

**Ensuring Safety and Health for LGBTIQ+ Asylum Seekers in
Dutch Reception Centres:**

***Upholding the Netherlands' International Human Rights
Obligations in the Context of Equality and Non-Discrimination***

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‘A river cuts through rock, not because of its power, but because of its persistence.’

James N. Watkins

I always relied on this quote from an early age, as I was subjected to bullying on many grounds. Perhaps as a reaction to the oppression I faced, I persistently struggled for change. Sometimes, I try to show this through my articles and writings, as I am doing now, and sometimes, I try to do so through activism. Maybe I could not change things in Turkey, but perhaps the persistent drops I distilled have opened the way for change, even if just a little; I do not know. But as a gay, non-binary refugee, I strive to fight in this field so that others do not have to endure the pain I did. This thesis might form one drop of the river metaphorically used by the author, and our collective duty is to continue it.

I dedicate this thesis to LGBTIQ+ asylum seekers, who are highly likely to face various forms of discrimination in everyday life. I respectfully commemorate all LGBTIQ+ asylum seekers who, unable to fight, have ended their lives.

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ABBREVIATIONS

CAP : Center for American Progress

CDDH : Steering Committee for Human Rights

CERD : Committee on the Elimination of Racial Discrimination

CESCR : Committee on Economic, Social and Cultural Rights

CJEU : Court of Justice of the European Union

CMCE : Committee of Ministers of the Council of Europe

CO : Concluding Observations

COA : Central Agency for the Reception of Asylum Seekers

ECHR : European Convention on Human Rights

ECRE : European Council on Refugees and Exiles

ECRI : European Commission against Racism and Intolerance

ECtHR : European Court of Human Rights

EU : European Union

EUAA : European Union Agency for Asylum

GC : General Comment

GR : General Recommendation

HRCtee : Human Rights Committee

IAWG : Inter-Agency Working Group

ICCPR : International Covenant on Civil and Political Rights

ICERD : International Convention on the Elimination of All Forms of Racial Discrimination

ICESCR : International Covenant on Economic, Social and Cultural Rights

IDC : International Detention Coalition

IE-SOGI : Independent Expert on Sexual Orientation and Gender Identity

LGBTIQ+: Lesbian, Gay, Bisexual, Transgender, Intersex, Queer and others

NAPHR : National Action Plan on Human Rights

NGO : Non-Governmental Organisation

OIIIE : Organisation Intersex International Europe

PACE : Parliamentary Assembly Council of Europe

RCD : New Reception Conditions Directive

RSR : Report of the Special Rapporteur

TFEU : Treaty on the Functioning of The European Union

TGEU : Transgender Europe

UDHR : Universal Declaration of Human Rights

UN : United Nations

UNGA : United Nations General Assembly

UNHCR : United Nations High Commissioner for Refugees

UPR : Universal Periodic Report

WHO : World Health Organization

YP : Yogyakarta Principles

1. INTRODUCTION

1.1. Background of the Thesis

When I first sought asylum, I explained to the authorities at the police station my reasons for seeking refuge, including persecution for political reasons and sexual orientation. I was then transferred to Ter Apel, the main reception and registration centre for asylum seekers¹ in the Netherlands, where I was initially housed in a tent with nearly a hundred other people for a few days. Feeling vulnerable and alone, I removed my nail polish to avoid potential discrimination since there was no security close to the tent. Later, despite my clear disclosure of my sexual orientation to the authorities, I was placed in a shared room with a person who disapproved of my sexual orientation at the reception centre,² where I had to stay until my interview. The state authorities justified their actions, including transferring me to a reception centre with no other LGBTIQ+s, by stating that the ‘priority’ of my refugee claim was its political nature. Throughout my stay, I endured various forms of discrimination, including bullying and violence. Each time I raised concerns, I was advised to be less visible about my sexual orientation to enhance my safety. Despite these hardships, I eventually found acceptance among other asylum seekers. However, the experience has left me with persistent anxiety. Moreover, when I sought mental health services during my stay, I discovered that the available doctor was not a therapist, leaving me without the support I needed in the reception centre.

My story is not unique; there are worse stories. On February 17, 2023, a Russian transgender woman seeking asylum tragically took her own life in a Dutch reception centre.³ This event marked the second suicide involving an LGBTIQ+ asylum seeker⁴ in the Netherlands within less than two months,⁵ illustrating severe struggles to access essential healthcare, particularly hormones. Since the beginning of 2023, LGBT+ Asylum Support, a Dutch non-governmental

¹ An individual seeking international protection in countries with individualised procedures, meaning their application has not yet been decided. See. United Nations High Commissioner for Refugees (UNHCR), Glossary (2006) 4. Although this research focuses on asylum seekers, it also covers persons who have obtained status but still reside in reception centres. A refugee is someone who meets the criteria defined by international or regional frameworks, UNHCR authority, or domestic laws. See. UNHCR, Glossary (2006) 17. For the criteria for refugees at the international level, See. Convention Relating to the Status of Refugees, art.1.

² A facility designated to handle, process, and address the urgent necessities of refugees or asylum seekers when they land in a sanctuary country. See. UNHCR, Glossary (2006) 17.

³ Pink News (2023).

⁴ This term refers to asylum seekers who are LGBTIQ+, not necessarily seeking asylum due to their sexual orientation or gender identity. Additionally, the term ‘LGBT’ refers to lesbian, gay, bisexual, and transgender persons, often expanded to ‘LGBTIQ+’ to include intersex and queer people. The ‘+’ signifies the term’s inclusivity of all sex, gender, and sexual diversities. See. European Commission against Racism and Intolerance (ECRI), Glossary (2024).

⁵ Pink News (2023).

organisation (NGO), has recorded over 750 incidents of threats and violence in reception centres linked to sexual orientation and gender identity.⁶ This includes fifty death threats targeting LGBTIQ+ persons, notably at Ter Apel and among asylum seekers from countries where ‘homosexuality’ remains criminalised.⁷ Despite the introduction of separate accommodations for some LGBTIQ+s in 2015 following an attack against a gay person,⁸ recent reports from 2023 continue to highlight persistent discrimination.⁹ In fact, a severe attack on a gay couple in Ter Apel on May 6, 2024,¹⁰ has confirmed the concerns raised by NGOs.¹¹

In 2021, parliamentarians raised questions about the safety and mental health care for LGBTIQ+ asylum seekers in reception centres.¹² Concerns were highlighted about the frequent reports of incidents by LGBT+ Asylum Support and the lack of substantial feedback or follow-up. The Deputy Minister acknowledged many reports, however, noting some were not related to sexual orientation.¹³ The Deputy Minister also stated that the Safety Bureau at the Central Agency for the Reception of Asylum Seekers (COA) coordinates safety concerns but is not a crisis service.¹⁴ This means that on-site staff and security must handle immediate incident responses, which can lead to delays or insufficient support during evenings and weekends when the bureau is not fully operational. The Deputy Minister emphasised that psychosocial support and health services for asylum seekers are essentially the same as those provided to Dutch nationals, ensuring access to necessary mental health care.¹⁵ The Deputy Minister also expressed concerns about setting up separate LGBTIQ+ units in asylum centres, fearing it could lead to stigmatisation.¹⁶ Instead, a more inclusive approach is preferred, with tailored solutions to ensure the safety of LGBTIQ+ asylum seekers within existing accommodations.¹⁷ In November 2021, parliamentarians proposed a motion urging separate LGBTIQ+ units, emphasising their exceptional vulnerability.¹⁸ However, although the Deputy Minister acknowledged the vulnerable situation of LGBTIQ+ asylum seekers, the motion was not

⁶ NL Times (2024).

⁷ Dutch News (2015).

⁸ Ibid.

⁹ LGBT+ Asylum Support (2023) 38.

¹⁰ De Telegraaf (2024).

¹¹ Indeed, COC, another Dutch Non-governmental organisation, raised its concern on this issue, See. NL Times (2024).

¹² Tweede Kamer (TK), 2020-2021, No.3256.

¹³ Ibid. Answers 1-3.

¹⁴ Ibid. Answers 4-7, 10-11.

¹⁵ Ibid. Answer 20.

¹⁶ Ibid. Answers 23-25.

¹⁷ Ibid.

¹⁸ TK 2021-2022, 35 925 VI, No.93.

adopted due to the rationale that the COA was already implementing measures to address the issue.¹⁹ In 2023, the Parliament adopted a motion to integrate tailored quality standards for LGBTIQ+ asylum seekers into legislation, addressing gaps and aligning with NGO recommendations.²⁰ Despite these efforts, the recent attack on a gay couple in Ter Apel on May 6, 2024, highlights the need for further protection. As of June 2024, even the implementation of the existing motion remains uncertain due to the less accommodating stance of the current coalition.²¹

Despite the anti-discrimination mandates of numerous international²² and regional²³ human rights treaties to which the Netherlands is a party, LGBTIQ+ asylum seekers continue to face discrimination, as recent incidents clearly demonstrate. The right to equality and non-discrimination, alongside the foundational principle of equality as a basis for applying other rights, entails various state obligations, including respect, protection, and fulfil.²⁴ It is essential to question whether having anti-discrimination provisions and the resulting national laws alone is sufficient. The Netherlands still faces challenges in effectively addressing discrimination against LGBTIQ+ asylum seekers. Reports of rights violations and the lack of an effective response from the Deputy Minister suggest ongoing issues ensuring their safety within the equality framework. This underscores the need to address unique needs and vulnerabilities to ensure genuine equality. Indeed, Article 26 of the International Covenant on Civil and Political Rights (ICCPR) calls for states to adopt measures to ensure equality and protect against discrimination.²⁵ This is especially critical for disadvantaged groups such as LGBTIQ+ asylum seekers, emphasising the need for actions tailored to actualise this right.²⁶

On the other hand, the compounded vulnerability of LGBTIQ+ people, considering both their sexual orientation/gender identity and asylum seeker status,²⁷ requires states to reconsider their obligations towards LGBTIQ+ asylum seekers and constitutes the motivation of this thesis.

¹⁹ Ibid. 50.

²⁰ TK 2023-2024, 36 333, No.43.

²¹ Kabinetsformatie (2024).

²² e.g. International Covenant on Civil and Political Rights (ICCPR), art.26; International Covenant on Economic, Social and Cultural (ICESCR), art.2; International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

²³ e.g. European Convention on Human Rights (ECHR), Article 14; European Social Charter (ESC) Part V, art.E.

²⁴ Young (2022) 135; Moeckli (2022) 164.

²⁵ HRCtee GC No.18, para.10.

²⁶ e.g. HRCtee GC No.36, para.23.

²⁷ Teixeira (2020) 1038; Brandl, Czech (2017) 251.

1.2. Research Objectives & Questions

This thesis analyses how the Netherlands meets its international human rights obligations under the ICCPR and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) regarding the safety and health of LGBTIQ+ asylum seekers in reception centres. It examines international human rights law, which applies to ‘all individuals within its territory and subject to its jurisdiction’²⁸ regardless of legal status, which is crucial for asylum seekers who often lack refugee status and associated rights. The research assesses Dutch national legislation and policies, focusing on formal and substantive equality, protection from violence and bullying, and access to tailored healthcare. It identifies gaps in current practices and suggests normative changes for future guidelines.

Thus, this thesis primarily investigates the following question: How does and should the Netherlands fulfil its international human rights obligations under the ICCPR and ICESCR towards LGBTIQ+ asylum seekers within reception centres, specifically regarding their safety and health?

To explore this, the research considers four sub-questions:

- i. How do the concepts of formal and substantive equality, along with the provisions against direct and indirect discrimination under the ICCPR and ICESCR, frame the approach to non-discrimination in international human rights law?
- ii. Under the ICCPR and ICESCR, what are the obligations of the Netherlands to ensure the safety and health of LGBTIQ+ asylum seekers, specifically regarding protection against violence, bullying, and discrimination, as well as access to health services?
- iii. How are the obligations from the ICCPR and ICESCR transposed into Dutch national legislation and policy frameworks specifically for the protection of LGBTIQ+ asylum seekers?
- iv. Based on existing reports and data, what gaps and deficiencies are observed in the implementation of the Netherlands’ obligations under the ICCPR and ICESCR concerning the safety and health of LGBTIQ+ asylum seekers, and how might these gaps be addressed?

²⁸ e.g. ICCPR art.2(1).

1.3. Methodology & Structure

The thesis employs a mixed-method approach to answer the main question. Each sub-question is addressed with a specific methodology: Chapter 2 includes a descriptive review of equality/non-discrimination under the ICCPR and ICESCR, addressing the first sub-question by defining equality/non-discrimination, examining substantive equality, and contributing to the existing academic discourse while offering practitioner insights. Chapter 3 provides a descriptive analysis of state obligations towards LGBTIQ+ asylum seekers' safety and health, addressing the second sub-question by examining how principles of equality and non-discrimination underpin these obligations. It identifies 'vulnerability'²⁹ as a basis for state obligations, examines safety in terms of protection against discrimination, and explores health obligations, particularly mental health and gender-affirming healthcare.

The examination centres on equality and non-discrimination as mandated under the ICCPR and ICESCR, chosen for their relevance to civil, political, and socio-economic rights. These treaties are pivotal, with the ICCPR articulating equality as an autonomous right³⁰ and the ICESCR addressing health-related obligations.³¹ The analysis will extensively draw upon General Comments (GC), Views, and Concluding Observations (CO) from the Human Rights Committee (HRCtee) and the Committee on Economic, Social and Cultural Rights (CESCR). CO from the HRCtee are selected for their focus on different types of discrimination, while those from the CESCR are chosen for their specific references to mental health and applicability to European Union (EU) states. The discussion also integrates insights from relevant soft-law instruments such as the Yogyakarta Principles (YP), which address specific healthcare needs, including gender-affirming healthcare, to provide a detailed understanding of the legal obligations and frameworks. These soft-law instruments were selected because they guide areas not explicitly mentioned by the CESCR.

Chapter 4 combines an evaluative and normative analysis of the third and fourth sub-questions, evaluating Dutch legislation's enactment and effectiveness in protecting LGBTIQ+ asylum seekers. It uses reports and data that comprehensively focus on the safety and health challenges faced by LGBTIQ+ asylum seekers in reception centres. These include NGO reports and

²⁹ Labelling specific groups as vulnerable can be criticised for potentially stigmatising and victimising them (Ducoulombier (2017) 202; Quinan et al. (2020) 350). However, in this thesis, the term is used synonymously with 'disadvantaged' or 'marginalised,' referring to the discrimination that certain groups frequently face socially and historically. This term is chosen for its widespread use in many international documents and reports.

³⁰ ICCPR art.26; HRCtee GC No.18, para.12.

³¹ ICESCR art.12.

individual research, selected for their comprehensiveness, relevance to the thesis topic, the questions they address, and their comparison of findings with previous studies to show progress. This chapter identifies gaps and measures policy effectiveness, concluding with recommendations for improving compliance with ICCPR and ICESCR obligations.

