MASTER'S THESIS IN INTERNATIONAL LAW AND HUMAN RIGHTS

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CONTROVERSIAL CURES – STATE OBLIGATIONS AND SEXUAL ORIENTATION CHANGE EFFORTS

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Abstract:
Sexual orientation change efforts (SOCE), more commonly known as "conversion therapy", is a term used to describe practices with the goal to change a person's sexuality from non-heterosexual to heterosexual or gender identity from transgender or gender diverse to cisgender. The methods used within these practices range from simple discussion to methods that are severely harmful to the participant, and the practices have no medical backing to stand on. This thesis discusses these controversial practices as well as what role the state plays as a protector, through examining conventions and legal cases.

The state's positive obligations are a central topic within this thesis. Positive obligations imply that the state should be taking an active preventative role in protecting individuals from being subjected to human rights violations. Legal cases determining the reach of the state's positive obligations are discussed in order to create a perspective on whether they would be applicable in cases involving SOCE. It is made clear that positive obligations are primarily applicable in situations where a breach of international human rights law is within the state's capacity to foresee, rather than cases where the breach was too sudden to predict.

The thesis then moves on to examine some of the human rights violations which are most commonly associated with SOCE. The prohibition of torture as well as other forms of ill-treatment is given special emphasis due to the nature of the practices, which in their most severe circumstances will involve methods brutal enough to possibly constitute as torture. The right to health as well as the right to privacy are also given emphasis along with the rights of the child in cases where the individual subjected to SOCE is under the age of 18. Based on the discussion about said violations, it is made clear that the factors that make SOCE legally problematic are multifaceted.

The freedom of religion as well as its limitations are then discussed in correlation with SOCE as well as the obligations of the state. The right to manifest one's religion is limited by the effect it has on others and this is especially crucial in the context of parent and child, as many cases of SOCE occur as a result of the parent pressuring the child into partaking. The thesis reaches the conclusion that manifestation of religion is limited when it harms the child. As for adults partaking in SOCE consensually, the concept of consensual harm and how international human rights law has interpreted this is also discussed.

SOCE is concluded to be a threat to the health and well-being of LGBTQ+ individuals worldwide. Through a legal lens the multiple potential issues with SOCE are clear and since there is no case law on the topic yet, any conclusions must be drawn based on previous case law on related topics. Taking into account the various human rights violations at play this thesis reaches the conclusion that the state's positive obligations require that action be taken to ban SOCE practices.

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1. Introduction

1.1. Background

In recent years, the topic of human rights for those with a sexual orientation or gender identity that differs from the norm has become increasingly relevant around the world. More and more states are legalising same-sex marriage, and sexual orientation and gender identity are also being included as protected categories in the context of non-discrimination provisions within some national constitutions.[1] However, despite these notable steps forward, LGBTQ+ people are still experiencing a wide range of human rights violations as a result of lack of acceptance of their identity from society at large that still remains prevalent in many cultures around the world.[2] This lack of acceptance from the surrounding world can be explicit or more subtle, which means that the ill-treatment of LBGTQ+ individuals may manifest in different ways worldwide on the domestic level within each state.

While there are a number of relevant issues associated with the topic of LGBTQ+ rights that could all be discussed at greater length and depth, the primary topic of discussion within this thesis will be the practices which are most commonly referred to as "conversion therapy", alternatively referred to as "reparative therapy" or "SOCE" (sexual orientation change efforts).[3] A report by the United Nations General Assembly on the practices defines them through the following statement:

> "Conversion therapy" is used as an umbrella term to describe interventions of a wide-ranging nature, all of which are premised on the belief that a person's sexual orientation and gender identity, including gender expression, can and should be changed or suppressed when they do not fall under what other actors in a given setting and time perceive as the desirable norm, in particular when the person is lesbian, gay, bisexual, trans or gender diverse. Such practices are therefore consistently aimed at effecting a change from non-heterosexual to heterosexual and from trans or gender diverse to cisgender. Depending on the context, the term is used for a multitude of practices and methods, some of which are clandestine and therefore poorly documented.[4]

The practices described here will henceforth primarily be referred to as SOCE outside of citations, due to the implications contained within the other common alternative terms. The use of the terms "conversion therapy" or "reparative therapy" implies, through the use of the word therapy, that there is some sort of medical legitimacy to be found here, which is not the case.

[1] Wojcik, 2016, p. 21
[2] Uppalapati et al, 2017, p. 637
[3] Larsen, 2019, p. 286
[4] UN Doc. A/HRC/44/53, 2020, p. 4

Though this is likely not intentional, it seems unnecessary to allow any implication of legitimacy through use of these terms when these practices are controversial to the point of being seen as dangerous and being considered completely unacceptable everywhere within the mainstream medical community.[5] As SOCE as a term describes more concretely what the purpose of the practices are, an effort to change someone's sexual orientation (or gender identity; this definition still remains somewhat lacking), this is the term that will primarily be used within the context this thesis. However, it should be noted that the terms are often used interchangeably and that "conversion therapy" is the term for the practice that most tend to be familiar with, as this is the term most often used in popular speech.

As a sidenote, this thesis will be using the acronym LGBTQ+ as an umbrella term to refer to the group of people being discussed, as simply using the commonly used LGBT fails to include certain sexuality and gender identity categories beyond gay, lesbian, bisexual and transgender, with the letter Q usually being used to refer to queer and/or questioning, and the + symbol representing other lesser known categories such as intersex, asexual, nonbinary, and so on. Despite their lack of traditional representation, these categories are also affected by SOCE due to still existing outside the normative concept of gender and sexuality, and a more inclusive acronym thus seems fitting. However, it must be noted that, as with the different terms for SOCE, the two acronyms still effectively have the same meaning and are used interchangeably for the most part.

