criterion applied to determine refugee status within Article 1(A) of the Refugee Convention. Thus, it first established the hurdles linked to defining the existence of well-founded fear for LGBTQI+ child applicants. To this end, it was highlighted that harmful beliefs that LGBTQI+ children can evade persecution by being 'discreet' or hiding their identity—an idea that has faced substantial criticism by human rights bodies and courts—continue to be used to reject their claims. Additionally, the expectation for children to provide clear and detailed accounts of their SOGIESC in order to define a subjective fear of harm fails to take into account the developmental and psychological hurdles they may encounter, particularly in hostile settings where their identities are suppressed.

Then, this article has also argued that persecution should be viewed through a child-sensitive lens, considering both child-specific forms of persecution that affect children (like conversion therapy, corrective rape, and intersex genital mutilation) and the broader child-specific manifestations of persecution (such as discrimination or lack of access to healthcare). The failure to recognize these harms as severe enough to qualify as persecution under the Refugee Convention leaves many LGBTQI+ children without the protection they need. Given the well-established principles of the CRC, particularly the right to non-discrimination, the right to identity, and the principle of the best interests of the child, there is an urgent need for decision makers to expand their understanding of what constitutes persecution for LGBTQI+ children. This necessitates systematic training for asylum officers and judges to ensure that asylum status determination procedures are carried out in an unbiased manner, free from cis- and heteronormative assumptions. Moreover, an official recognition of the forms of harms faced by LGBTQI+ children as

amounting to persecution by bodies such as the UNCRC or UNHCR would add to the foreseeability of such claims and help in ensuring that such forms of harms are adequately considered by national decision makers.

Moreover, the challenge of state protection remains a significant barrier for LGBTQI+ children seeking asylum. Many decision makers mistakenly believe that state protection is guaranteed simply because a country has decriminalized homosexuality or enacted non-discrimination laws. However, as this article has highlighted, legal protections on paper do not always equate to real safety, especially for children who rely on families and caregivers who may themselves inflict harm. In situations where state authorities fail to act, or even participate in the persecution of LGBTQI+ persons, LGBTQI+ children should not be expected to seek state protection before filing an asylum claim. Instead, international protection mechanisms must recognize the structural obstacles that hinder children from reporting abuse and grant them refugee status without imposing unreasonable evidentiary requirements.

Finally, this article considered the potential of officially recognizing LGBTQI+ children as a Particular Social Group in order to facilitate the recognition of their claims under the MPSG ground. While LGBTQI+ adults have been widely accepted to form a particular social group, the same cannot yet be said of children, particularly in view of the fact that age is not considered as a ground for asylum under the Refugee Convention. Legal precedents, notably from the CJEU, can however be utilized to argue that children can and should constitute a particular social group of their own, and that LGBTQI+ children should constitute an even more narrowly defined group to this end.

Furthermore, this article considered that, when LGBTQI+ children do not fit the refugee definition under the 1951 Convention, the Convention on the Rights of the Child (CRC) should act as an interpretation tool for assessing their claim to complementary protection. Moreover, it may also be argued that the CRC itself can constitute an independent source of protection. The BIC principle, highlighted in Article 3 of the CRC, offers a strong rationale for providing additional protection when sending a child back to their home country could lead to harm, discrimination, or a lack of access to essential rights. By acknowledging the BIC principle as a binding guideline in refugee and asylum law, countries can ensure that LGBTQI+ children are not compelled to return to situations where their dignity, identity, and safety are jeopardized.

This research ultimately advocates for a significant transformation in how international protection frameworks cater to the needs of LGBTQI+ children. Without specific reforms that focus on children's rights, such as recognizing LGBTQI+ children as a particular social group, allowing clear exemptions from the subjective fear criteria, and formally acknowledging child-specific forms of persecution, LGBTQI+ children will continue to encounter overwhelming challenges in their quest for safety. By fully incorporating a child rights-based approach into asylum processes, states can work towards a more inclusive and equitable system that upholds the rights of the most vulnerable, ensuring that no child is left unprotected due to systemic biases or outdated legal interpretations. This article thus argues that it is essential for states to embrace a genuinely child-centred, rights-based approach to asylum that transcends mere legal acknowledgment and leads to tangible policy changes, guaranteeing meaningful and effective protection for LGBTQI+ children around the world.

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