1.4.Limitations

This thesis focuses on LGBTIQ+ asylum seekers, including those persecuted for their sexual orientation and others identifying as LGBTIQ+ under various asylum grounds. It will not discuss the specific issues faced by asylum seekers who are perceived as LGBTIQ+ but do not identify as such, as their unique vulnerabilities require a broader investigation. Additionally, the research uses LGBTIQ+ as an umbrella term and generally does not distinguish between different LGBTIQ+ identities unless specific needs, particularly for trans or intersex persons, become relevant. The asylum procedure itself is not investigated.

Since Dutch legislation must align with EU law,³² this thesis will primarily refer to EU Directives, citing Dutch law only where it is particularly relevant. Apart from the ICCPR and ICESCR, other treaties, non-binding documents, and applicable European Court of Human Rights (ECtHR) decisions will be referred to whenever particularly relevant.

A notable limitation is the targeted exploration of state obligations regarding equality and non-discrimination, particularly concerning safety and health for focused groups. Issues like bullying, violence, and health concerns, mainly psychological and specialised healthcare needs of trans and intersex persons, are emphasised. Broader rights, such as the right to security of a person or the right to life, are mentioned within discussions on safety and health but are not analysed in depth.

Lastly, NGOs and independent research will be used due to the absence of data from UN-based institutions.³³

³² Bobek (2023) 177.

³³ See. Section 4.3.

2. LAYING THE GROUNDWORK: EQUALITY, DISCRIMINATION, AND PATHWAYS TO JUSTICE

2.1. Equality and Non-Discrimination: A Foundational Principle and a Right

Equality is often found as a complex and difficult-to-define concept.³⁴ The terms of equality and non-discrimination are closely intertwined and should be considered together.³⁵ Indeed, they are complementary and indivisible notions³⁶ since the main aim of the prohibition of discrimination, central to the principle of equality, is to address and eliminate social inequalities.³⁷ Thus, one term serves as a positive articulation while the other represents a negative expression of the same fundamental principle.³⁸ Consequently, they are frequently interchangeable.³⁹ Recently, however, these terms have been given a more affirmative framing; while non-discrimination is seen as a formal concept,⁴⁰ equality emphasises a proactive approach targeting genuine equality.⁴¹

In the legal context, these two concepts can be understood in two ways, as a foundational principle and as a right.⁴² In this context, the legal principle of equality is designed to function as a tool that guarantees the fulfilment of basic human rights for all individuals, irrespective of their power, talent, or wealth.⁴³ Moreover, the non-discriminatory respect for human rights and fundamental freedoms is accepted as a basic principle of international human rights law.⁴⁴ The Universal Declaration of Human Rights (UDHR) starts by highlighting that the essence of human rights is rooted in human dignity and equality.⁴⁵ This foundational belief is reinforced by articles which outline fundamental principles such as equality and non-discrimination.⁴⁶ The ICCPR also encompasses both substantive rights and the principle of equality, affirming these concepts throughout its provisions.⁴⁷ Indeed, Article 2(1) of the ICCPR regulates that all rights protected in the Convention must be safeguarded without unjustified treatment differences (see

³⁴ Loenen (1995) 194.

³⁵ Keleş (2019) 3; Kudret (2020) 1081.

³⁶ CESCR, GC No.16, para.10; Gülmez (2010) 221.

³⁷ CESCR GC No.16, para.10.

³⁸ Moeckli (2022) 152.

³⁹ Ibid.

⁴⁰ Shelton (2020) 132.

⁴¹ Moeckli (2022) 152.

⁴² Ibid. 154.

⁴³ Loenen (1995) 196.

⁴⁴ Moeckli (2022) 151; CESCR, GC No.20 para.2.

⁴⁵ Universal Declaration of Human Rights (UDHR), art.1.

⁴⁶ Ibid. art.2; Shelton (2020) 126.

⁴⁷ Shelton (2020) 127.

below). A similar expression is included in ICESCR article 2(2). These serve as accessory norms,⁴⁸ which means they cannot be invoked independently and must always be claimed in conjunction with other rights.⁴⁹ This characterisation emphasises their supportive role in ensuring the principle of equality and non-discrimination is applied throughout the rights protected under these conventions.

On the other hand, equality/non-discrimination is not only a foundational principle but is also established as an autonomous right under Article 26 of the ICCPR.⁵⁰ This provision specifies that ‘All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination...’ Consequently, Article 26 serves as a standalone non-discrimination clause, which operates independently of other rights outlined in the Covenant.⁵¹

2.2. Direct and Indirect Discrimination and the Grounds for Prohibition

Although the HRCtee does not explicitly define equality, it characterises the negative aspect of discrimination in GC No. 18. The GC defines discrimination as ‘...to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.’⁵² CESCR also made a similar definition.⁵³

International human rights law prohibits discrimination not only in terms of treatment but also in terms of outcomes, addressing both direct and indirect forms regardless of intent.⁵⁴ Direct discrimination arises when an individual is treated less favourably than another in similar circumstances based on prohibited grounds.⁵⁵ In other words, this kind of discrimination arises from a breach of the formal equality principle.⁵⁶ The assessment of such inequality of treatment

⁴⁸ Petersen (2021) 426; Slingenberg (2016) 178.

⁴⁹ HRCtee GC No.18, para.12; CESCR, GC No.16, para.2.

⁵⁰ HRCtee GC No.18, para.12.

⁵¹ Choudhury (2003) 29.

⁵² HRCtee GC No.18, para.7.

⁵³ CESCR GC No.20, para.7.

⁵⁴ Moeckli (2022) 151.

⁵⁵ Ibid. 158; Fredman (2023) 306; Slingenberg (2016) 93.

⁵⁶ Acconciamezza (2022) 240.

requires justification of differential treatment and, importantly, whether those compared are in analogous situations.⁵⁷

Indirect discrimination, on the other hand, involves practices or rules that appear neutral but result in disproportionate impacts on specific groups identified by protected characteristics.⁵⁸ For example, different labour conditions for part-time workers can disproportionately affect women, as they are more likely to work part-time due to childcare and domestic ‘obligations’.⁵⁹ These rules/policies highlight how treating all parties the same can inadvertently lead to disparate outcomes due to structural biases.⁶⁰ Although the HRCtee has not explicitly defined this form of discrimination in its GCs, it has implicitly recognised it by using the term ‘effect’ to describe the impacts observed,⁶¹ which it later explicitly addressed in its views.⁶² Yet, the CESCR has explicitly articulated this concept in its GCs.⁶³

It is important to note that international human rights law does not require discriminatory intent for an act to be considered discriminatory.⁶⁴ This framework encompasses both intentional and unintentional forms of discrimination, as recognised in the HRCtee’s broad definition of discrimination.⁶⁵

Moreover, not all distinctions constitute discrimination; the HRCtee clarified in its GC on non-discrimination that differentiations in treatment are permissible if they are based on reasonable and objective criteria and aimed at achieving a legitimate purpose under the ICCPR.⁶⁶ The CESCR similarly upheld this position regarding justified differentiation.⁶⁷

As for prohibited grounds, both the ICCPR and ICESCR articulate non-discrimination in terms that allow for a broad interpretation. Shelton notes that the use of phrases like ‘such as’ followed by ‘other status’ in legal texts typically suggests that the list of discrimination grounds is intended to be non-exhaustive.⁶⁸ This interpretation is reinforced by the HRCtee’s views, such as in *Gueye*, where the Committee considered that a differentiation based on nationality

⁵⁷ Moeckli (2022) 158.

⁵⁸ Ibid. 159; Slingenberg (2016) 93.

⁵⁹ Loenen (1995) 202; Fredman (2022) 306.

⁶⁰ Moeckli (2022) 159 ; Loenen (1995) 202.

⁶¹ HRCtee, GC No.18, para.7.

⁶² Moeckli (2022) 159; Petersen (2021) 429; *Althammer et al.(HRCtee)*, para.10.2; *Miriana Hebbadj(HRCtee)*, para.7.14; *Prince(HRCtee)*, para.7.5; *Derksen(HRCtee)*, para.9.3; *Sonia Yaker(HRCtee)*, para.8.14.

⁶³ CESCR GC No.16, para.13; CESCR GC No.20, paras.7,10.

⁶⁴ Moeckli (2022) 160.

⁶⁵ Choudhury (2003) 37; HRCtee, GC No.18, para.7.

⁶⁶ HRCtee GC No.18, para.13.

⁶⁷ CESCR GC No.20, para.13.

⁶⁸ Shelton (2020) 132; Moeckli (2022) 158; Choudhury (2003) 30.

acquired upon independence falls under ‘other status’ because the ICCPR aims to protect ‘all persons’ universally.⁶⁹ Subsequently, the HRCtee, in its GC on state obligations, emphasised that Article 2(1) of the ICCPR should be interpreted to include protections for asylum seekers, reaffirming its application to all within a state’s jurisdiction.⁷⁰ Furthermore, the HRCtee has interpreted ‘sex’ to include sexual orientation⁷¹ as well as ‘gender identity’⁷² encompassing transgender status,⁷³ offering protection against discrimination based on these aspects under the categories established in Article 26 ICCPR.⁷⁴ The Committee has explicitly stated that the terms ‘everyone’ in Article 9 and ‘every human being’ in Article 6 of the ICCPR include LGBTIQ+ persons, ensuring their inclusion and protection under the rights discussed.⁷⁵

Although the HRCtee did not explicitly state this, the CESCR has clearly indicated in its GC that ‘other status’ should be interpreted as an open-ended term.⁷⁶ Following this clarification, the CESCR emphasised that ‘other status’ also encompasses groups such as asylum seekers⁷⁷ and LGBTIQ+ individuals.⁷⁸

Thus, Article 26 of the ICCPR, along with similar clauses in the ICESCR, underscores a flexible and inclusive framework for advancing equality and non-discrimination. By broadly interpreting ‘other status,’ these provisions enable both recognised and emerging groups, including LGBTIQ+ asylum seekers, to affirm their rights under international law, reflecting the HRCtee’s dynamic understanding of human rights protections.

2.3. Formal and Substantive Equality in Human Rights Law

As previously noted, equality manifests in two fundamental concepts: formal and substantive equality. Formal equality, rooted in Aristotle’s maxim, asserts that equals should be treated equally, focusing primarily on uniform law application.⁷⁹ While formal equality emphasises procedural fairness, it may overlook individual differences, potentially perpetuating existing

⁶⁹ *Gueye et al.(HRCtee)*, para.9.4; Shelton (2020) 141; Moeckli (2022) 158; HRCtee GC No.15, paras.1,7; *Nell Toussaint(HRCtee)*, para.11.7.

⁷⁰ HRCtee GC No.31, para.10.

⁷¹ *Toonen(HRCtee)*, para.8.7; *Young(HRCtee)*, para.10.4; *X(HRCtee)*, para.7.2; *C(HRCtee)*, para.8.4. HRCtee reiterated this by referring to these decisions in its subsequent decisions. e.g. *Irina Fedotova(HRCtee)*, para.10.5; *Nikolai Alekseev(HRCtee)*, para.7.12.

⁷² *Nepomnyashchiy(HRCtee)*, para.7.3; *C(HRCtee)*, para.8.4; *Nikolai Alekseev(HRCtee)*, para.7.12; *Vladimir Ivanov(HRCtee)*, para.7.12; *Ruslan Savolaynen(HRCtee)*, para.7.15.

⁷³ *G(HRCtee)*, para.7.12.

⁷⁴ Petersen (2021) 433-434; Moeckli (2022) 158; O’Flaherty (2022)311-312.

⁷⁵ HRCtee GC No.35, para.3; HRCtee GC No.36, para.61.

⁷⁶ CESCR GC No.20, para.15.

⁷⁷ *Ibid.* para.30.

⁷⁸ *Ibid.* para.32.

⁷⁹ Moeckli (2022) 152-153; Loenen (1995) 195; Fredman (2022) 9.

inequalities.⁸⁰ Additionally, Fredman observes that practical implementation can inadvertently sustain inequalities despite efforts to ensure equal treatment.⁸¹ She elaborates that the aim should not be to eliminate differences but to prohibit the detriment attached to such differences, preferably by adjusting existing norms to accommodate differences.⁸² Thus, unequal treatment is sometimes essential to attain true equality, as differences must be accounted for to foster absolute parity.⁸³ Indeed, as Petersen has pointed out, no two individuals will ever be completely equal in every aspect.⁸⁴

Substantive equality complements formal equality by considering different groups' actual needs and circumstances to achieve genuine equality, requiring measures that ensure differences in treatment are proportionate to the differences in position between groups.⁸⁵ Fredman suggests that an alternative conception of equality, rooted in a more substantive view of justice, should concentrate on correcting maldistribution.⁸⁶ She further clarifies that measures, such as affirmative action, which rely on classifications to address disadvantage, are not regarded as a breach of equality but as a means to achieve it.⁸⁷ The HRCtee's GCs reflect this notion, suggesting that equality does not always necessitate identical treatment but should accommodate differences to ensure that rights are equally enjoyed.⁸⁸ Furthermore, the Committee supports the idea that affirmative actions may be necessary to correct conditions that perpetuate discrimination, viewing such measures as legitimate differentiations under the Covenant to accomplish actual equality.⁸⁹

In contrast to the more implicit interpretations by HRCtee, the CESCR provides a more explicit framework, emphasising that achieving rights under the ICESCR necessitates addressing both formal and substantive disparities.⁹⁰ Furthermore, the Committee specifies that genuine equality requires proactive strategies, including affirmative actions designed to mitigate historical and structural disadvantages.⁹¹ This direct approach by the CESCR clarifies that

⁸⁰ Moeckli (2022) 153; Shelton (2020) 132; Loenen (1995) 195.

⁸¹ Fredman (2022) 2,280.

⁸² Ibid.15.

⁸³ Ibid.

⁸⁴ Petersen (2021) 423.

⁸⁵ Moeckli (2022) 153-154; Young (2022) 136; Loenen (1995) 197.

⁸⁶ Fredman (2022) 3.

⁸⁷ Ibid.29,372.

⁸⁸ HRCtee GC No.18, para.8. The HRCtee's members also referred to substantive equality in their views. See. *Eugénie Chakupewa et al.(HRCtee)*, Concurring opinion by Bulkan and Tigroudja, para.6.

⁸⁹ HRCtee GC No.18, para.10.

⁹⁰ CESCR GC No.16, paras.6-8; CESCR GC No.20, para.8.

⁹¹ CESCR GC No.16, para.36. CESCR extends this approach to specific needs. See. CESCR GC No.22, paras.23-24.

achieving substantive equality involves more than mere legal equality; it requires practical measures tailored to overcome actual inequities, ensuring that all individuals can enjoy their rights fully and equally.