The issues with SOCE are multidimensional. First and foremost, major medical organisations agree that sexual orientations and gender identities that differ from the norm are no longer considered illnesses as they were in the past; thus, there is no need for a cure in the first place.[6] Secondly, and perhaps more importantly, the issues with SOCE run far deeper than the practices simply being unscientific. SOCE as a practice varies wildly in execution and can range from simply talking to patients and telling them that God will not love them if they do not change, to attempting to create an association with pain by showing patients same-sex imagery while applying physical stimuli such as heat, ice, or electricity. These latter methods are the reason that these practices are seen as controversial.[7]

SOCE as a practice has largely flown under the radar for a long time and it is not until more recently that awareness for it is being raised and legislation is being made to prohibit it. As

[5] Young, 2006, p. 164
[6] Nugraha, 2017, p. 177
[7] Bracken, 2020, p. 325–326

recently as August 2021, a citizens' initiative in Finland with the purpose of banning SOCE reached 50,000 signatures and is now being referred to the Finnish Parliament. Similar efforts are being made in other states such as Germany, Canada and parts of the United States, while Malta is an example of a state where the practice has already been prohibited.[8] However, the practices still remain and are being actively promoted in many states, particularly by religious groups in the United Kingdom, the United States and Australia, despite the steps that have been made towards more widespread prohibition.[9] In other words, there is still significant work to do worldwide for opponents of SOCE to reach their goal of eliminating the practice.

1.2. Research question

The purpose of this thesis is to examine SOCE practices through the lens of the positive obligations of the state in international human rights law. The most central discussion of the thesis will be focused on the role of the state in SOCE questions when it is playing the role of the protector. The majority of SOCE practices are being performed by non-state private actors, with the most common perpetrator being religious organisations, and thus the question becomes one about defining how much of a reach the state has in situations like this, and how much of the obligation lies on the state for its non-interference if it permits private actors to continue performing actions that could potentially involve human rights violations.

In order to determine where the positive obligations of the state would be applicable, the thesis will attempt to identify where the primary issues with SOCE can be found from a human rights perspective. Due to the varied nature of the practices, there is potentially some distinctions that will have to be made about different variations of the practice that occur under different circumstances, as well as the varied types of methods that are used. The first focus of discussion in this section will be the prohibition of torture as well as other cruel, inhuman or degrading treatment or punishment, due to the common occurrence of the topic of torture being used as an argument within discussions regarding SOCE as a practice, but other potential human rights violations that could be relevant regarding situations involving SOCE will also be addressed in order to create a more comprehensive view of the topic.

The thesis will also attempt to examine private actors' rights and when exactly it may become necessary to limit them in order to prevent human rights violations. There is a potential conflict of rights between the state and these private actors that can arise if the state interferes with the

[8] Yle Uutiset, 2021, available at https://yle.fi/uutiset/osasto/news/gay_transgender_conversion_therapy_ban_initiative_heads_to_parliament/12069406
[9] OutRight Action International, 2019, p. 8

actions of the private actors who perform SOCE. This is to be expected, as especially the question of freedom of religion could come into conflict with the human rights of LGBTQ+ people, the right of a person to make autonomous decisions, as well as the rights of parents to raise their child according to their own beliefs coming into conflict with the rights of the child as an individual. The last section of the thesis will examine how to balance these rights against each other in these specific circumstances.

As the focus of this thesis will be on situations with private actors as the perpetrator of SOCE, this thesis will not go into detail about any occurrences where the state is the primary perpetrator in discriminatorily targeting LGBTQ+ individuals for various harmful practices, including situations where state authorities are the ones actively encouraging and practicing SOCE, which does occasionally occur, but only in a minority of the cases of SOCE worldwide.[10] While state actors perpetuating discrimination is also a massive problem, the scope would become too broad and the issues would be too different from one another and thus, the focus will be kept on situations where private actors are the perpetrator, placing the state in the protector role.

1.3. Material and methodology

This thesis will use a variety of material, with international conventions being its main source of law. Publications from various law journals will be cited to demonstrate opinions about the issues with SOCE as they would be defined within human rights law. This material has been chosen as it provides the most discussion about SOCE as a topic, because of the lack of firmly established legal material involving it. It will also use this material to examine the state's obligations in the context to protecting its citizens from practices that can be categorised as SOCE, while also including previous judicial decisions to demonstrate examples where the state has already fulfilled similar obligations in other situations. Similarly, it will examine the conflict of rights that occurs when the rights of private non-state actors are pitted against those of the individual and analyse how this conflict plays out through the use of legal material that suits the topic which is being addressed.

The legal dogmatic method will be the primary method used in correspondence with the material used in this thesis. As a result, the analysis that is conducted within the thesis will be relying first and foremost on the aforementioned normative legal sources to reach conclusions about the topic at hand as is required. Any subsidiary material that may be used within the thesis will only be used for individual statements, either ones that are needed to clarify a piece of

[10] UN Doc. A/HRC/44/53, 2020, p. 7

information that is not directly tied to the judicial discussion within the thesis, or for more personal stories to discuss the direct impact of the practices on the victims, rather than to make any in-depth analysis based on non-legal sources. These sources will include materials such as interviews, news articles, and other similar content.

2. The state's obligations and SOCE

2.1. Defining positive obligations

In order to be able to properly discuss the issues with SOCE from a human rights perspective, the first question that must be addressed is what sort of role the state plays in the situations that have been outlined here, with private non-state actors performing SOCE on LGBTQ+ individuals. With non-state actors committing acts that could potentially involve human rights violations, it becomes important to determine when exactly the state should be interfering with these acts, as well as the nature of that interference in a legal context. Thus, the state's obligations within human rights law must be examined in greater detail so that its role in this context may be better understood.