These insights provide a substantive understanding of equality that addresses complex societal issues while respecting the unique circumstances of individuals under international law. Indeed, as Loenen has pointed out, ‘substantive equality is a demand for inclusion.’⁹²

However, applying substantive equality is not without its challenges. It demands differential treatment, which can complicate legal applications and risk entrenching divisions or even unintentionally fostering segregation if not carefully managed.⁹³ Loenen underscores the importance of an intermediate approach that neither relies solely on individual assessments nor uniform applications.⁹⁴ This approach, which considers group-specific characteristics, aims to correct systemic inequalities and focus on equitable outcomes rather than identical treatment.⁹⁵

Practically, achieving substantive equality involves legislative measures tailored to specific group characteristics, recognising that formal equality does not suffice to address real-world inequalities.⁹⁶ For instance, differentiated treatment based on group characteristics such as income or employment status helps address systemic inequalities, thus realising substantive equal treatment by focusing on equitable outcomes rather than mere treatment equality.⁹⁷ Fredman notes that lawmakers encounter considerable complexity when transforming abstract concepts of equality into actionable legislation, emphasising that it is essential for these legal definitions to be clear and understandable yet also include practical tools for actualising equality.⁹⁸ Moreover, fully embracing the right to equality may necessitate more innovative legal frameworks that extend beyond merely outlawing discriminatory actions to actively imposing obligations to foster equality.⁹⁹ Loenen underscores that acknowledging differences for inclusionary purposes is crucial, and substantive equality demands that unalikes be treated according to their unlikeness to truly level the playing field.¹⁰⁰ Moeckli also supports

⁹² Loenen (1995) 196.

⁹³ *Ibid.* 199-200.

⁹⁴ *Ibid.* 197-198.

⁹⁵ *Ibid.* 198.

⁹⁶ *Ibid.* 201-203.

⁹⁷ Loenen (1995) 202.

⁹⁸ Fredman (2022) 4.

⁹⁹ *Ibid.*

¹⁰⁰ Loenen (1995) 198,200-202.

combining formal and substantive equality, suggesting that a blended approach is essential for laws and policies to effectively meet diverse needs and enhance true equality.¹⁰¹

Having explored the foundational principle and right of equality/non-discrimination, including the nuances of direct and indirect forms, it can be seen how both formal and substantive equality are essential to address the complex realities faced by LGBTIQ+ asylum seekers. These groups can seek redress under Article 26 of the ICCPR, which functions autonomously as a right and as a principle that bolsters claims in conjunction with other rights within the ICCPR and ICESCR. This enables claims to be framed in terms of both direct and indirect discrimination. While formal equality ensures equal access to rights, substantive equality is crucial for achieving genuine equality and addressing deeper societal and structural disparities.

However, legislation may not always be sufficient to achieve substantive equality. As Loenen highlights, the inherent limitations of legislation mean that achieving absolute equality is practically impossible, requiring legislatures to tailor laws to diverse societal needs.¹⁰² This sometimes necessitates temporary special measures, especially when substantive equality cannot address all specific or severe inequalities. Such measures, crucial for accelerating the achievement of equity, particularly for groups facing significant systemic disadvantages, will be discussed in the next chapter on state obligations. They are phased out once their goals are accomplished, reinforcing the dynamic nature of achieving equality.

¹⁰¹ Moeckli (2022) 167.

¹⁰² Loenen (1995) 197,201-202.

3. ENSURING SAFETY AND HEALTH: STATE OBLIGATIONS UNDER THE ICCPR AND THE ICESCR

This chapter examines state obligations using a tripartite typology, specifically focusing on equality/non-discrimination under the ICCPR and ICESCR. It provides an overview of state obligations and then delves into the vulnerability doctrine as a basis for these obligations, comparing the approaches of the HRCtee and CESCR. The chapter explores state obligations upon arrival of LGBTIQ+ asylum seekers, followed by an analysis of their safety, with emphasis on protection from discriminatory behaviour and violence, primarily addressing these issues through the lens of the HRCtee. It then addresses state obligations related to mental health and gender-affirming healthcare, utilising the CESCR's approach. Due to the absence of explicit references to gender-affirming healthcare by the CESCR, relevant soft law instruments are also used to interpret the CESCR's stance.

3.1. Overview of State Obligations Under International Law

Rights inherently justify the imposition of duties; rights are the foundation, and the duties they engender are essential for their realisation.¹⁰³ Consequently, as Shelton emphasises, human rights law establishes a complex set of binding obligations on states articulated through global and regional frameworks that compel states to 'respect,' 'ensure,' 'secure,' 'prevent and punish,' 'adopt measures,' 'guarantee,' and 'cooperate with each other' to ensure all individuals fully enjoy their rights.¹⁰⁴ Indeed, similar expressions also appear in the ICCPR and ICESCR as 'respect and ensure'¹⁰⁵ or 'take steps.'¹⁰⁶ This terminology underscores the necessity for states to avoid direct violations of rights and take proactive steps to guarantee their realisation.¹⁰⁷ As developed by scholar Asbjørn Eide and embraced by various human rights bodies, the framework of state obligations categorises these duties into three main types: to respect, protect, and fulfil human rights.¹⁰⁸ This tripartite typology, which helps clarify the spectrum of actions states must undertake to secure human rights effectively,¹⁰⁹ is also reflected in the GCs of the CESCR.¹¹⁰

¹⁰³ Young (2022) 131.

¹⁰⁴ Shelton (2020) 194.

¹⁰⁵ ICCPR art.2(1).

¹⁰⁶ ICESCR art.2(1).

¹⁰⁷ Shelton (2020) 194; Young (2022) 134-135. As Young pointed out, these could be named negative (requiring restraint) and positive (requiring action) obligations. Also See. Beijer (2017) 57.

¹⁰⁸ Shelton (2020) 194; Young (2022) 135.

¹⁰⁹ Young (2022) 130.

¹¹⁰ e.g. CESCR GC No.14, para.33; CESCR GC No.22, para.39.

The duty to respect requires states to abstain from any actions that directly or indirectly violate or interfere with the exercise of individual rights, such as enacting discriminatory laws or policies.¹¹¹ For example, public officials are expressly prohibited from engaging in discriminatory practices that diminish rights based on prohibited grounds.¹¹² However, as Young points out, achieving substantive equality often necessitates affirmative action, which demands more from states than merely fulfilling their duty to respect; it requires proactive engagement to rectify inequalities.¹¹³

On the other hand, the obligation to protect requires states to proactively safeguard individuals from violations by non-state actors, including ensuring equal access to services and preventing interference.¹¹⁴ This includes enacting laws to prevent, investigate, and remedy discrimination and violence by private persons or entities,¹¹⁵ and extends to preventing domestic violence and abuses by corporate actors.¹¹⁶

Following the duty to protect, the obligation to fulfil necessitates that states actively implement legislative, administrative, and budgetary measures to ensure the full realisation of rights.¹¹⁷ This obligation, often broken down into duties to facilitate or provide, addresses state actions needed when respect and protection measures fall short of rights enjoyment.¹¹⁸ On the other hand, the CESCR has stated in many GCs that this obligation should also include ‘promote,’ in addition to the two sub-categories mentioned by Young.¹¹⁹

Notably, under the ICCPR, state obligations to ‘respect and ensure’ protected rights include the immediate requirement to take necessary measures.¹²⁰ In contrast, the ICESCR outlines a framework for progressively realising economic, social, and cultural rights.¹²¹ Nevertheless, certain obligations under the ICESCR, including the crucial obligation of non-discrimination, take immediate effect upon the Covenant’s entry into force.¹²²

¹¹¹ Shelton (2020) 194; Young (2022) 135; Beijer (2017) 57; CESCR GC No.14, paras.33,34; CESCR GC No.16, para.18.

¹¹² Young (2022) 135.

¹¹³ Ibid.136.

¹¹⁴ Ibid.; Beijer (2017) 57; HRCtee GC No.31, para.8; CESCR GC No.14, paras.33,35.

¹¹⁵ Shelton (2020) 194; Young (2022) 136; Beijer (2017) 57; HRCtee GC No.31, paras.8,16.

¹¹⁶ Young (2022) 137; Moeckli (2022) 164.

¹¹⁷ Young (2022) 137; CESCR GC No.14, paras.33,35; HRCtee GC No.31, para.7.

¹¹⁸ Young (2022) 138; CESCR GC No.14, para.33.

¹¹⁹ e.g. CESCR GC No.14, para.37; CESCR GC No.16, paras.17, 21.

¹²⁰ Shelton (2020) 196; HRCtee GC No.31, paras.5,14.

¹²¹ Shelton (2020) 196; Young (2022) 143; CESCR GC No.3, paras.1, 2.

¹²² Shelton (2020) 197; Young (2022) 143; CESCR GC No.3, para.1; CESCR GC No.14, para.30.

Lastly, regarding the question to whom state obligations apply, as mentioned before, the scope of the ICCPR includes all persons within a state's jurisdiction.¹²³ Although the ICESCR does not explicitly address this, it is generally accepted in human rights law that the scope of jurisdiction is interpreted similarly.¹²⁴ In this context, it is undeniable that states have responsibilities towards asylum seekers under the rights protected in both ICCPR and ICESCR. Indeed, they reside within state borders and in locations under state control, such as reception centres.¹²⁵ As a matter of fact, both the HRCtee and the CESCR have explicitly stated this in their GCs.¹²⁶

3.2. States Obligations Upon Arrival

3.2.1. Vulnerability as a Basis for Enhanced State Obligations

Vulnerability is also a key factor in determining state obligations.¹²⁷ Indeed, both Committees use this term in their GCs. When comparing the HRCtee and the CESCR GCs, it is observed that the HRCtee began to emphasise the term 'vulnerability' more prominently in later GCs,¹²⁸ whereas the CESCR has consistently included references to vulnerable groups/individuals in nearly every GC since its early GCs.¹²⁹ While the HRCtee focuses on 'vulnerable' groups/individuals, the CESCR initially used 'vulnerable',¹³⁰ but it has later expanded its terminology to include 'marginalised' or 'disadvantaged' groups/individuals, thus broadening the scope beyond just the vulnerable.¹³¹ This term, as used in international treaties, is also considered an integral part of European asylum law.¹³² Consequently, this section uses the term 'vulnerability' as an overarching concept that includes disadvantaged or marginalised groups.

As Morawa noted over two decades ago, the concept of 'vulnerability' can be approached from multiple perspectives.¹³³ Indeed, possibly for this reason, neither the HRCtee nor the CESCR has defined this term to date. However, even though there is no exact definition, it often refers

¹²³ ICCPR art.2(1).

¹²⁴ Shelton (2020) 200-201; Young (2022) 144; Slingenber (2016) 180; CESCR GC No.12, para.14.

¹²⁵ Slingenber (2016) 49-50.

¹²⁶ HRCtee GC No.15, para.1; HRCtee GC No.31, para.10; CESCR GC No.14, para.34.

¹²⁷ Slingenber (2016) 297.

¹²⁸ e.g. HRCtee GC No.20, para.11; HRCtee GC No.21, para.3; HRCtee GC No.31, para.15; HRCtee GC No.35, para.30; HRCtee GC No.36, paras.9,23; HRCtee GC No.37, para.80.

¹²⁹ e.g. CESCR GC No.3, para.12; CESCR GC No.4, paras.8(e),13; CESCR GC No.5, paras.9,10; CESCR GC No.13, paras.6,16,26,32; CESCR GC No.14, paras.12,18,35,37,43(f).

¹³⁰ Ibid.

¹³¹ e.g. CESCR GC No.16, paras.15,16; CESCR GC No.17, paras.20,21,34,39(d); CESCR GC No.18, paras.23,26; CESCR GC No.20, paras.12,27.

¹³² Brandl, Czech (2017) 269.

¹³³ Morawa (2003) 150.

to groups needing special attention for protection due to past discrimination, sometimes including temporary special measures to promote their rights under human rights law.¹³⁴ This is echoed by Acconciamezza, who notes that the principle of substantive equality is intertwined with human vulnerability, shaping international conventions to protect the most vulnerable from discrimination.¹³⁵ Thus, it can impose specific and stricter protective obligations on states.¹³⁶ Indeed, as evaluated in Macioce's book, vulnerability, as some scholars have argued, either directly serves as a source of state obligation¹³⁷ or acts as a marker of contexts that require special attention and enhanced protection,¹³⁸ justifying the recognition of rights and the imposition of obligations.¹³⁹ Whichever approach is defended, legally, group vulnerability justifies the recognition and guarantee of specific rights and triggers various protective measures.¹⁴⁰ In other words, despite the lack of a specific definition, it is acknowledged in the doctrine that vulnerability has defining characteristics in terms of state responsibilities,¹⁴¹ even when there is a lack of state interference.¹⁴² Another important conclusion drawn here is that referring to vulnerable groups and individuals has become an established part of the international human rights system without the need for specific justification.¹⁴³ Indeed, as mentioned in the second chapter, this is a requirement of the principle of substantive equality.

These approaches in the doctrine are reflected in the GCs of both the HRCtee and the CESCR. When examining the emphasis placed on vulnerable groups by both Committees, it is evident that they sometimes highlight the importance of equal access to rights protected by treaties,¹⁴⁴ framing state responsibilities in terms of formal equality. In this context, states are reminded explicitly of their positive obligations to protect these groups.¹⁴⁵ However, there are also instances where the Committees acknowledge historical disadvantages,¹⁴⁶ advocating for

¹³⁴ Morawa (2003) 139,150; Macioce (2022) 48-49.

¹³⁵ Acconciamezza (2022) 241.

¹³⁶ Ducoulombier (2017) 202; Teixeira (2020) 1033-1034; Macioce (2022) 33,46.

¹³⁷ Macioce (2022) 78.

¹³⁸ Ibid. 80.

¹³⁹ Ibid. 80-81.

¹⁴⁰ Ibid. 86.

¹⁴¹ Teixeira (2020) 1037; Morawa (2003) 147.

¹⁴² Beijer (2017) 58.

¹⁴³ Macioce (2022) 32.

¹⁴⁴ e.g. HRCtee GC No.20, para.11; CESCR No.13, para.6; CESCR GC No.14, para.12.

¹⁴⁵ e.g. HRCtee GC No.21, para.3; HRCtee GC No.32, para.37; CESCR GC No.9, para.10; CESCR GC No.14, para.35.

¹⁴⁶ e.g. HRCtee GC No.36, para.23; CESCR GC No.20, paras.12,27.

preferential treatment,¹⁴⁷ prioritisation,¹⁴⁸ or special measures¹⁴⁹ to ensure substantive equality. Furthermore, the term ‘specific need’¹⁵⁰ is emphasised, highlighting a particular state obligation. Additionally, the Committees note that equal treatment can disproportionately affect individuals and groups within this category, underlining the importance of state obligation in addressing indirect discrimination.¹⁵¹ Thus, for both Committees, this category signifies a distinct state responsibility. This leads me to support Macioce’s argument that vulnerability can serve as a fundamental basis for developing an exceptional protective framework.¹⁵²

Regarding who falls into this category, while neither Committee provides a precise definition, the use of terms like ‘including,’¹⁵³ ‘such as,’¹⁵⁴ and ‘other’¹⁵⁵ when referring to vulnerable persons/groups indicates the open-ended nature of this category.¹⁵⁶ Nevertheless, both Committees explicitly mention sexual orientation, gender identity, and asylum seekers as examples of vulnerable situations,¹⁵⁷ making it clear that LGBTIQ+ asylum seekers fall within this category.