With all human rights, there exists positive and negative obligations for the state to uphold. The more traditional civil and political rights are more commonly viewed as having negative obligations, while economic, social and cultural rights are considered to be more focused on the positive obligations of the state.[11] While this is a simplification and all human rights can in fact be manifested through positive as well as negative obligations, it is a good starting point for this discussion, as it clarifies that the negative obligations are the ones that are traditionally more commonly discussed within human rights law, particularly in the context of civil and political rights. The negative obligation of not actively engaging in human rights violations as a state is a perspective that, while being the traditional course of action for the state, can be rather limiting in terms of the protection it offers to any individual that may be affected by human rights violations.[12]

While the state may not directly be taking an action that directly leads to a human rights violation, the negative obligations of the state, meaning that the state is not actively committing any human rights violations, is not seen as enough in terms of preventing human rights violations from occurring, which would of course be ideal. Instead, states need to take steps to ensure that human rights are actively protected beyond avoiding causing direct harm. This is

[11] Tomuschat, 2009, p. 19
[12] Russell, 2010, p. 281

commonly referred to as the positive obligations of the state.[13] The existence of positive obligations puts more pressure on the state to be proactive in its defence of human rights, since it relies on the idea that a state who is not actively committing human rights violations is not in itself enough protection for individual people.

Of course, this does not mean that only one type of obligation is relevant only with that specific set of human rights. Positive and negative obligations are both important in order to fully achieve the level of protection necessary to fully defend individuals from perpetrators of human rights violations.[14] However, given that negative obligations are more firmly established within human rights law, it may be necessary to examine the role of positive obligations in particular within this field in order to understand what areas may still be lacking within human rights law as a whole, as well as regarding the limitations concerning this particular topic. Specifically in this context, the role of positive obligations in situations involving non-state actors needs to be examined.

In practice, the addition of positive obligations as a concept into human rights law means that the norm is now that the state is expected to be a more active party within cases where it otherwise might not have played a role at all. Specifically, the state being an active participant in cases that originally would only have involved non-state actors, with no interference from the state at all, if one would only be examining them from a traditional human rights perspective. Acknowledging that states have positive obligations creates an entirely new perspective on human rights law, one that is only more recently being given room to develop fully into its own categorisation.

To provide an example of how recent this development regarding positive obligations is, within Europe, the earliest case law related to this matter was only just beginning to be established in the last few decades of the 20th century. These cases were addressing the state's obligation to step in and protect individuals both from public authorities as well as holding the state responsible for other individuals who are committing human rights violations against the victimised individuals.[15] The latter situation in particular creates a complex dynamic between conflicting rights as the rights of individual freedoms are suddenly under scrutiny by the state

[13] Singh, 2008, p. 94
[14] Tomuschat, 2009, p. 19
[15] Singh, 2008, p. 95

where they would not have been before.[16] These conflicting rights will be discussed more in depth later on in this thesis, as the focus will kept on the state's obligations for now.

Despite its relatively recent relevance, there has been a clear shift to take positive obligations into account in the context of human rights violations where the state would otherwise not be involved. The state's role in cases like these is, in other words, being increasingly considered.[17] With the issues in this thesis primarily revolving around the actions of private actors, the concept of positive obligations is central in order to discuss what role the state should fill in a situation where individuals are being harmed by SOCE practices and exactly what the implications of this role mean for the actions that should be taken. The question to address first, then, is how situations would be affected if there was more state interference in situations involving private parties and human rights violations.

2.2. In relation to private parties

Traditionally, human rights have existed to protect individuals from the actions of the state that they reside in, as citizens or otherwise, or from other states that may threaten their well-being. However, this interpretation is somewhat lacking and has thus in recent decades come to face criticism, since it fails to take into account non-state actors and whether they can play a role in human rights violations.[18] As this thesis will discuss SOCE as perpetrated by non-state actors, specifically private parties outside state influence, a central point in this discussion becomes to define how positive obligations affect these private parties in particular and how far the obligations of the state can reach in the context of SOCE.

When following tradition, as has been addressed, the state is supposed to primarily act in response to state actors or actors that are otherwise connected to those of the state as a public power of some sort.[19] However, an important factor to consider in regard to the obligations of the state is the principle of due diligence. Specifically, it is the duty of a state to protect individuals from non-state actors that cause harm, and to consequently be diligent and observant enough to notice when a human rights violation is being committed.[20] The state is obligated, in other words, to assure that human rights law is being upheld within its territory, or else it will be violating its obligations under said law.[21] The principle of due diligence is commonly

[16] Tomuschat, 2009, p. 26
[17] Marshall, 2008, p. 147
[18] Marshall, 2008, p. 143
[19] Manjoo, 2013, p. 240
[20] Barnidge, 2006, p. 93
[21] Marshall, 2008, p. 147

considered to be a basic principle of international law and it should thus always be acknowledged in matters where it might be relevant.[22] How this ends up interacting with a specific situation in practice, however, may depend on exactly what sort of violation is being committed by the party in question.

A foundational case that helped shape the principle of due diligence into its current form is the case of *Velásquez Rodríguez v. Honduras.* The case in question is a 1988 case from the Inter-American Court of Human Rights; one of the first judgments that the court ever made, in fact. The case was related to the topic of forced disappearances; Velásquez Rodríguez had been the victim of one such incident, but while there were suspicions as to who was behind it, no explicit link to the state could be proven due to the circumstances under which he had been taken away. It must also be noted that while the state could not be proven explicitly to be the perpetrator when it came to his disappearance, the state had also not made any notable attempts to locate him, leaving the investigation of this disappearance very lacking.[23]

Notably, Velásquez Rodríguez was far from the only person who disappeared in Honduras around this time; between 1981 and 1984 as many as 100 to 150 people went missing, with many of them never returning.[24] This displays a distinct pattern of occurrences rather than one singular incident, which is important to consider when comparing this case to other similar judgments. It was determined by the Court that the state of Honduras would be held responsible for the incidents regardless of whether there was direct involvement regarding cause of the disappearances on the state's part or not,[25] as stated within the judgment:

> Thus, in principle, any violation of rights recognized by the Convention carried out by an act of public authority or by persons who use their position of authority is imputable to the State. However, this does not define all the circumstances in which a State is obligated to prevent, investigate and punish human rights violations, nor all the cases in which the State might be found responsible for an infringement of those rights. An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.[26]

In other words, the state has obligations to its people to assure their safety, even if it is not or cannot be explicitly proven to be the perpetrator of a human rights violation. The state has the

[22] Barnidge, 2006, p. 121
[23] Medina, 1988, p. 68–69
[24] Medina, 1988, p. 71
[25] Medina, 1988, p. 72
[26] Velásquez Rodríguez v. Honduras, 1988

obligation to react and respond to these actions, as well as take actions to prevent them from occurring in the first place, even if the actor committing the human rights violations is not a state or in any way acting through the state in the form of an official. In modern times, non-state actors are often involving themselves in international affairs at an increasing frequency. Terrorism is a more extreme example of an act that by itself cannot always be pinned on a specific state. In other words, in today's international world individuals have more power than ever, and one can draw the conclusion that this principle has become more important than ever in order to ensure the protection of human rights worldwide.[27]

Other notable situations where state interference in the actions of private parties becomes particularly important often involve violations of the human rights of minorities. Violence against women, such as domestic violence and trafficking, is a central issue often raised in these discussions, and so is labour exploitation, slavery, as well as other forms of private violence against different minority groups.[28] In other words, it is noteworthy that minorities are often facing a higher risk than the average individual of being mistreated by non-state actors for discriminatory reasons. The state's interference thus has the potential to become particularly important to ensure the protection of these vulnerable groups specifically, as traditional negative obligations often prove not to be enough to prevent human rights violations aimed towards them in particular due to their position in society.

One only needs to look at cases such as the widespread crimes in the city of Ciudad Juárez in Mexico, where 400 young women went missing in the timespan between the early 1990s and the early 2000s, in order to see the necessity for positive obligations. Many of the bodies of the women were found with signs of sexual torture which had occurred prior to their deaths. Even though the Mexican government had a magnitude of crime scenes to investigate, the authorities were not successful in stopping the killings, despite national and international criticism of this lack of attention to the crimes.[29] This neglectful attitude towards the crimes in the city eventually led to legal action on an international level.

In 2009, the Inter-American Court of Human Rights investigated the situation in Ciudad Juárez through the case of *González et al. ("Cotton Field") v. Mexico* and concluded that the state should have taken further action to prevent these killings as well as attempt to find the perpetrators, as the actions that had been taken were found to be very lacking, with alleged

[27] Barnidge, 2006, p. 121
[28] Farrior, 1998, p. 300
[29] Robinson, 2005, p. 168

failure to search for the victims and discrediting that they might be in danger before the bodies were found, and then failing to conduct proper investigations of the crime scenes. The state was consequently ordered to provide extensive reparations in form of, among other contributions, creating new legislation in an attempt to prevent gender-based killings from occurring in the future, finding and punishing the perpetrators as well as the officers who delayed the investigations, and providing compensation for the victims' families.[30]

The case of Velásquez Rodríguez, despite the shift in conventional framework, seems to be a fitting comparison to this case. Both cases involve a situation where the state is standing by and allowing some rather obvious human rights violations to continue through its lack of proper action in order to prevent further harm from being done to the citizens who are being severely negatively affected by the crimes in question.[31] Just like in the case of Velásquez Rodríguez, the violations in the case of González et al. v Mexico were part of a greater pattern of human rights violations committed in the area that were not given enough attention by the state, and in both cases it was decided that the state was to be held responsible despite no direct link being proven between the state and the crime, simply because the state should have been more diligent.

In the context of the case of González et al. v Mexico, it is plain to see that women as a vulnerable group were the ones primarily affected by the state's inability to interfere. They were disproportionally targeted and victimised by these incidents in comparison to the rest of the population, as was also made clear in the judgment of the case, where it was shown that the state authorities failed to take the threat against them seriously. The state may not have had direct involvement in the killing of these young women, but its positive obligations to assure their safety and investigate the harm done to them remain, nonetheless.

Another example of a case which involved a minority group being persecuted where authorities did not interfere was the case *of Hajrizi Dzemajl et al. v.Yugoslavia*, a communication that was decided upon by the Committee against Torture in 2002. In this case, a Romani settlement was burnt down by private persons, specifically a group of Montenegrin individuals with intent of harming them specifically on the basis of them being Romani, with the police doing nothing to prevent this from occurring, simply standing by and allowing it to occur.[32] The Committee came to the following conclusion about the events that had transpired:

[30] González et al. ("Cotton Field") v. Mexico, 2009
[31] Robinson, 2005, p.168
[32] Nowak, 2006, p. 824

> Moreover, the Committee considers that the complainants have sufficiently demonstrated that the police (public officials), although they had been informed of the immediate risk that the complainants were facing and had been present at the scene of the events, did not take any appropriate steps in order to protect the complainants, thus implying "acquiescence" in the sense of article 16 of the Convention. In this respect, the Committee has reiterated on many instances its concerns about "inaction by police and law-enforcement officials who fail to provide adequate protection against racially motivated attacks when such groups have been threatened" […]. Although the acts referred to by the complainants were not committed by public officials themselves, the Committee considers that they were committed with their acquiescence and constitute therefore a violation of article 16, paragraph 1, of the Convention by the State party.[33]

The state was, in other words, still deemed to have failed in its responsibilities despite not directly being the party inflicting harm to these individuals. Because law enforcement stood by and allowed the incident to occur, choosing not to interfere rather than fulfilling its obligation to step in to protect the Romani settlement, the state was considered to be the enabler of this human rights violation.