Although these GCs do not explain why these groups are considered ‘vulnerable,’ it is acknowledged that LGBTIQ+s are classified in this category because they are more likely to face human rights violations from domestic authorities or individuals compared to the general population.¹⁵⁸ Similarly, asylum seekers are considered in this category because of their ‘inherent situation as asylum-seekers’,¹⁵⁹ and the traumatic experiences they have likely endured make them particularly susceptible to prejudice and stigmatisation,¹⁶⁰ as highlighted by the ECtHR. Thus, the Court emphasises that asylum seekers are a particularly vulnerable group in need of special protection, a consensus supported by international and European standards.¹⁶¹ On the other hand, it is also important to note that vulnerability can arise not only

¹⁴⁷ e.g. CESCRC GC No.5, para.9. In this GC, the Committee highlighted preferential treatments for people with disabilities, but the wording includes all vulnerable groups. While the HRCtee did not explicitly mention preferential treatment, previous GCs justified it (HRCtee GC No.18, para.10).

¹⁴⁸ e.g. CESCRC GC No.4, para.8(e); CESCRC, GC No.25, para.52.

¹⁴⁹ e.g. HRCtee GC No.36, para.23; CESCRC GC No.13, para.32; CESCRC GC No.16, para.15; CESCRC GC No.22, para.31.

¹⁵⁰ e.g. HRCtee GC No.37, para.80; CESCRC GC No.14, para.37; CESCRC GC No.22, para.31.

¹⁵¹ e.g. CESCRC GC No.7, para.10; CESCRC GC No.16, para.21; CESCRC GC No.20, para.12.

¹⁵² Macioce (2022) 49.

¹⁵³ HRCtee GC No.31, para.15.

¹⁵⁴ e.g. CESCRC, GC No.14, para.12; CESCRC GC. No.21, para.42.

¹⁵⁵ e.g. HRCtee GC No.35, para.30; CESCRC GC No.13, paras.16,55; CESCRC GC No.19, para.38.

¹⁵⁶ Morawa (2003) 141,150; Brandl, Czech (2017) 250; Macioce (2022) 39.

¹⁵⁷ HRCtee GC No.36, para.23; CESCRC GC No.22, para.9.

¹⁵⁸ Ducoulombier (2017) 202; O’Flaherty (2022) 306-307. Also See. *Identoba and Others*(ECtHR), paras.68,72.

¹⁵⁹ *M.S.S.*(ECtHR), para.233.

¹⁶⁰ *Ibid.* para.232.

¹⁶¹ *Ibid.* para.251.

from past prejudice and stigmatisation but also from the actions or omissions in the host state, making the state responsible for providing the necessary support and protection due to the increased needs of asylum seekers from their traumatic experiences.¹⁶²

Compound vulnerability,¹⁶³ especially for LGBTIQ+ asylum seekers, highlights the intersection of multiple factors that increase their risk, necessitating heightened protection. Indeed, Quinan et al. note that isolation, traumatic pasts, indefinite waiting, and a lack of social resources call for special protection for these people due to their exceptional vulnerabilities.¹⁶⁴ Similarly, Venturi underscores that sexual orientation and gender identity create special procedural and reception needs, making LGBTIQ+ individuals particularly vulnerable.¹⁶⁵ UN experts¹⁶⁶ and United Nations High Commissioner for Refugees (UNHCR)¹⁶⁷ emphasise that LGBTIQ+ asylum seekers face trauma and persecution long before and during their journey to safety, requiring recognition of their unique vulnerabilities.¹⁶⁸ This underscores the state's significant responsibility to provide comprehensive support and protection towards these group of people.

Finally, it should be noted that although vulnerability, even among these groups, is not homogeneous,¹⁶⁹ thus, its level—and consequently the state's responsibility—may vary.¹⁷⁰ The above explanations, especially the ECtHR's reasoning in *M.S.S.*, which highlighted the inadequate detention conditions and reception facilities for asylum seekers,¹⁷¹ suggest that states have a special obligation towards LGBTIQ+ asylum seekers due to their vulnerability. In other words, although the discretion to determine who among asylum seekers is more vulnerable lies with the states,¹⁷² their responsibilities stemming from general vulnerability persist, especially considering their compound vulnerabilities.¹⁷³ Indeed, as mentioned above, failure to do so could contradict the special protection obligations explicitly stated by both the HRCtee and CESCR, which are manifestations of the principle of substantive equality.

¹⁶² Brandl, Czech (2017) 250.

¹⁶³ Teixeira (2020) 1038; Brandl, Czech (2017) 251.

¹⁶⁴ Quinan et al. (2020) 350.

¹⁶⁵ Venturi (2023) 476.

¹⁶⁶ UN experts press release (2019).

¹⁶⁷ UNHCR (Discussion, 2021) para.41; UNHCR (Conclusions 2021) 7.

¹⁶⁸ Venturi (2023) 478,484; Lasowski at al. (2023) 606.

¹⁶⁹ Macioce (2022) 38; Venturi (2023) 485.

¹⁷⁰ Teixeira (2020) 1032-1033; Brandl, Czech (2017) 250-251,260

¹⁷¹ *M.S.S.(ECtHR)*, paras.229-233.

¹⁷² Brandl, Czech (2017) 251; Macioce (2022) 50.

¹⁷³ *O.M.(ECtHR)*, para.53. Also See. Committee of Ministers of the Council of Europe (CMCE), CM(2021)67-final, para.6.

3.2.2. Identification of Vulnerability

Upon arrival, states arguably must identify the specific vulnerabilities of LGBTIQ+ asylum seekers to ensure their protection and well-being, addressing their unique needs and safeguarding their rights, based on a teleological approach discussed in the previous section.¹⁷⁴ Indeed, as discussed, vulnerability is a significant factor in determining state responsibilities, as emphasised by both Committees. This approach aligns with substantive equality and non-discrimination principles, requiring proactive measures to address challenges faced by these groups. Thus, as highlighted by Macioce, states arguably must identify vulnerable groups early in the asylum process to provide appropriate protection.¹⁷⁵

Furthermore, states are urged to monitor the implementation of rights and generate overviews for targeted policies, supported by disaggregated data collection to address discriminatory treatment and focus on particularly vulnerable groups.¹⁷⁶ This highlights the importance of identification.

Considering these points, the identification process should also involve comprehensive assessments conducted by trained personnel who understand the specific risks and needs of LGBTIQ+ asylum seekers.¹⁷⁷ This includes recognising the compounded vulnerabilities arising from their sexual orientation or gender identity, combined with the precarious situation of being asylum seekers. One important point to emphasise here is that this assessment should be conducted independently of the refugee claim, especially for LGBTIQ+ asylum seekers.¹⁷⁸ Therefore, even if an LGBTIQ+ person seeks asylum for other reasons, identifying their sexual orientation and gender identity will be crucial for ensuring their protection throughout the process. On the other hand, as mentioned above, although the degree of vulnerability varies from person to person, this does not mean that only individuals historically in a disadvantaged status should be considered in this category. On the contrary, it should be interpreted as emphasising the necessity of identifying those ‘more vulnerable’.

By identifying vulnerabilities upon arrival, states can implement tailored protective measures and provide necessary support, such as safe accommodations, access to healthcare, and psychosocial services, thereby preventing further discrimination and harm.

¹⁷⁴ Brandl, Czech (2017) 265; Macioce (2022) 41-43, 46; Teixeira (2020) 1038-1039.

¹⁷⁵ Macioce (2022) 42.

¹⁷⁶ Teixeira (2020) 1039; CESCR GC No.1, paras.3-4.

¹⁷⁷ UNHCR, International Detention Coalition (IDC) (2016) 2.

¹⁷⁸ UNHCR, IDC (2016) 12.

3.3.State Obligations to Ensure Safety from Discrimination Against LGBTIQ+ Asylum Seekers

According to Knijff’s research, safety can be categorised into various types, such as physical, civil, and social safety, as well as aspects related to police effectiveness and community relations.¹⁷⁹ Perceived safety, influenced by individual experiences such as victimhood and environmental factors like criminal, social, institutional, and physical surroundings, is considered crucial in determining an individual’s overall sense of safety.¹⁸⁰ According to another research, LGBTIQ+ asylum seekers in interviews perceived safety as including physical protection and mental assurance, highlighting the need for personal space and a supportive community.¹⁸¹ In this section, safety will be considered in terms of states’ obligation to protect LGBTIQ+ asylum seekers from any discriminatory acts, including bullying and violence they may face.¹⁸² Indeed, the HRCtee provides examples of such discriminatory practices in a non-exhaustive way,¹⁸³ including social stigmatisation,¹⁸⁴ harassment,¹⁸⁵ negative or discriminatory attitudes,¹⁸⁶ incitement to hate,¹⁸⁷ hate speech,¹⁸⁸ and various forms of violence¹⁸⁹ based on sexual orientation or gender identity. While this concept is also related to mental well-being, that aspect will be addressed in section 3.4.1., mainly under the ICESCR. In this section, the specific obligations under the ICCPR to prevent discrimination, focusing on protection and fulfilment, will be examined.

Specific state obligations under the ICCPR necessitate general protective measures and tailored actions that pre-emptively mitigate potential harms. Reflecting on GC No. 18, states are compelled to enforce equality before the law and provide effective protection against discrimination, necessitating legislative and practical measures to ensure these protections are realised.¹⁹⁰ According to the HRCtee, this includes affirmative actions, including preferential treatment, to eliminate conditions that lead to discrimination,¹⁹¹ which exemplifies the state’s

¹⁷⁹ Knijff (2021) 20.

¹⁸⁰ Ibid.

¹⁸¹ Quinan et al. (2020) 350-351.

¹⁸² Independent Expert on Sexual Orientation and Gender Identity (IE-SOGI) (2018) paras.28,36,42.

¹⁸³ The Committee uses terms ‘such as,’ ‘including,’ ‘all forms.’ See. HRCtee, CO Cameroon 2010, para.12; Turkmenistan (2012) para.21; Turkmenistan (2023), para.15(b).

¹⁸⁴ e.g. HRCtee CO Morocco (2016) para.12(c); Nigeria (2019) para.19; Dominica (2020) para.15(a); Turkmenistan (2023) para.15(b).

¹⁸⁵ e.g. HRCtee CO Cameroon (2010) para.12; Zambia (2023) para.16(b); Turkmenistan (2023) para.15(b).

¹⁸⁶ e.g. HRCtee CO Dominica (2020) para.15(a); Iraq (2022) para.13(b); Egypt (2023) para.10(b).

¹⁸⁷ e.g. HRCtee CO Morocco (2016) para.12(c).

¹⁸⁸ e.g. HRCtee CO Zambia (2023) para.16(c); Turkmenistan (2023) para.15(b).

¹⁸⁹ e.g. HRCtee CO Iraq (2015) para.12(c); Turkmenistan (2017) para.9(c); Zambia (2023) para.16(c).

¹⁹⁰ HRCtee GC No.18, para.5; HRCtee GC No.28, para.4; HRCtee GC No.31, para.13.

¹⁹¹ HRCtee GC No.18, para.10.

obligation to fulfil.¹⁹² On the other hand, considering the Committee's definition of discrimination,¹⁹³ the state's responsibility includes ensuring that LGBTIQ+ individuals' right to be free from discrimination is not nullified or impaired. However, this GC does not specify what measures should be taken to create these conditions, which can indicate that discretion is given to the state.¹⁹⁴ From a teleological perspective, educating the general population and state officials on human rights, which is vital for fostering a culture of respect and commitment to human rights standards, serves as an example of this obligation.¹⁹⁵ Similarly, combating the historical, traditional, cultural, or religious roots of discrimination can also serve as an example.¹⁹⁶ Moreover, raising awareness among state officials as well as the population is another example given by the Committee.¹⁹⁷ Furthermore, states must enact protective laws against discrimination and address, document, and provide detailed information on discrimination in practice, including measures to reduce or eliminate it.¹⁹⁸

Regarding state obligations to protect, the HRCtee has explicitly stated that states must take due diligence preventive measures against harm caused by third parties to protect all rights,¹⁹⁹ which is particularly relevant to combating discrimination in this context. Moreover, in the case of such a failure, preventing future violations requires states to take additional preventive measures, which may include changes to laws or practices.²⁰⁰

GC No. 36 on the right to life (the extent of discrimination and violence that LGBTIQ+ individuals are exposed to can be life-threatening) elaborates further on these obligations, asserting that states must anticipate and counteract by taking appropriate measures to reasonably foreseeable threats to the lives of people,²⁰¹ which undoubtedly includes LGBTIQ+ people due to their historical disadvantages. Indeed, the Committee has explicitly stated that the right to life should not be interpreted narrowly and should be understood to include 'enjoying life with dignity.'²⁰² Thus, states may violate the right to life even if no loss of life occurs,²⁰³ in conjunction with the right to equality. Preventing suicide, especially among

¹⁹² HRCtee GC No.4, para.2; HRCtee GC No.28, para.3.

¹⁹³ HRCtee GC No.18, para.7.

¹⁹⁴ CESCR GC No.16, para.32.

¹⁹⁵ HRCtee GC No.28, para.3.

¹⁹⁶ HRCtee GC No.28, para.5.

¹⁹⁷ HRCtee GC No.31, para.7.

¹⁹⁸ HRCtee GC No.18, para.9; HRCtee GC No.4, para.2; HRCtee GC No.28, para.31.

¹⁹⁹ HRCtee GC No.31, para.8.

²⁰⁰ Ibid. paras.16,17; *Young(HRCtee)*, para. 12.

²⁰¹ HRCtee GC No.36, paras.7,18,21.

²⁰² Ibid. para.3.

²⁰³ Ibid. para.7.

vulnerable persons and in reception centres, is highlighted as another preventative obligation of states,²⁰⁴ considering that suicides can arise in situations of intense discrimination and vulnerability.²⁰⁵

Additionally, the HRCtee underscores that states must take special protective measures for individuals in vulnerable situations, such as LGBTIQ+ persons and asylum seekers, whose lives are at particular risk due to specific threats or pre-existing patterns of violence.²⁰⁶ The Committee provides examples of these measures, including round-the-clock police protection, protection and restraining orders, and, in exceptional cases, protective custody.²⁰⁷ HRCtee also highlights the obligation to both protect and fulfil by directing states to tackle societal conditions that may threaten life directly or hinder the enjoyment of life with dignity.²⁰⁸ The Committee emphasises the necessity for comprehensive strategies that enhance public safety and promote conditions conducive to a dignified life, including ensuring access to essential services like adequate housing, emergency health services, and police forces, additionally, advancing community awareness on non-violence and gender equality.²⁰⁹

Furthermore, the HRCtee recognises that the right to security of a person obligates states to take protective measures against threats of violence, emphasising the need to safeguard individuals from foreseeable threats to bodily integrity.²¹⁰ This underscores the states' duty to fulfil the protection and prevention mandates for vulnerable groups, including LGBTIQ+ persons, which was explicitly mentioned in this GC.²¹¹ In this context, situations of violence or threats that do not reach the threshold of the right to life but fall under the right to personal security are also the responsibility of the state. Indeed, violence or any security threat arising from discrimination constitutes another violation stemming from Article 26.²¹²

Finally, acts of violence, including those arising from discriminatory practices, also threaten an individual's physical and mental health and, as such, states must protect against these threats as part of their duty to uphold the right to health, as explicitly stated by the CESCR.²¹³ As can

²⁰⁴ Ibid. paras.9,25.

²⁰⁵ IE-SOGI (2018) para.61.

²⁰⁶ HRCtee GC No.36, para.23.

²⁰⁷ Ibid.

²⁰⁸ Ibid. para.26.

²⁰⁹ Ibid.

²¹⁰ HRCtee GC No.35, para.35.

²¹¹ Ibid.

²¹² HRCtee GC No.36, para.57.

²¹³ CESCR GC No.14, para.51.

be seen, the protection of LGBTIQ+ asylum seekers against discriminatory acts, including violence, is connected to many rights and requires significant protective measures.

3.4.States' Obligations Regarding the Right to Health of LGBTIQ+ Asylum Seekers

The right to the highest attainable standard of physical and mental health is protected under ICESCR Article 12. As discussed in Chapter 2, Article 2(2) of the ICESCR mandates equality in accessing this right,²¹⁴ emphasising substantive equality as stated in the CESCR's GCs.²¹⁵ This, again, includes the obligation to take affirmative actions or special measures²¹⁶ and prohibits both direct and indirect discrimination.²¹⁷ This section will examine the states' obligations in the realm of health on a bilateral basis. These include the obligations concerning the mental health of LGBTIQ+ asylum seekers and the obligations regarding access to specific health needs of these people. GC No. 14 includes many aspects of health,²¹⁸ including sexual health,²¹⁹ under the right to health. Therefore, the obligations of states regarding mental health explained in this section are also applicable to sexual health and will not be repeated in that section.

3.4.1. In terms of Mental Health

As previously mentioned, Article 12(1) of the ICESCR encompasses both physical and mental health. The CESCR has emphasised that the rights protected by Article 12 are inseparable from the enjoyment of other rights and are fundamental to living with human dignity.²²⁰ Furthermore, this right requires a system that provides everyone with an equal opportunity to achieve the highest attainable level of health.²²¹ Eide & Eide argue that 'attainable' includes both social factors that impact individual health (in this regard obligation to protect), including mental health, and in terms of health services.²²²

The Committee's GC on the right to health stresses the necessity of mental health facilities being available, accessible, acceptable, and of high quality.²²³ Furthermore, these facilities must be physically, economically, informatively, and non-discriminatorily accessible to asylum

²¹⁴ Ibid. para.18.

²¹⁵ e.g. CESCR GC No.20, para.8.

²¹⁶ e.g. CESCR GC No.16, para.15; CESCR GC No.22, paras.31,36.

²¹⁷ e.g. CESCR GC No.14, para.33; CESCR GC No.20, paras.7,10.

²¹⁸ e.g. CESCR GC No.14, paras.9,10; CESCR GC No.22, para.5.

²¹⁹ e.g. CESCR GC No.14, paras.11,16,21,23,34,36; CESCR GC No.22, para.1.

²²⁰ CESCR GC No.14, paras.1,3.

²²¹ Ibid. para.8.

²²² Eide & Eide (2022) 197.

²²³ CESCR GC No.14, para.12.

seekers.²²⁴ These facilities must also be culturally sensitive and accommodate variations in gender identity and sexual orientation,²²⁵ supported by a professionally skilled team.²²⁶ This set of criteria defines the scope of states' obligations.²²⁷

The Committee has described the state obligations under Article 12(2) as non-exhaustive.²²⁸ Thus, states' obligations, as discussed by the Committee, can be assessed in the tripartite typology as described above.

Firstly, states are obligated to respect to right to health of individuals, including asylum seekers, by avoiding the denial or restriction of equal access to mental health services.²²⁹ Indeed, the Committee has recognised that when individuals face discrimination in accessing health services, whether *de jure* or *de facto*, it constitutes a violation of the state's duty to respect.²³⁰ Furthermore, as will be mentioned in the explanation of the 'obligation to fulfil' below, states also have the responsibility to remove barriers to equality.²³¹ In this context, although the Committee has not provided specific examples related to this responsibility, it has emphasised in many of its GCs the need to adopt special measures to ensure equality.²³² The Committee has stated that these measures are necessary for the state to address past and current discrimination.²³³ It can be argued that when such measures are not taken and the right to health access seems equal but results in inequality, the state fails in its obligation to respect. Here, for instance, if a national health program prioritises mental health access through general practitioners, this seemingly equitable policy could indirectly discriminate against LGBTIQ+ asylum seekers, whose compounded vulnerability and background²³⁴ may necessitate specialist care as soon as possible.

In terms of the obligation to protect, the Committee has determined that the state must take preventive measures against violations of the right to health by third parties.²³⁵ For example, if necessary measures are not taken, this may amount to a breach of the state's obligation to

²²⁴ Ibid. para.12(b).

²²⁵ Ibid. para.12(c).

²²⁶ Ibid. para.12(d).

²²⁷ Eide & Eide (2022) 197.

²²⁸ CESCR GC No.14, paras.7,13.

²²⁹ Ibid. para.34.

²³⁰ Ibid. para.50.

²³¹ Ibid. para.21.

²³² e.g. CESCR GC No.16, paras.15,18,21; CESCR GC No.20, para.9.

²³³ e.g. CESCR GC No.16, paras.35,36; CESCR GC No.20, paras.8,9.

²³⁴ Quinan et al. (2020) 350; Venturi (2023) 476; Nematy et al. (2023) 636.

²³⁵ CESCR GC No.14, para.35.

protect this right.²³⁶ This includes protecting individuals from discriminatory practices that harm mental health.²³⁷ It is particularly relevant for LGBTIQ+ asylum seekers who face compounded vulnerabilities, emphasising the necessity for states to address these harmful practices.²³⁸ Additionally, as discussed in section 3.3, paragraph 4 above, considering states' obligation to prevent suicide further highlights the importance of access to mental health. For instance, in its CO regarding Switzerland, the CESCR emphasises the state's responsibility to ensure the availability and accessibility of appropriate mental health services, particularly in response to the increased suicidal tendencies among LGBTIQ+ persons.²³⁹ Indeed, it has been discussed in previous sections that the risk of suicide is likely to emerge as a result of discriminatory practices.

In terms of the obligation to fulfil, the Committee has emphasised that this right should be recognised and implemented in national legislation, taking concrete steps in this direction.²⁴⁰ For example, obligations such as training health personnel and establishing an adequate amount of health facilities, including those for mental health, have been highlighted.²⁴¹ Another responsibility is the removal of barriers that prevent disadvantaged groups from equally benefiting from this right, which includes elements such as education programs and access to information about mental health.²⁴² For example, in its CO regarding Finland, the Committee has stated that barriers to access to mental health services for asylum seekers must be removed.²⁴³ Within the scope of the obligation to fulfil, the Committee has also stated the obligation to take positive measures that enable the benefit from this right (obligation to facilitate).²⁴⁴ In this context, it was stated that Article 12(2)(d) would cover appropriate mental health treatment and care.²⁴⁵ Another emphasis was on the state's duty to facilitate facilities for everyone to equally benefit from this right.²⁴⁶ When individuals or groups cannot secure their rights, including access to appropriate mental health services, due to circumstances beyond their control, states must ensure these rights are provided under the Covenant.²⁴⁷ The obligation

²³⁶ Ibid. para.51.

²³⁷ CESCR GC No.22, para.7; Report of the Special Rapporteur (RSR), Hunt (2004) paras.82,84; RSR, Mofokeng, (2022) paras.1,14,15,33; IE-SOGI (2022) paras.41-43. For detailed research, also See. Krug et al. (2002).

²³⁸ Also See. CESCR GC No.22, paras.2,8,30,31.

²³⁹ CESCR CO Switzerland (2019) para.49; CESCR CO Denmark (2019) para.59.

²⁴⁰ CESCR GC No.14, para.36.

²⁴¹ Ibid.

²⁴² Ibid. para.21.

²⁴³ CESCR CO Finland (2021) para.45.

²⁴⁴ CESCR GC No.14, para.37.

²⁴⁵ Ibid. para.17.

²⁴⁶ Ibid. para.19.

²⁴⁷ Ibid. para.37.

to promote the right to health requires states to ensure that health services are culturally appropriate and that mental healthcare personnel are trained to recognise and respond to the specific needs of vulnerable groups.²⁴⁸

Additionally, states must develop a public health strategy, regularly review it, monitor actions with benchmarks for particularly vulnerable groups, including refugee camps, and maintain transparency while doing so.²⁴⁹ The Committee has clearly stated that non-fulfilment of these obligations could amount to a breach of the obligation to fulfil.²⁵⁰ Finally, considering the negative effects of discrimination practices on mental health, states also have obligations such as conducting campaigns against violence and providing appropriate mental health training related to violence.²⁵¹

Another violation is states' reluctance to use the maximum available resources to advance the right to health.²⁵² The failure of the state to take necessary measures, whether through action or omission, is also considered a cause of violation under this right.²⁵³

Although this section explains the states' obligations regarding access to mental health rights, specifically through the CESCR GCs, it must always be remembered that states have increased responsibilities when considering situations of vulnerability and the levels of vulnerability discussed in the previous section. In this context, for example, the significant negative impact on mental health from traumas experienced by LGBTIQ+ persons due to punishment in their country of origin²⁵⁴ or forced displacement²⁵⁵ necessitates that states take more effective measures in response.²⁵⁶

3.4.2. Specific Needs of Certain Groups Accessing Healthcare

Following the acknowledgement that sexual health is included within the scope of the right to health as elaborated in CESCR's GC No.22, it has also been indicated that the obligations outlined in the section on mental health apply to sexual health.²⁵⁷ This connection underscores the importance of protecting sexual health and ensuring access to it, as its impairment can

²⁴⁸ Ibid.

²⁴⁹ Ibid. para.43(f); CESCR GC No.22, para.60.

²⁵⁰ CESCR GC No.14, para.52.

²⁵¹ RSR, Hunt (2004) para.85.

²⁵² CESCR GC No.14, para.47.

²⁵³ Ibid. para.49.

²⁵⁴ RSR, Grover (2010) para.17.

²⁵⁵ Interim RSR, Pūras, (2018) para.32.

²⁵⁶ CESCR GC No.22, paras.30-31.

²⁵⁷ Ibid. paras.12-21,33-49.

adversely affect mental health.²⁵⁸ Indeed, according to the World Health Organisation's (WHO) definition²⁵⁹ also referred to by the CESCR, sexual health encompasses mental health.²⁶⁰ Similarly, the specific health needs of certain groups also give rise to the same responsibilities within this scope, such as accessibility, availability, acceptability, and good quality, along with the duties of states to respect, protect, and fulfil these obligations. Additionally, it should be kept in mind that the failure to meet these specific needs within the scope of sexual health could also have negative consequences for mental health.

On the other hand, although the CESCR refers to the 'specific needs' of some groups within the context of sexual health,²⁶¹ it does not specify what these needs are. Since the concept of 'specific needs' can encompass various elements, this section will focus on state obligations concerning these needs of transgender and intersex persons.

As CESCR has pointed out states are obligated to meet minimum essential levels of sexual and reproductive health rights, guided by 'contemporary' human rights standards.²⁶² Here, as exemplified by the Committee with references like the latest WHO guidelines and the Inter-Agency Working Group (IAWG) manual,²⁶³ a teleological approach indicates this is not limited, and the IAWG manual acknowledges the special health needs of transgenders, such as hormone therapy.²⁶⁴ Moreover, given the document's emphasis on special attention to LGBTIQ+s, including intersex people in terms of sexual health,²⁶⁵ a teleological approach suggests that the special health needs of intersex persons should also be considered. Additionally, some types of hormone treatments, surgery or other 'gender-affirming medical care,'²⁶⁶ which are important for transgender and intersex people, are included in the WHO's Essential Medications List.²⁶⁷ Furthermore, while not legally binding, the Parliamentary Assembly of the Council of Europe (PACE) has adopted resolutions concerning the fulfilment

²⁵⁸ Ibid. para.42; Coleman et al. (2022) 163.

²⁵⁹ World Health Organisation (WHO) (2015) 5.

²⁶⁰ CESCR GC No.22, para.6.

²⁶¹ Ibid. para.31; CESCR GC No.14, para.37.

²⁶² Ibid. para.49.

²⁶³ Ibid.

²⁶⁴ Inter-Agency Working Group (IAWG) (2018) 221.

²⁶⁵ Ibid. 110,

²⁶⁶ Shaw, Verghese (2022) 3, UNHCR (Discussion, 2021) para.18; UNHCR (Conclusions, 2021) 14,20. For a detailed analysis of gender-affirming health care for transgender and gender-diverse persons, See. Coleman et al. (2022). For examples of the specific needs of intersex people, See. Organisation Intersex International Europe (OIIE) (2023) topic 6.

²⁶⁷ WHO (2023) 18.1-18.3.

of specific health needs for intersex and transgender persons,²⁶⁸ which support the argument that these kinds of special treatments constitute ‘contemporary’ human rights standards.²⁶⁹ Indeed, strong evidence shows that gender-affirming treatments, such as hormonal and surgical procedures, significantly improve the quality of life and well-being of these people when adequately performed.²⁷⁰ Therefore, the inclusion of these treatments under the umbrella of essential health care is not only justified but necessary to meet the contemporary human rights standards outlined by international bodies.²⁷¹

Access to the same health facilities is a requirement of the principle of formal equality for trans and intersex asylum seekers. As discussed in section 4.3., in the last paragraph, since the Netherlands offers such treatments to its nationals, it must also provide them to asylum seekers. In fact, it is not related to refugee claims.²⁷² Although not legally binding, some regional²⁷³ and international²⁷⁴ documents have also emphasised the necessity of meeting such specific needs. In this regard, for example, the Yogyakarta Principles (YP), which are guidelines on applying international human rights law to sexual orientation and gender identity, was established by human rights experts in 2006²⁷⁵ and supplemented by additional principles in 2017 (YP+10),²⁷⁶ are also significant due to their authoritative nature.²⁷⁷ Their authoritative nature stems from their foundation in existing international human rights law and their endorsement by various human rights bodies and organisations.²⁷⁸ According to Principle 23, which interprets the right to health, access to hormone therapy and other treatments for LGBTIQ+ asylum seekers²⁷⁹ constitutes a health need recognised by contemporary human rights standards.²⁸⁰

It is also important to emphasise that if some trans and intersex persons start specific treatments in their home states and are then prevented from accessing similar treatments in the host state, this could result in the host state bearing increased responsibility because discontinuing

²⁶⁸ Parliamentary Assembly Council of Europe (PACE) Res.2048(2015), para.6.3; Res.2191(2017), para.7.1; CMCE, Rec(2010)5, para.35.

²⁶⁹ In addition, the United Nations Office on Drugs and Crime (UNODC) has recommended that these specific needs should be provided for prisoners with gender dysphoria. See. UNODC (2009) 117.

²⁷⁰ Coleman et al. (2022) 18.

²⁷¹ Ibid. 16-17,110; UN experts press release (2019).

²⁷² Transgender Europe (TGEU) (2018) 5.

²⁷³ Steering Committee for Human Rights (CDDH), (Report, 2019) paras.108,130. Also See. Ibid. 24; TGEU (2018) 4,5; TGEU (2019) 17.

²⁷⁴ UNHCR (Discussion, 2021) para.78; UNHCR (Conclusions, 2021) 20.