This, as well as the Velásquez Rodríguez case, perfectly encompasses the practical use of positive obligations, as well as why they become necessary when dealing with private parties as perpetrators; to prevent the state from standing by and simply allow human rights violations that it is not directly committing to happen, as states can and will do this if left completely without scrutiny. Like the above described killings in Mexico, this also concerned a minority group, in this case members of the Romani people, being an ethnic minority, that ended up being disproportionally affected by the crime specifically targeted towards them and the lack of effort by the state to protect them, which further proves that it is primarily members of vulnerable minority groups that often end up affected by the lack of proper state protection.

However, this does not mean that the state will always be found obligated to interfere in any and all private affairs. Another case involving actions taken by a non-state actor that should be discussed for comparison's sake was the case of *Osman v. the United Kingdom*, where the European Court of Human Rights dealt with an alleged failure on the authorities' part to defend the applicant's husband from the individual who killed him.[34] The Court came to the conclusion that there had been no violation on the state's part, with the following motivation:

> For the Court, and bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or

[33] Hajrizi Dzemajl et al. v. Yugoslavia, 2002
[34] Hofstotter, 2004, p. 528

> disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention.[35]

In this case, in opposition to the other cases that have been previously discussed, it was ruled that the state had committed no violations in this case, due to the nature of the case being too difficult to predict. Specifically, the perpetrator's actions were seen as too unpredictable to reasonably expect that interference on the state's behalf would have been possible. It should be noted that the crime in this case was an isolated incident committed by a single perpetrator. While the perpetrator did display a pattern of suspicious behaviour, it was not seen as widespread enough to be considered predictable, unlike the distinct pattern of countless disappearances and murders in the two American cases and also in clear contrast to the several perpetrators that were involved in the case of *Hajrizi Dzemajl et al. v.Yugoslavia*.

However, the case of *Osman v. the United Kingdom* remains important because it established that the state does have obligations that it should be fulfilling, even if they did not end up applying to this particular case. It was, in other words, an important case for establishing positive obligations and the exact role that these obligations play in the interaction between state and non-state actors, despite these obligations not being seen as applicable within the context of the case itself.[36] It is, after all, also important to know where positive obligations do not apply.

Another case involving similar topics was *E. and others v. the United Kingdom*, a 2002 case that was also given a judgment by the European Court of Human Rights. The four applicants had been the victims of abuse at the hands of their stepfather and there had already been criminal proceedings directed against him. However, the stepfather was not detained and was allowed to walk free, upon which he returned home to continue his behaviour against his stepchildren, despite the fact that he was not supposed to be allowed to reside there.[37] The Court had the following to say about the role that the authorities played in this situation:

> The Court was satisfied that the pattern of lack of investigation, communication and cooperation by the relevant authorities must be regarded as having had a significant influence on the course of events and that

[35] Osman v. the United Kingdom, 1998
[36] Hofstotter, 2004, p. 528
[37] Hofstotter, 2004, p. 526

> proper and effective management of their responsibilities might, judged reasonably, have been expected to avoid, or at least, minimise the risk or the damage suffered. There had, accordingly, been a violation of Article 3.[38]

This further clarifies that the state does have the obligation to interfere in a situation where the damage caused could have been preventable, even if only a single perpetrator may be involved. It serves as a counterpoint to the *Osman v. the United Kingdom* case due to the different conclusions that the Court came to. The state cannot possibly be asked to know everything, as the Court concluded in said case, but in cases like *E. and others v. the United Kingdom*, there are certainly steps that the state could have taken to protect these individuals.[39] Where exactly the line where due diligence is necessary is hard to precisely determine, but these two cases in contrast at least give some guidance as to the limits of the reach of the positive obligations of the state.

What made *E. and others v. the United Kingdom* different from *Osman v. the United Kingdom* was that there was already substantial proof of the issues existing within the family, which was viewed by the Court as clearer than in the latter case, in which proof existed but was not seen as clear enough. The stepfather had previous charges against him and the children had displayed clear signs of distress such as running away from home and drug abuse. Through this it was clear that the social services should have been aware of the stepfather still continuing his behaviour towards the family, especially since the stepfather was supposed to be monitored after being convicted.[40] In other words, the state had more than enough knowledge on the situation and this was the reason that it was determined to have mishandled the situation.

In comparison, preventing the incidents that occurred in the case of *Osman v. the United Kingdom* would have required more effort on the state's behalf to the point that it was viewed as unreasonable. It was argued that the state could not have been able to predict human behaviour to the extent that it would have been made clear that anyone's life was in danger.[41] Based on this, it seems that what is most important in order for the state to be obligated to interfere, there needs to be a pre-established pattern of behaviour that the correct authorities have been made aware of that it then does not act accordingly with.

When looking at these cases and comparing their circumstances, one can draw the conclusion that there are definitely situations where the actions of private persons where the state has a

[38] E. and others v. the United Kingdom, 2002
[39] Hofstotter, 2004, p. 534
[40] Hofstotter, 2004, p. 531
[41] Osman v. the United Kingdom, 1998

legal obligation to interfere, even if it naturally is not possible for a state to do so in every single situation that occurs between private persons, which thus makes positive obligations dependable on context. Positive obligations rely heavily on the necessity that the state needs to already be aware of pre-existing issues in order to act preventatively in the future, such as in *E. and others v. the United Kingdom*, rather than interfering in cases where nobody has committed a crime yet, such as *in Osman v. the United Kingdom*, where there was a pattern of far-reaching troubling behaviour but no crime had been committed yet, for the sake of comparison.

To summarise the relationship between the state and private actors, one can conclude that despite the prevalent idea that international law exists to govern state actors, the state's duty to protect must be considered even when the perpetrator is not a state actor. In other words, passively harmful government inaction needs to be treated as seriously as actively harmful government action would be.[42] Acknowledging this and knowing the state may have a role to play even when a private actor is committing human rights violations, it is time to examine how exactly SOCE fits into this equation.