²⁷⁵ Yogyakarta Principles(YP), 7 (Introduction); O’Flaherty (2015) 280-281;283-284.

²⁷⁶ YP+10, 4,5 (Introduction).

²⁷⁷ O’Flaherty (2022) 317.

²⁷⁸ O’Flaherty (2015) 287-294.

²⁷⁹ YP+10, Pr.23(M). Also See. YP, Pr.9(b).

²⁸⁰ Center for American Progress (CAP) (2013) 7,9,17.

medical treatments can have negative consequences, both mentally and physically.²⁸¹ However, this expectation applies if the host state already provides such treatments to its nationals. On the other hand, situations where these persons in some states are unable to access specific treatments legally and face complications after seeking them through unofficial means may require the host state to provide post-surgery or post-treatment care.²⁸²

Furthermore, access to these specific treatments is a matter related to personal autonomy²⁸³ and can significantly reduce the tendency towards suicide among these persons.²⁸⁴ These treatments should be based on health specialists' recommendations and include those listed in the WHO and IAWG manuals. States should ensure the availability of further treatments for those seeking them, even if they are not obligated to pay for or provide them. Taking into account compound vulnerabilities in these groups, states have increased obligations as discussed earlier.²⁸⁵ On the other hand, as was discussed previously, these specific treatments must also be available, accessible, acceptable and of good quality.

Considering this chapter's explanations, discrimination practices, including violence, have health-related consequences,²⁸⁶ leading to heightened state responsibility. Additionally, preventing trans and intersex asylum seekers from accessing essential treatments for their well-being directly contravenes state obligations to provide adequate healthcare and prevent discrimination under the right to health. When states do not provide access to these health facilities, it results in direct discrimination. Although access to mental health or other health services might seem neutral, assuming everyone first seeks general practitioners, the inability of LGBTIQ+ asylum seekers to receive timely psychological or specific support can result in indirect discrimination.

²⁸¹ For details, See. TGEU (2018) 2-4; Singer (2021) 250; Coleman et al. (2022) 65,106.

²⁸² Ibid; CAP (2013) 7. For similar concerns, also See. UNHCR (Summary, 2021) 21; IE-SOGI (2022) para.30.

²⁸³ TGEU (2018) 2, Nematy et al. (2023) 660.

²⁸⁴ TGEU (2018) 4; Nematy et al. (2023) 660; ILGA Europe (Policy Briefing, 2021) 10; ILGA Europe (2016) 8.

²⁸⁵ In terms of transgender asylum seekers, also See. Shaw, Verghese (2022) 26.

²⁸⁶ Yarwood et al. (2022) 17; Javanainen (2018) 30.

4. FROM ASSESSMENT TO ENHANCEMENT: STRENGTHENING DUTCH LEGISLATION FOR LGBTIQ+ ASYLUM SEEKERS

This chapter explores how equality and non-discrimination are regulated under Dutch law, with a specific focus on the reception conditions for LGBTIQ+ asylum seekers. The analysis will primarily utilise EU directives as EU law takes precedence over national law, requiring national courts to set aside any conflicting national regulations.²⁸⁷ Here, while allowing some discretion in implementation, directives are binding and must be transposed into national law within a specified timeframe.²⁸⁸ Failure to comply can result in financial penalties and the EU's enforcement measures, which recognise their direct effect and introduce a special judicial procedure to impose financial penalties on member states that fail to comply with these directives.²⁸⁹ Thus, this chapter will consider directives within the context of national legislation.

After reviewing these aspects, the chapter will, based on various research, highlight existing gaps in the safety and health provisions for LGBTIQ+ asylum seekers. It will then provide recommendations for addressing these gaps, specifically focusing on ensuring compliance with international human rights obligations.

4.1.Regarding Equality and Non-Discrimination

The fundamental principles of equality and non-discrimination are enshrined in Dutch legislation. Discrimination, including on the grounds of sexual orientation, is prohibited under Article 1 of the Dutch Constitution and recognised as a fundamental right. Furthermore, this article is detailed in the General Equal Treatment Act, which also explicitly references nationality,²⁹⁰ meaning to protect against discriminatory behaviours due to their asylum status. Additionally, both direct and indirect forms of discrimination are explicitly prohibited.²⁹¹ Provisions also address substantive equality. For instance, it is stated that measures taken to prevent existing inequalities²⁹² cannot be considered discrimination.²⁹³ Indeed, two decades

²⁸⁷ Bobek (2023) 154,177-179.

²⁸⁸ Ibid. 167; Bradley (2023) 103; Treaty on the Functioning of The European Union (TFEU), art.288.

²⁸⁹ Bradley (2023) 104; TFEU, art.260(3).

²⁹⁰ General Equal Treatment Act, art.1(b).

²⁹¹ Ibid. art.1(a).

²⁹² Ibid. art.3.

²⁹³ Ibid.

ago, Dutch scholar Loenen acknowledged that the principle of substantive equality is embraced within the legal framework of the Netherlands.²⁹⁴

4.2. Minimum Requirements of Reception Centres

In 1999, EU leaders established the Common European Asylum System to create a unified asylum status across the EU.²⁹⁵ The first directive was adopted in 2003,²⁹⁶ followed by the Recast Directive in 2013,²⁹⁷ which faced criticism for vague language on vulnerabilities, leading to inconsistent practices among member states.²⁹⁸ Consequently, many states struggled to identify and support special needs effectively.²⁹⁹ The current Reception Conditions Directive (RCD)³⁰⁰ in force from June 11, 2024,³⁰¹ is binding for the Netherlands, with a transposition deadline of June 12, 2026.³⁰² All these directives emphasise that asylum seekers should be received with dignity and similar living standards should be maintained across member states³⁰³ to ensure equal treatment throughout the EU.³⁰⁴ Like the previous directives, the RCD also regulates minimum standards.³⁰⁵

According to the RCD, ‘applicant with special reception needs’ is defined similarly to the previous directive,³⁰⁶ regardless of whether the person is considered vulnerable,³⁰⁷ meaning a person does not need to be considered vulnerable to benefit from special reception needs. A significant step in this directive is explicitly including LGBTIQ+ persons in this category.³⁰⁸ It is important to note that although the 2013 Directive did not explicitly mention LGBTIQ+s, the terms used, such as ‘special needs’³⁰⁹ or ‘vulnerability’³¹⁰ in a non-exhaustive way,³¹¹

²⁹⁴ Loenen (1995) 194.

²⁹⁵ Peers (2023) 799.

²⁹⁶ Directive 2003/9/EC.

²⁹⁷ Directive 2013/33/EU.

²⁹⁸ O’Nions (2016) 137,160.

²⁹⁹ Ibid. 1390-140. For different practices of assessing vulnerability and specific needs, See. Odysseus Network (2006) 74-77; Commission Proposal (2008), 11; Commission Report (2007) 9-10; Commission Proposal (2016) 3, Directive 2024/1346, recital, paras.3,5.

³⁰⁰ Directive 2024/1346.

³⁰¹ Directive 2024/1346, art.37.

³⁰² Ibid. art.35; Peers (Blog, 2024).

³⁰³ Directive 2003/9/EC, recital, paras.5,7; Directive 2013/33/EU, recital, paras.11,35; Directive 2024/1346, recital, paras.3,5,11,75.

³⁰⁴ Directive 2013/33/EU, recital, para.8; Directive 2024/1346, paras.5,7,53.

³⁰⁵ Peers (Blog, 2024).

³⁰⁶ Directive 2013/33/EU, art.2(k).

³⁰⁷ Directive 2024/1346, art.2(14).

³⁰⁸ Ibid. art.24(f).

³⁰⁹ Directive 2013/33/EU, art.18(5) (regarding material reception conditions), 19(2) (regarding health).

³¹⁰ Directive 2013/33/EU, art.11,17(2),18(3),21,22.

³¹¹ The wording of ‘such as’ has led to this interpretation. See. Directive 2013/33/EU, art.21. Also See. O’Nions (2016) 160.

should be interpreted to include LGBTIQ+ asylum seekers. The RCD only clarifies this inclusion. Thus, states' explicit obligations towards these groups must be considered, even stemming from previous directives. Another important provision is that trained staff must conduct the assessment³¹² as soon as possible,³¹³ with comprehensive obligations on the state to ensure this process.

The RCD introduces an 'adequate standard of living' for housing,³¹⁴ explicitly considering gender-specific and special reception needs,³¹⁵ which ensures the safety of LGBTIQ+ asylum seekers. Related to this, an important change in the RCD is the inclusion of 'violence committed with sexual, gender, racist, or religious motives' within the scope of measures that states must take against sexual violence and harassment.³¹⁶ Peers has interpreted this as an expansion of the state's protection scope against attacks on reception centres,³¹⁷ which also clearly includes protecting LGBTIQ+ persons in asylum centres. Given the high likelihood of violence against these individuals due to religious or gender motives, discussed previously, the directive also stipulates that different accommodation options can be provided when special needs require it.³¹⁸

Regarding health provisions, the current directive emphasises the obligation of states to provide 'appropriate mental health care,' including those with special needs.³¹⁹ As discussed in the previous chapter, 'essential treatment'³²⁰ or 'necessary medical or other assistance to applicants who have special reception needs'³²¹ can be interpreted to include trans and intersex-specific health care. The explicit inclusion of sexual health in the RCD³²² confirms this interpretation. Furthermore, these provisions also apply to individuals transferred under the Dublin Regulation,³²³ consistent with the CJEU's interpretation of the 2003 Directive, which states that applicants must benefit from all minimum conditions even during a Dublin transfer.³²⁴

³¹² Directive 2024/1346, art.25(2).

³¹³ Ibid. art.25(1). According to this provision, it must be completed within 30 days.

³¹⁴ Ibid. art.20(1).

³¹⁵ Ibid. art.20(3).

³¹⁶ Ibid. art.20(4).

³¹⁷ Peers (Blog, 2024).

³¹⁸ Directive 2024/1346, art.20(10)(a).

³¹⁹ Ibid. art.22(3); Directive 2013/33/EU, art.19(2).

³²⁰ Directive 2024/1346, art.22(1).

³²¹ Ibid. art.22(3).

³²² Ibid. art.22(1).

³²³ Ibid. art.22(1). Also See. Peers (Blog, 2024).

³²⁴ O'Nions (2016) 135; *Cimade & GISTI(CJEU)*, para.50.

As for Dutch legislation, the adopted motion requests the government to incorporate specific quality frameworks for vulnerable groups, including LGBTIQ+ persons.³²⁵ Similar to these concerns, the explanatory memorandum of the Municipal Task Act states that a quality framework will be developed for asylum reception to meet vulnerable groups' material and immaterial needs³²⁶ and implemented as soon as possible, considering the diversity of the reception landscape.³²⁷ More importantly, it explicitly states that referencing the 2013 Directive, this framework aligns with international human rights standards.³²⁸ The amended regulation includes municipalities in these responsibilities,³²⁹ but its recent adoption and time for implementation³³⁰ leave the extent of special needs coverage uncertain.

Notably, both the Court of The Hague and the Court of Appeal of The Hague have stressed the special needs of vulnerable individuals, even under the previous directive. They mandated that accommodation must consider these needs,³³¹ and vulnerable people should not be placed in emergency locations if their needs are unmet.³³² The courts emphasised the absence of specific needs assessments and the need to prioritise these assessments in emergency locations, highlighting the negative impact on vulnerable groups.³³³ Although the previous directive did not explicitly include LGBTIQ+ persons, the RCD's classification of them as having 'special needs' may support future court decisions in their favour.

However, apart from the adopted motion and amended regulation, it can be concluded that the provisions of the 2013 Directive discussed above have been integrated into Dutch legislation, and with the RCD entering into force, special needs, including those of LGBTIQ+ persons, are explicitly recognised in Dutch law. Only the development of the quality framework remains necessary. Considering that the concept of equality discussed above includes substantive equality, it can be seen that, at least in theory, Dutch legislation is 'minimally' in line with the ICCPR and ICESCR.

³²⁵ TK, 2023-2024, 36 333, No.43.

³²⁶ TK, 2022–2023, 36 333, No.3, section 7,10.5.

³²⁷ Ibid. Section 10.5.

³²⁸ Ibid. Section 7.

³²⁹ Municipal Task Act, art.6,7.

³³⁰ According to Article 12, the estimated implementation date is within two years. Also See. COA (2024).

³³¹ *Vluchtelingenwerk Nederland (District Court of The Hague)* (District Court), para. 6.15; *State of the Netherlands and COA (Court of Appeal The Hague)* (Court of Appeal), para.9.4.

³³² District Court, paras.6.31,7.2,7.3; Court of Appeal, para.11.7.

³³³ District Court, para. 6.35; Court of Appeal, para.11.8.

4.3.Gaps in the Implementation of Safety and Health for LGBTIQ+ Asylum Seekers: Compliance with International Human Rights Law

When looking at the HRCtee's last two COs regarding the Netherlands, in 2009, only an assessment related to the asylum procedure was included.³³⁴ While the 2019 report included a separate and relatively extensive evaluation of the treatment and conditions of asylum seekers, it primarily focused on non-refoulement.³³⁵ The noteworthy aspect is the expression of concerns about insufficient data regarding asylum seekers³³⁶ and the recommendation for the state to collect comprehensive data.³³⁷ In the CO of the CESCR, in 2010, concerns and recommendations were primarily about the detention conditions of asylum seekers.³³⁸ In 2017, it can be said that a more comprehensive evaluation was made compared to the HRCtee. For instance, concerns about the *de facto* discrimination of LGBTIQ+s and asylum seekers in various areas were expressed,³³⁹ and recommendations were made for implementing temporary special measures to combat this.³⁴⁰ Furthermore, concerns about the barriers to access to health care for asylum seekers were addressed,³⁴¹ reminding the obligations under the ICESCR.³⁴² In this context, the Committee recommends that the Netherlands develop independent mechanisms to monitor progress and use appropriate indicators based on the principles of participation, accountability, and non-discrimination, in line with its obligations under the Covenant.³⁴³

Although not the main focus of the thesis, it is important to mention the Committee on the Elimination of Racial Discrimination (CERD)'s COs. Indeed, as a party to the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Netherlands is obligated to prevent discrimination against asylum seekers under Article 1(a), which includes 'national' in 'racial discrimination.'³⁴⁴ In its 2015 observation, the Committee expressed concerns about the lack of reporting on racial discrimination, emphasising that this leads to a lack of trust in state authorities.³⁴⁵ Additionally, it highlighted the importance of

³³⁴ HRCtee, CO the Netherlands (2009) para.9.

³³⁵ HRCtee, CO the Netherlands (2019) paras.17,19(c).

³³⁶ Ibid. para.18.

³³⁷ Ibid. para.19(f).

³³⁸ CESCR, CO the Netherlands (2010) para.25.

³³⁹ CESCR, CO the Netherlands (2017) para.18.

³⁴⁰ Ibid. para.19.

³⁴¹ Ibid. para.46.

³⁴² Ibid. paras.47,58.

³⁴³ Ibid. paras.58,59.

³⁴⁴ CERD GR, No.30 (2004) preamble paras.2,3.