2.3. In the context of SOCE

Taking everything that has already been addressed within this thesis regarding state obligations into account, one must ask the question of how exactly these examples of state obligations are applicable to situations involving SOCE. Since the practices vary in shape and form it can be hard to make completely certain statements about how exactly their relationship with the state can be defined, but as with any other controversial practice, they can be analysed in order to come to a conclusion. The ideal way to do this would be to first discuss SOCE as a whole, in order to understand how exactly the practices function before further analysing them.

SOCE practices currently occur in at least 68 countries in all regions of the world.[43] As the practice is not always well-documented, especially in certain parts of the world, it is hard to provide an exact number for the amount of occurrence worldwide. The nature of the practice also varies slightly from region to region, as does the underlying reason it is performed, beyond the consistent intention of changing someone's sexual orientation or gender identity. Usually, the reason is connected to pressure from the family, as well as more general cultural and religious pressure within the context of that specific state due to how homosexuality and

[42] Farrior, 1998, p. 300
[43] UN Doc. A/HRC/44/53, 2020, p. 6

transgenderism are perceived within the culture and religion of the involved individuals and their society.[44]

The organisations that provide these services are also often religiously motivated despite claims that the practice is based on science. The providers of the service can include churches and religious mental health organisations of different types, but there are also some governments that choose to condone these services.[45] The issues with governments themselves condoning SOCE do, of course, fall outside the scope of this thesis, as they point to a larger issue of states that fail to support the human rights of LGBTQ+ people rather than private individuals who choose to do so. Even so, it should be noted, nonetheless, that this problem exists and is widespread in certain areas of the world, despite not being addressed within this thesis due to the limitations of its scope.

Despite the widespread existence of the practices, they are also being widely recognised as unscientific, ineffective, and mentally and emotionally harmful.[46] The practices have been condemned by every major medical and mental health association in the European Union, the United States, Canada and Australia, among other countries.[47] A vast majority of individuals who have undergone the practice report it as having been ineffective in achieving its intended purpose of actually changing their sexual orientation or gender identity. Most of these individuals also report that they have been hurt by the practice in some way, which does not include the practice not achieving its intended purposes. These reported consequences of SOCE include depression, anxiety, shame, self-hatred, loss of faith, permanent physical harm, suicidal thoughts as well as actual suicide attempts.[48]

With each and every individual case of SOCE, the practices will naturally vary widely, and as such, the severity of the effects may not be consistent. Participants often report the practice as being religiously motivated and having been treated by the practitioner as if they have demons inside them that need to be expelled through, for example, fasting and prayer. They are often pushed into participating by family members in order to avoid facing rejection from their family and community, which could in turn negatively impact their lives significantly. In its more severe forms, these practices can turn violent. Lesbians and transgender women in particular

[44] OutRight Action International, 2019, p. 4
[45] Nugraha, 2017, p. 176–177
[46] Wojcik, 2016, p. 23
[47] OutRight Action International, 2019, p. 16
[48] UN Doc. A/HRC/44/53, 2020, p. 4-5

have reported these religious rituals turning into sexual assault.[49] Shocking, burning and freezing are also commonly used by the practitioner to attempt to create a negative association with same-sex imagery within the participant.[50]

Through interviews, LGBTQ+ individuals have been able to describe how the practice has affected them in various ways. George Barasa, a gay gender non-conforming Kenyan living in South Africa, who has experienced the practice, describes it as such:

> "Conversion therapy" is not a single event—it is a process of continued degradation and assault on the core of who you are. There are often repeated violations in the form of psychological and sometimes physical abuse…It is not one instance—it is a continued sense of rejection. The pressure is enormous.[51]

Within some instances of SOCE, the practice is conducted primarily through "talk therapy" rather than more physical methods. In an example from the United States, a man named James Guay was struggling with self-hatred due his same-sex attraction, a mindset instilled in him by his religious community. Repressing the thoughts did not help, so he sought out SOCE, where he was told to date women, act more masculine and maintain platonic relationships with men. It was only through actual psychological treatment that Guay was eventually able to accept himself and his sexuality so that he could finally escape his self-hatred.[52] In this case, the practice was primarily conducted through speech, as the term "talk therapy" would imply, but it is far from the only method that practitioners of SOCE may choose to apply.

The activist Ro-Ann Mohammed, a queer woman from Trinidad and Tobago, told her parents about her sexuality because she was going to speak at an event about her advocacy and it was going to be in the news and she would rather have them hear it from her first. Her parents, who had not known about her sexuality nor her advocacy, did not take the news well and when she came to visit them, they prevented her from leaving the house or using the internet. She was then taken to a pastor and then to a church counsellor by her distraught mother. Both the pastor and counsellor spent hours of their individual appointments with her attempting to perform exorcism rituals on her with forceful methods. Mohammed describes the experiences as violating and she ended up moving to Barbados after her parents kicked her out when she refused to change her lifestyle.[53] This case reflects the religious angle that is often underlying in SOCE.

[49] OutRight Action International, 2019, p. 46
[50] Bracken, 2020, p. 286-287
[51] OutRight Action International, 2019, p. 3
[52] Larsen, 2019, p. 286
[53] OutRight Action International, 2019, p. 59

In another example from the United States, Matthew Shurka came out to his parents at the age of 16 and was sent to a so-called conversion therapist in Manhattan by his father. Here he was told by the practitioner of SOCE that homosexuality did not actually exist and that his feelings were curable through "conversion therapy." As a part of this "therapy", Shurka was separated from his mother and sister for three entire years to prevent female influence on his personality, which allowed him nothing but interaction with men both in his family and in his school. The "treatment" was not effective in the slightest; in fact, Shurka's feelings only ended up growing stronger.[54] Here one can see that the person who was exposed to SOCE was expected to perform a radical change of lifestyle to guarantee success, with his personal life being vastly impacted by the practice.

For yet another example from the United States involving some of the more controversial methods that are used in SOCE, Samuel Brinton experienced what is often commonly referred to as "aversion therapy", a term used in order to distinguish it from the less intense "talk therapy". He describes that he was shown homo-erotic images while having his hands burned or frozen. The purpose of this "aversion therapy" is, as the name implies, to create an aversion through negative association between the sensation and the images, with Brinton comparing it to the classic Pavlov dog experiment.[55] These more radical treatments such as what Brinton experienced are what primarily creates the controversy around the practices.

The level of severity that these practices involve can be incredibly scarring for the individual who goes through them. Reverend Nokuthula Dhladhla is a lesbian from South Africa who realised that she was different from other girls at the age of 14. She grew up in a religious household where she was made to feel that there was something wrong with her. A group from the local church got involved and would come to her house to pray and drive the demons out of her to make her stop being a lesbian. She was subjected to physical and sexual violence during these sessions and she had to lie about her sexuality having been successfully changed in order to get it to stop.[56] Situations like Dhladhla's seem to be the worst case scenario of what exactly SOCE can include as methods to attempt to change the participant's orientation.

The stories which have been described here are, of course, only a few out of many others from individuals who have experienced SOCE first-hand. There are many other stories which have been shared by those who have lived through the practice and each case is unique in its

[54] Larsen, 2019, p. 287
[55] Larsen, 2019, p. 287
[56] OutRight Action International, 2019, p. 49

circumstances, with these particular examples being chosen mainly to reflect some different types of treatment that may occur during sessions of SOCE. Still, the events that have been described here are far from the only methods that may be inflicted upon LGBTQ+ individuals by practitioners of SOCE, but they hopefully provide the insight needed to grasp the fundamentals of SOCE, nonetheless.

The variations in the severity of the practices are notable, as has been made clear here, but what remains a consistent factor between the different iterations of SOCE is the negative effect that the practices can end up having on the participants and their health, even though they may end up varying in severity just as the practices themselves do. With the questionable treatment methods being used within the practices, as well as the distinctly negative reported consequences and the complaints from the medical community to further point out the unethical aspects of SOCE, there are definitely grounds for calling the validity of the practices into question from a purely medical perspective.

If one chooses instead to approach SOCE from a legal perspective rather than a medical one, one will quickly find that the practices have also been condemned by the UN independent expert on sexual orientation and gender identity, who has called for a ban on them due to their questionable nature.[57] Despite this stance from the UN, only a few states have created legislation with the intention of completely prohibiting SOCE so far, while there are other states which are currently preparing to put national bans into place.[58] In some states the ban is regional, such as in the United States, where some of the states have prohibited the practice, some are in progress of adopting legislation, while others have made no attempt to take action in the first place.[59]

The parliament of the European Union has encouraged its member states to adopt measures that prohibit the practice, but as this is only a resolution, it is therefore not legally binding for any member state.[60] In other words, state attitude regarding SOCE varies wildly, from condemnation and prohibition to the opposite, active endorsement of the practices, as was previously mentioned to be the case in certain states. One could say that the legal status of SOCE largely reflects the general societal divide regarding individuals' opinion on the LGBTQ+ community, both regionally as well as internationally.

[57] IESOGI, Report on Conversion Therapy, 2020, p. 3
[58] OutRight Action International, 2019, p. 21
[59] Larsen, 2019, p. 288
[60] EU, 2017/2125(INI), 2018

There was originally no explicit mention of LGBTQ+ rights in the main human rights instruments, considering that when they were drafted, norm-deviating sexual practices and gender expression were still very much considered a taboo and were widely criminalised across the world, and thus they simply were not considered as an option for a potential addition at the time. Over time, however, some efforts have been made to acknowledge this minority group as a part of groups that need specific protection, progress being made only in more recent decades. The Charter of Fundamental Rights of the European Union was the first to explicitly address discrimination based on sexual orientation, which it did in 2000.[61]

The Yogyakarta Principles, a set of international principles with focus on sexual orientation and gender identity, outright make a request for states, in Principle 18, to "ensure that any medical or psychological treatment or counselling does not, explicitly or implicitly, treat sexual orientation and gender identity as medical conditions to be treated, cured or suppressed".[62] However, the Yogyakarta Principles are not legally binding, given that they do not constitute a treaty but principles adopted by experts in the field. They are merely a suggestion for specific framework that could be used to protect LGBTQ+ individuals from human rights violations and should not be seen as anything more than that.[63]

As of now, no legal framework that was outright designed for this specific purpose exists, despite these efforts from LGBTQ+ activists and human rights advocates worldwide. UN reports have gone as far as to state that there is no need for human rights designed for LGBTQ+ individuals, as the current existing international human rights law should already contain all the rights that are necessary in order to protect the human rights of LGBTQ+ individuals.[64] This suggests that in order to find the problems with SOCE from a human rights perspective, it should be possible to simply look at already existing human rights and apply them to the situation, rather than attempt to create completely new conventions with the specific aim to protect individuals from certain groups from SOCE.

When knowing this, it is clear that there is still a lot of work to be done in this area. So far, there has been no international case law regarding the topic of SOCE in particular. There have been national legal cases involving SOCE, some of which have had legal impact in that particular area, such as in the United States, where the debate around SOCE has not yet had the Supreme

[61] Langlet, 2010, p. 344
[62] Principle 18, Yogyakarta Principles, 2006
[63] Uppalapati et al, 2017, p. 638–639
[64] Combatting discrimination based on sexual orientation and gender identity, available at https://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx

Court deliver any substantial judgments but has been debated on a state level in different US states.[65] This lack of existing case law on the topic makes it hard to know for certain what an official stance on SOCE would be in a legal context on a broader level than the legal systems of individual states.

Regarding state obligations to intervene in the context of SOCE, then, one can see that there is substantial documented proof that SOCE is harmful to those who are subjected to it. However, one must question whether this is enough for a blanket ban of the practices, or if this is something that the state would have to look into on a case-by-case basis due to how the practices may differ in severity for each individual case of SOCE. To conclusively say whether the state has an obligation to interfere with SOCE first requires an understanding of on what legal basis the state would be interfering, in terms of human rights law. In order to successfully determine this, one must examine what human rights in particular would be brought into question in a hypothetical case that would involve SOCE being conducted by a private non-state actor. To achieve this, the best approach is to discuss the human rights that are relevant to SOCE in order to gain a better insight into the situation.