³⁴⁵ CERD, CO the Netherlands (2015) para.25.

effectively informing individuals, including those in asylum centres, about the mechanisms they can use to file complaints.³⁴⁶ More importantly, unlike the HRCtee and CESCR, the Committee emphasised intersectional discrimination and explicitly recognised that LGBTIQ+ asylum seekers fall into this category, recommending that the Netherlands raise public awareness and knowledge about the double or multiple discrimination faced by these individuals and how to recognise and react to such discriminatory practices.³⁴⁷ Furthermore, the Committee expressed concerns about LGBTIQ+ phobic behaviours coming from both state officials and peers.³⁴⁸ Consequently, the Committee recommended that the Netherlands take measures to protect this group, considering their particular vulnerability.³⁴⁹ In the 2021 report, the Committee reiterated concerns about insufficient data, noting it weakens the assessment of state policies' compliance with ICERD.³⁵⁰

Regarding Universal Periodic Reviews (UPR), in the 2017 UPR for the Netherlands, the National Report highlighted the National Action Plan on Human Rights (NAPHR), covering 'non-discrimination and equal treatment,' and 'immigration and asylum' policies.³⁵¹ In this context, it was emphasised that the aim is to combat all forms of discrimination and that the measures to be taken focus on specific groups, including LGBTIQ+ persons.³⁵² Importantly, it is recognised that LGBTIQ+ persons are likely to face intersectional discrimination.³⁵³ However, when looking at the NAPHR, there is no specific policy related to this situation in the section on asylum seekers; it merely states that the COA is responsible for providing safe reception for asylum seekers.³⁵⁴ The absence of an LGBTIQ+ section, despite the detailed focus on children asylum seekers,³⁵⁵ may suggest that intersectional discrimination affecting LGBTIQ+ individuals is not explicitly recognised or given importance. Unfortunately, this specific issue was not addressed in the stakeholders' reports or the UPR Working Group report; instead, general concerns and recommendations were made regarding the discrimination faced by LGBTIQ+s³⁵⁶ and the protection system for asylum seekers.³⁵⁷ The same applies to the 2022

³⁴⁶ Ibid. para.26(a).

³⁴⁷ Ibid. para.26(b).

³⁴⁸ Ibid. para.33(d).

³⁴⁹ Ibid. para.34(d).

³⁵⁰ CERD, CO the Netherlands (2021) para.5.

³⁵¹ Universal Periodic Review (UPR), National Report (2017), para.10.

³⁵² Ibid. para.26.

³⁵³ Ibid. para.41.

³⁵⁴ National Action Plan on Human Rights (2014) 41-42.

³⁵⁵ Ibid. 42.

³⁵⁶ UPR, Stakeholders' Report (2017), paras.22,36; UPR, Report of Working Group (2017), paras.81,116.

³⁵⁷ e.g. UPR, Report of Working Group (2017) para.131.196.

UPR National Report³⁵⁸ and Stakeholders' Report.³⁵⁹ However, two important points stand out in the National Report: first, it highlights that measures have been taken regarding transgender and intersex-specific health care;³⁶⁰ second, it mentions that a special shelter is provided for LGBTIQ+s in cases of violence.³⁶¹ In the Working Group report, the United States' recommendation for additional resources to protect vulnerable asylum seekers³⁶² is noteworthy. To address the issue of insufficient data highlighted earlier, the following recommendation is proposed:

Recommendation 1: The Netherlands must acknowledge intersectional discrimination against LGBTIQ+ asylum seekers, incorporating it into relevant policies and systematically collecting comprehensive data to address their unique vulnerabilities and needs better. Indeed, this is explicitly stated as a state obligation by the ICCPR³⁶³ and ICESCR,³⁶⁴ as discussed in previous sections and as noted by CERD, it is also necessary for better assessment. As discussed in Chapter 3, the HRCtee and CESCR underscore the need for states to develop independent mechanisms to monitor progress and use appropriate indicators based on participation, accountability, and non-discrimination principles. Furthermore, the CESCR emphasises that states must take proactive measures to ensure equal access to rights, including the collection of disaggregated data to assess and address health disparities among LGBTIQ+ asylum seekers. Thus, the Netherlands should collect health data disaggregated by sexual orientation and gender identity to address health disparities among LGBTIQ+ asylum seekers. Otherwise, it can breach the obligation to fulfil the rights discussed in this thesis. Thus, it can be recommended that the state use the 'A Step by Step Manual'³⁶⁵ as a guideline for determining, obtaining, and assessing the data.

As can be seen, due to the lack of comprehensive data on vulnerability, safety, and health highlighted by various UN mechanisms, it is inevitable to rely on NGOs and independent research, which will be used in the following section.

³⁵⁸ e.g. UPR, National Report (2022) paras.47-51.

³⁵⁹ e.g. UPR, Stakeholders' Report (2022) paras.22,82.

³⁶⁰ UPR, National Report (2022) paras.54-55.

³⁶¹ Ibid. para.73.

³⁶² UPR, Report of Working Group (2022), para.147.103.

³⁶³ ICCPR, art.40.

³⁶⁴ ICESCR, art.16.

³⁶⁵ WHO (2017).

4.3.1. Identifying Vulnerability

According to the European Council on Refugees and Exiles (ECRE) 's latest report, special reception needs in the Netherlands have been assessed.³⁶⁶ However, the report notes that researchers have found that COA does not follow a target group policy but pays structural attention to this group's specific needs.³⁶⁷ Additionally, the report does not specify when the assessment of special needs began. Furthermore, within the scope of procedural guarantees, it is mentioned that there is no vulnerability assessment other than for unaccompanied children.³⁶⁸ Considering that the initial contact points for individuals arriving at airports or land routes are police units³⁶⁹ and that no vulnerability assessment is conducted at this stage,³⁷⁰ it can be concluded that this assessment occurs only after registration.

Recommendation 2: Considering the discussions in the previous chapters and the necessity to identify and take action on the specific needs of LGBTIQ+ persons due to their particular vulnerabilities as per the Netherlands' international human rights obligations and the principle of equality, and following the RCD, the assessment of specific needs must be conducted as soon as possible. This assessment must begin from the moment the applicant makes their initial application.³⁷¹ In this context, in addition to collecting information from applicants, they should be asked if they have any specific needs they wish to disclose, or this assessment might be conducted using other methods.³⁷² Otherwise, during the waiting period, which can last for weeks during reception crises, these persons may be subjected to discrimination that can escalate to violence. Thus, it will impair or nullify the rights enshrined by ICCPR and ICESCR, as discussed in Chapter 3. Failure to adequately identify and address these vulnerabilities or special needs not only undermines the principles of equality and non-discrimination but also constitutes a breach of the state's human rights obligations as articulated in the ICCPR and ICESCR.

4.3.2. Regarding Safety

In this section, findings from four main studies will be used to illustrate the gap between theory and practice concerning safety. Quinan et al.'s 2020 study is based on the experiences of five persons (two of them work at an LGBTIQ+ NGO and share the experiences they have heard

³⁶⁶ European Council on Refugees and Exiles (ECRE) (2023) 133.

³⁶⁷ Ibid. 134.

³⁶⁸ Ibid. 71.

³⁶⁹ Ibid. 30.

³⁷⁰ For questions regarding the information collected from individuals, See. Ibid. 30-31.

³⁷¹ European Union Agency for Asylum (EUAA) (2024) 31; ILGA Europe (2016) 14; Hamilton (2017) 21.

³⁷² In this context, UNHCR's Vulnerability Screening Tool can be used as a method. See. UNHCR, IDC (2016).

from their visitors) interviewed in-depth, with experiences dating back to 2020 and earlier,³⁷³ and incorporates previous findings. Furthermore, Knijff's research includes a survey of 26 people and detailed interviews with four people, all of whom were staying in reception centres in 2021.³⁷⁴ Additionally, the findings of the LGBT+ Asylum Support research from 2023, which covers a larger group, will be briefly discussed. Moreover, van Ommeren's 2024 study, which includes interviews with COA employees and LGBTIQ+ asylum seekers visiting COC Nijmegen, a Dutch LGBTIQ+ NGO, will be only used to show alignment with these findings.

In Quinan et al.'s research, interviewees stated that they had to ensure their safety,³⁷⁵ many asylum seekers felt safer and less fearful at NGO events.³⁷⁶ Additionally, when they reported discrimination to the COA, their advice was to 'tone down' their sexuality or 'be more careful,'³⁷⁷ or, if desired, they could be transferred to another reception centre.³⁷⁸ This aligns with van Ommeren's findings, where COA employees confirmed that some of their colleagues advise asylum seekers to be less visible.³⁷⁹ These suggestions were interpreted as viewing safety as a 'temporary problem' and an 'oversimplification of violence.'³⁸⁰ These findings are consistent with those from before 2020.³⁸¹ Indeed, there are examples of these being taken to court.³⁸²

Furthermore, Quinan et al.'s research also aligns with the detailed and varied questions posed by Knijff in 2021. Indeed, according to this research, LGBTIQ+ asylum seekers rate their safety in asylum centres as inadequate, with an average score of 3.69 out of 10.³⁸³ Only 14.8% rate their safety as 8 or higher, while the majority rate it as 5 or lower.³⁸⁴ In contrast, safety outside the asylum centre received higher scores; with an average of 7.58 for asylum seekers and 8.57 for status holders.³⁸⁵ Furthermore, most participants are not open about their gender identity (52%) or sexual orientation (62%) in the asylum centres, with only 16% and 30%, respectively,

³⁷³ Quinan et al. (2020) 349.

³⁷⁴ Knijff (2021) 23.

³⁷⁵ Quinan et al. (2020) 350.

³⁷⁶ Ibid. 353.

³⁷⁷ Ibid.

³⁷⁸ Ibid. 354.

³⁷⁹ Van Ommeren (2024) 54-55.

³⁸⁰ Quinan et al. (2020) 354. Also See. van der Pijl et al. (2018) 15.

³⁸¹ Ibid. 347-348; Luit (2013) 10-11; Elferink, Emmen (2017) 16-18; COC (Blog, 2015); van der Pijl et al. (2018) 12-14.

³⁸² van der Pijl et al. (2018) 3.

³⁸³ Knijff (2021) 49.

³⁸⁴ Ibid.

³⁸⁵ Ibid.

feeling able to be open.³⁸⁶ This is echoed in van Ommeren's research, where many LGBTIQ+ asylum seekers do not feel safe and hide their sexual orientation or gender identity,³⁸⁷ especially in emergency facilities.³⁸⁸ According to Knijff's research, some conceal their identities out of fear of bullying, discrimination, and lack of staff support; some believe it is safer to be open to avoid rumours and attacks.³⁸⁹ Additionally, more than half of the participants (53.8%) always or often fear being victims of crime in the asylum centre, 26.9% sometimes feel at risk, and 11.5% do not have this fear.³⁹⁰ Regarding discrimination, 33.3% feel discriminated against most of the time or always, 25.9% feel it half the time, and 25.9% feel it sometimes, with only 14.8% never feeling discriminated against.³⁹¹ Two notable statements stand out here as reasons for not reporting: the perception that nobody cares because it is a reception centre, and the belief that no assistance will be provided unless one is on the brink of death.³⁹² COA employees interviewed in van Ommeren's research also noted that some COA staff lack knowledge about LGBTIQ+-sensitive issues, further contributing to asylum seekers' reluctance to ask for support.³⁹³ Some staff believe that offering an LGBTIQ+ person extra support can sometimes seem like another form of discrimination.³⁹⁴ Lastly, according to Knijff's research, many participants suggested improvements for the safety of newly arrived LGBTIQ+ persons: 30% suggested separate units or centres, while others called for more security, better information from COA, more space, and increased support from COA.³⁹⁵

The most recent detailed research conducted with 95 participants by LGBT+ Asylum Support³⁹⁶ aligns with the findings mentioned above. According to this report, 53% of participants stated they felt unsafe during the application process,³⁹⁷ and 59% reported their security concerns to COA but noted that no measures were taken.³⁹⁸ Additionally, 53% of participants experienced discrimination due to their appearance, and 14% reported both verbal and physical attacks.³⁹⁹ One notable finding is that these rates are higher in emergency centres,

³⁸⁶ Ibid. 51-52.

³⁸⁷ Van Ommeren (2024) 48-50.

³⁸⁸ Ibid. 48.

³⁸⁹ Knijff (2021) 52.

³⁹⁰ Ibid. 53.

³⁹¹ Ibid.

³⁹² Ibid. 54.

³⁹³ Van Ommeren (2024) 55-56.

³⁹⁴ Ibid. 56.

³⁹⁵ Knijff (2021) 55-58. Also See. van der Pijl et al. (2018) 19.

³⁹⁶ LGBT+ Asylum Support (2023) 23.

³⁹⁷ Ibid. 31.

³⁹⁸ Ibid. 32. In terms of reception centres, See. Ibid. 55.

³⁹⁹ Ibid. 38.

with 69% of participants feeling unsafe.⁴⁰⁰ According to this survey, 83% of participants believe that there should be a separate LGBTIQ+ unit for their safety.⁴⁰¹

The research findings corroborate each other, showing that the situation has not changed over the years, and there is no uniformity in locations or among COA employees in addressing LGBTIQ+ safety. Van Ommeren's research further illustrates these issues, noting that while some places have LGBTIQ+ rooms, many do not, forcing asylum seekers to stay with non-queer people.⁴⁰² Additionally, Dutch reception facilities often provide only binary options, with no spaces for trans or non-binary individuals.⁴⁰³ Consequently, there is a significant gap in protection, especially in prevention measures arising from the states' international human rights obligations.

Recommendation 3: The serious security concerns highlighted above necessitate a thorough reconsideration of the requirement for a separate LGBTIQ+ unit.⁴⁰⁴ Indeed, there are states where such practices are implemented.⁴⁰⁵ Although ideally, everyone should live together equally, reception centres should not be perceived as representative of Dutch society. Here, security measures such as the presence of security units within the reception centre where this group of individuals can report at any time,⁴⁰⁶ separating the floors/buildings where these people stay within the same reception centre and placing them in locations close to security,⁴⁰⁷ or establishing crisis service of state officials such as COA, can be seen under the obligation to protect, as highlighted by the HRCtee. Furthermore, providing 'education' or early adaptation processes to all asylum seekers in terms of equality and inclusivity, as suggested by many participants in Knijff's research,⁴⁰⁸ ensuring the rainbow flag is displayed at every reception centre, mandatory LGBTIQ+-sensitive training for COA who would then be designated as contact persons, (this training must also be provided to security personnel or any other staff that working in the reception centre) and organising social activities (such as films and theatre)

⁴⁰⁰ Ibid. 34.

⁴⁰¹ Ibid. 68.

⁴⁰² Van Ommeren (2024) 50.

⁴⁰³ Ibid.

⁴⁰⁴ Knijff (2021) 70; LGBT+ Asylum Support (2023) 101-102; COC (Blog, 2015).

⁴⁰⁵ Jansen, Spijkerboer (2011) 78.

⁴⁰⁶ The HRCtee has explicitly cited a similar recommendation as an example measure. See. HRCtee, GC No.36, para.23.

⁴⁰⁷ For similar recommendations, See. EUAA (2024) 53,69,

⁴⁰⁸ Knijff (2021) 55. Also See. Quinan et al. (2020) 352. Some states have taken similar measures. See. van der Pijl et al. (2018) 8.

that include these topics to increase LGBTIQ+ visibility, as recommended by Knijff,⁴⁰⁹ can be seen as examples of obligations to fulfil and, thus, can facilitate addressing this gap.

Taking into account the binary accommodation of reception facilities, it is also crucial to ensure that all LGBTIQ+ applicants, especially intersex individuals, are placed in shelters based on their self-identified gender rather than perceived gender.⁴¹⁰ Arguably, this can be seen as an obligation to respect under Article 26 of the ICCPR, as failing to do so could be viewed as discrimination by states. Additionally, there is an obligation to protect, as not accommodating these individuals based on their self-identified gender may result in discriminatory acts by third parties and, therefore, could result in a lack of preventative measures by states.

Moreover, in cases where discrimination or unsafe situations are reported, the concept of safety should be addressed by COA not only in terms of physical violence but also in various other forms, such as bullying and name-calling.⁴¹¹ Indeed, as discussed in section 3.3., HRCtee considers many acts, including non-physical, that can be seen as discriminatory practices. Otherwise, it can amount to a breach of Article 26 or other rights, such as a person's right to life or security, as state officials could not address these threats. However, until security measures are ensured, having a separate unit should be considered not just a preference but a necessity measure, given that the principle of substantive equality is not adequately implemented according to the findings above. Indeed, it is certain that lasting segregation will lead to many negative consequences.⁴¹² Furthermore, the Netherlands national report's mention of special shelters for LGBTIQ+s⁴¹³ in cases of violence supports this recommendation, especially compared to non-asylum LGBTIQ+s with more protective resources. Not implementing similar measures for asylum seekers could be the result of a breach of formal equality. Lastly, considering the concerns regarding emergency facilities, LGBTIQ+ persons should not be accommodated in these facilities unless their safety is ensured.

4.3.3. Regarding Health

Detailed analyses of mental, trans, or intersex-specific healthcare for LGBTIQ+ asylum seekers in the Netherlands are not readily available, at least in English. For instance, the Netherlands Institute for Human Rights raised concerns only about the mental and physical

⁴⁰⁹ Ibid. 70.

⁴¹⁰ OIIE (2023) topic 1.

⁴¹¹ Ibid.

⁴¹² van der Pijl et al. (2018) 17.

⁴¹³ UPR, National Report (2022) para.73.

health of asylum seekers in its submission to the CESCR.⁴¹⁴ Therefore, this section will mainly use data from the LGBT+ Asylum Support, which collected responses from 95 participants through an online survey. While the survey included a diverse group of LGBTIQ+ asylum seekers, only 16 participants identified as transgender, and there were no intersex participants.⁴¹⁵ Consequently, intersex-specific care is not assessed. Despite these limitations, the report provides valuable insights into the healthcare needs and experiences of LGBTIQ+ asylum seekers in the Netherlands, highlighting a stark contrast to the Deputy Minister's claim that psychosocial support and health services for asylum seekers are equivalent to those provided to Dutch nationals.

According to this report, 88% of participants indicated they do not feel mentally well.⁴¹⁶ This includes expressions of suicidal tendencies (with 64% of participants reporting suicidal thoughts⁴¹⁷), depression, anxiety, fear of re-experiencing violence, discrimination, and sleeping problems.⁴¹⁸ Additionally, 82% of participants reported suffering from trauma.⁴¹⁹ Furthermore, 49% of participants stated that they needed psychiatric treatment.⁴²⁰ Despite these issues, the comments regarding access to GZA, responsible for healthcare for asylum seekers in the Netherlands, include concerning statements such as health conditions not being taken seriously,⁴²¹ lack of access to mental health services, not being assigned a specialist, psychiatric medications being stopped after some time,⁴²² lack of LGBTIQ+ sensitivity⁴²³ and that access to psychological support can take months.⁴²⁴ In emergency locations, even access to GZA is reported to be difficult.⁴²⁵ When asked for suggestions to improve their situation, participants highlighted the need for access to mental health (specialists), equal treatment, and LGBT sensitivity.⁴²⁶

When evaluating this report in terms of trans-specific healthcare, it is noted that 56% of the participants started hormone therapy in their home state.⁴²⁷ However, despite this, 75% of

⁴¹⁴ Netherlands Institute for Human Rights (2023) para.36.

⁴¹⁵ LGBT+ Asylum Support (2023) 89.

⁴¹⁶ Ibid. 76.

⁴¹⁷ Ibid. 79.

⁴¹⁸ Ibid. 76.

⁴¹⁹ Ibid. 78.

⁴²⁰ Ibid. 86-87.

⁴²¹ Ibid. 80.

⁴²² Ibid. 81.

⁴²³ Ibid. 82.

⁴²⁴ Ibid. 83.

⁴²⁵ Ibid. 80. Also See. ECRE (2023) 132.

⁴²⁶ Ibid. 88.

⁴²⁷ Ibid. 89.

respondents reported that they could not access hormones in the reception centre.⁴²⁸ Reasons for this include not having started hormones yet, the lack of a prescription in their home country, or the absence of status.⁴²⁹ Besides hormones, some participants also mentioned needing related psychological support, physiotherapy and surgery.⁴³⁰ These findings are consistent with the observations in previous research.⁴³¹

Recommendation 4: To address the severe mental health challenges faced by LGBTIQ+ asylum seekers, it is crucial to establish specialised mental health services in reception centres, considering the impact of past traumas, situations encountered during transit,⁴³² and even their discriminatory challenges in reception centres negatively affect mental health. Indeed, post-traumatic stress disorder is one of the special needs situations mentioned in the RCD.⁴³³ Thus, the Netherlands should prioritise the recruitment of specialist psychologists and psychiatrists trained in trauma-informed care⁴³⁴ and LGBTIQ+ sensitivity,⁴³⁵ fulfilling its obligation to respect the right to health by avoiding denying or restricting equal access to mental health services. Healthcare providers must adopt trauma-informed practices to ensure the delivery of appropriate care under the obligation to fulfil and realise this right, as highlighted by the CESCR. Additionally, considering these people face unique challenges in the host state,⁴³⁶ it must also be monitored as recommended before. Monitoring mechanisms should be established to ensure that mental health services meet the criteria of accessibility, availability, acceptability, and quality. Furthermore, efforts must be made to eliminate barriers to healthcare access, such as language and transportation (especially in emergency shelters⁴³⁷), ensuring that LGBTIQ+ asylum seekers receive timely and culturally appropriate psychological support. Failure to do these may breach the state's obligation to fulfil the right to health, as discussed in section 3.4.1. Lastly, considering the term 'attainable' also includes factors that have adverse effects on mental health, to fulfil the obligation to protect, the state must prevent discriminatory practices by third parties that harm mental health as discussed under safety. Taking into account the CESCR's emphasis on taking concrete measures to realise this right, failing to implement these

⁴²⁸ Ibid. 92.

⁴²⁹ Ibid.

⁴³⁰ Ibid. 93.

⁴³¹ e.g. van der Pijl et al. (2018) 12,20.

⁴³² Yarwood et al. (2022) 2.

⁴³³ Directive 2024/1346, art.24(j).

⁴³⁴ Willey et al. (2022) 6-7.

⁴³⁵ Lasowski et al. (2023) 605-606; Hamilton (2017) 22; Yarwood et al. (2022) 17.

⁴³⁶ Nematy et al. (2023) 636-637,657-658.

⁴³⁷ ECRE (2023) 133.

recommendations can violate the right to health. Thus, the state must use its maximum resources to implement these.

Recommendation 5: The Netherlands must ensure access to hormone replacement therapy, post-surgical care, and related psychological support which are crucial for trans and intersex asylum seekers,⁴³⁸ aligning with the obligation to respect the right to health, as discussed in Chapter 3. These measures are essential for personal autonomy and can significantly reduce suicidal tendencies among these people;⁴³⁹ thus, under the obligation to protect, the states must prevent this tendency by implementing this recommendation. Given the length of waiting lists for trans-specific healthcare across the Netherlands,⁴⁴⁰ the state should prioritise providing this specific healthcare need to those who have already started hormone therapy, regardless of their status. Indeed, this can be seen under the obligation to respect as accessing this treatment cannot be restricted and to protect as delay of this treatment can cause severe physical and mental health consequences. In many countries, as discussed earlier, this specific healthcare may be illegal or impossible, so, individuals' initiation of this process illegally should be evaluated, and mandatory conditions such as prescriptions should not be required, as this is unrealistic. Failing to do so can amount to a breach of the obligation to respect the right to health. Those who have not started should be placed on the waiting lists. Otherwise, the prolonged asylum process delays placement on the list, which can relieve these people and allow them to see themselves as equals. This can be interpreted under the obligation to fulfil the right to health and as a targeted measure that the state is obliged to take, as highlighted by the CESCR.

As previously recommended, LGBTIQ+ persons should not be accommodated in emergency facilities unless both specialised mental health services and necessary medical care are ensured.

⁴³⁸ YP+10, Pr.23(M); CAP (2013) 17; ILGA Europe (Policy Briefing, 2021) 9-10; van der Pijl et al. (2018) 20.

⁴³⁹ Nematy et al. (2023) 660, ILGA Europe (2016).

⁴⁴⁰ UPR, National Report (2022) para.54; van der Pijl et al. (2018) 12.

5. CONCLUSION

The thesis examines how Article 26 of the ICCPR and Article 2(2) of the ICESCR encompass formal and substantive aspects of equality. As indicated in their GCs, both treaty bodies advocate for an intermediate approach that includes formal and substantive equality. Therefore, the right to the highest attainable standard of health must also adhere to this principle. Moreover, discrimination, whether direct or indirect, is prohibited. However, regulating substantive equality in legislation poses challenges, requiring a balanced approach that considers group-specific characteristics, as highlighted by Loenen.⁴⁴¹ Given the difficulty of implementing such regulations to give effect to the right to equality, ensuring equality may necessitate taking measures. This is especially important for LGBTIQ+ asylum seekers due to their compounded vulnerabilities, which are considered grounds for prohibited discrimination under both treaties. Consequently, Dutch national legislation aligns with formal and substantive equality principles and the obligations to eliminate discrimination, as outlined in the ICCPR and ICESCR.

State obligations detailed in GCs include respecting, protecting, and fulfilling (including promoting, facilitating, and providing). Although ICESCR rights require progressive realisation, the principle of equality has an immediate effect, similar to the ICCPR. Furthermore, vulnerability creates a special state obligation, with both Committees recognising LGBTIQ+ asylum seekers in this category. Therefore, states must identify these vulnerabilities. While the Netherlands theoretically meets this requirement during reception due to the structural attention paid to the specific needs of vulnerable groups by COA, the lack of targeted policy or early-stage vulnerability or special needs assessment means it is not adequately implemented, creating a gap. Additionally, this assessment should occur during the pre-reception process, as required by international human rights law. Implementing Recommendation 2 would fulfil this obligation. Not addressing this recommendation might nullify or impair the rights protected by the ICCPR and ICESCR and also amount to a breach of the RCD.

Regarding the safety of LGBTIQ+ asylum seekers, which is connected to their rights to life, security, and health, states have obligations not only to respect but also, through due diligence, to protect people from human rights violations by third parties. Both Committees have emphasised that this preventive obligation must be present in law and practice. Practical

⁴⁴¹ Loenen (1995) 198.

application of this obligation is vital, rather than merely punishing perpetrators, as addressed by Recommendation 3. Numerous studies have revealed a significant gap in the safety of LGBTIQ+ asylum seekers, aligning with my experiences and indicating insufficient measures over the years. Thus, the Deputy Minister's reservations about separate units without considering the existing gap show a breach of the obligation to protect from discriminatory practices. Moreover, as can be seen from various research, the reality is that COA does not address safety issues properly, contrary to the Deputy Minister's statements. The Netherlands can fulfil these obligations by implementing Recommendation 3, which includes reconsidering a separate LGBTIQ+ unit, increasing security, and training COAs and residents about their obligations. These recommendations align with state obligations exemplified by the HRCtee. Indeed, the RCD explicitly mentions that when special needs are required, they must be provided with different accommodations, supporting these recommendations.

Since the safety issues faced by this group are related to their sexual orientation and gender identity, they should be addressed within the Netherlands' obligations against discrimination. The Deputy Minister's statements regarding the irrelevance of many reports on sexual orientation can be seen as ignorance of this critical issue and not considering other types of discriminatory practices highlighted by the HRCtee. Indeed, as seen in many research, COA does not address different types of discriminatory practices unless they are physical.

Regarding the mental health of this group, the highest attainable standard must consider the impact of social factors, thus creating an obligation to prevent the negative effect of such factors on mental health. Failure to do so could violate the state's obligation to protect. Access to mental health services for these individuals must be ensured and facilitated, considering the importance of concrete measures. Implementing Recommendation 4, as mentioned in the thesis, would align the state with its international obligation to respect. Otherwise, the inability to access mental health services in emergency shelters would constitute direct discrimination, and access to non-specialist general practitioners, assuming this is the case in Dutch legislation, would result in indirect discrimination. Here, the Deputy Minister's explanation of equal access to mental health services lacks clarity on the national access system, risking indirect discrimination if not properly addressed.

In addition, gender-affirming healthcare should be evaluated within 'contemporary human rights standards' as per CESCR. Therefore, access for trans and intersex persons to these needs, as specified in Recommendation 5, must be ensured. Furthermore, not prioritising those who

began this process in their home state or requiring direct evidence like prescriptions could result in indirect discrimination. Additionally, preventing access without legal status leads to direct discrimination. This issue concerns essential health needs and the rights to life, mental health, and sexual health, and its importance should not be overlooked.

On the other hand, considering existing gaps in terms of both mental health and specific healthcare needs, it is evident that without ensuring these special needs, state officials continue to accommodate these people in the emergency facilities, which contradicts Dutch courts' decisions. Thus, until guaranteeing access to these facilities, LGBTIQ+ people should not be accommodated in emergency locations.

Perhaps even more importantly, the state needs to establish a monitoring mechanism and collect data on how it fulfils these obligations, which is the main reason for utilising NGOs and independent research in this thesis. The Netherlands meets its international obligations by fulfilling the responsibilities outlined in Recommendation 1.

Lastly, discussing the new coalition's withdrawal from EU regulations would be incompatible with international legal obligations, as the Netherlands is already a party to these international treaties. The HRCtee has explicitly emphasised that the state's failure to take necessary preventive measures against discrimination, whether for protection or fulfilment, cannot be justified by political, social, cultural, or economic factors.⁴⁴² Additionally, considering discrimination does not require intent, failing to take measures, as exemplified by recommendations, can amount to a breach of the right to equality.

In conclusion, the state is legally obligated to create policies that include temporary measures (such as establishing separate units and crisis services until security measures are completed) or permanent special measures, such as the availability of trauma-informed mental health facilities in the reception centres, or other necessary measures such as raising awareness, training state officials as detailed in the recommendations. These policies are not merely a choice but a binding requirement under the ICCPR and the ICESCR. Additionally, this thesis suggests that more comprehensive recommendations should be developed through further research, which is necessary to improve these policies.

⁴⁴² HRCtee GC No.31, para. 14.

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