3. Specific human rights and SOCE

3.1. The prohibition of torture

The issues with SOCE are often discussed from a human rights perspective when attempting to motivate a prohibition of the practice. Even if recent years have brought significant progress in this area regarding jurisdiction in various states, the question of whether there is a need for further international legislation in the area in order to pressure more states into change has been raised by LGBTQ+ activists and human rights advocates, specifically requesting rights that protect LGBTQ+ individuals from SOCE to be provided. However, as has been mentioned, it is useful to examine what protection exists within the framework of existing international human rights law to find examples of legislation that can be used to protect LGBTQ+ individuals from SOCE. Thus, it seems like a natural conclusion that some common points should be discussed.

An argument that is often raised by opponents of SOCE is the comparing of the practices to torture due to their controversial nature, which is something that even the UN independent expert on sexual orientation and gender identity has addressed in the past.[66] The UN anti-torture

[65] Bracken, 2020, p. 329
[66] IESOGI, Report on Conversion Therapy, p. 3

machinery has expressed similar concerns regarding some forms of the practice due to the questionable methods which been known to occur during sessions, once again pointing out that under specific circumstances the practices performed could be considered torture.[67] Thus, when discussing which human rights violations could come into play during circumstances surrounding SOCE as a practice, torture is one type of violation whose relevance should immediately be addressed in order to understand the full nature of SOCE.

Torture as a practice is completely prohibited according to Article 5 of the Universal Declaration of Human Rights (hereafter the UDHR), along with other cruel, inhuman or degrading treatment or punishment.[68] The terms "torture" and "other cruel, inhuman or degrading treatment or punishment" in use here are not defined further within the UDHR itself, leaving it up to interpretation; the addition of other forms of ill-treatment besides torture were added because the word torture was considered too specific to be as useful as possible, as it would lessen the ability for the article to be used for its intended purpose.[69]

The International Covenant on Civil and Political Rights (hereafter the ICCPR) largely utilises the same terminology as the UDHR in its seventh article which serves as framework for prohibiting torture and other cruel, inhuman or degrading treatment or punishment, with the addition of medical and scientific experimentation as a specific example of a prohibition, but the article still does not further attempt to define what exactly is considered torture, and thus the definition remains unclear.[70] Thus, the exact meaning of the word torture remains mostly uncertain if one only takes the UDHR and ICCPR into account, which is why one must look further into a convention that more specifically addresses torture, along with other forms of ill-treatment, by focusing completely on this topic, in order to find a fitting definition that can be used to discuss SOCE in the context of a relationship to torture.

In Article 1 of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereafter the UNCAT), torture is defined thoroughly, unlike the UDHR and the ICCPR, as follows:

> For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason

[67] UN Doc. A/HRC/44/53, 2020, p. 15
[68] Article 5, Universal Declaration of Human Rights, 1948
[69] Morsink, 2010, p. 42
[70] Article 7, International Covenant on Civil and Political Rights, 1966

based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[71]

The UNCAT contains an absolute prohibition of torture; under no circumstances are these acts considered acceptable. No exceptions are ever made to this rule, not even during wartime or other special situations that could require it. This clearly establishes the customary law in this area, as this total opposition prevents any attempts at justification of torture under any circumstances.[72] This means that if one can successfully establish that some SOCE constitutes torture, there would be no question of whether the practices are acceptable or not, as the practices are absolutely prohibited according to the UNCAT if they constitute as such.

More than a mere prohibition, it must be noted the UNCAT also gives an actual definition of torture that can be used to attempt to define practices as such, which is a notable upgrade to what the UDHR and ICCPR provide within their own prohibitions. However, the definition still remains vague to the degree that determining whether an act is torture or not can be difficult unless the act being assessed has especially heavy consequences.[73] This makes it harder to determine whether the assertion that SOCE is torture is in any way accurate, or if it is simply hyperbole by its opponents.

To start with, it would be the best course of action to break down the definition written in the UNCAT in order to understand what exactly it is that makes an act identifiable as torture. The definition provided by the UNCAT can be narrowed down into the following three criteria, in order to make it easier to determine what exactly would identify an act as torture:

- Does the act cause the victim severe suffering?
- What is the perpetrating party's purpose for performing the act?
- Who is the party performing the act?

As for the first point, SOCE definitely causes suffering for its victims; it would be difficult to argue otherwise, as there is extensive research available about its negative effects.[74] The question then, of course, becomes one about whether these negative effects are severe enough to fall under the definition that the UNCAT provides. Additionally, the UNCAT addresses

[71] Article 1, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987
[72] Huntington, 2014, p. 287
[73] Smith, 2013, p. 14
[74] Larsen, 2019, p. 287

physical as well as mental suffering, but the latter becomes particularly hard to determine, with suffering in general being so subjective to the recipient.[75]

The more extreme cases of SOCE can involve controversial methods such as electric shocks as well as violence in different forms, and when it reaches this point it would not be a reach to refer to these methods as being methods that cause physical and mental suffering to the recipient.[76] Where exactly the line would be drawn as to what sort of methods are considered severe enough, however, is not as easy to determine, as suffering is subjective, depending entirely on the perspective of the person who experiences the pain.

However, the potential for SOCE to be considered torture according to the first point of the criteria is inarguably there, at least in its more severe iterations. It would be difficult to argue that the sexual and physical abuse that certain recipients have had to endure during their treatments would not be such severe suffering that it constituted torture. According to the International Rehabilitation Council for Torture Victims, physical torture can include beating, electric shocks, stretching, submersion, suffocation, burns, rape and sexual assault.[77] As some of these actions occur during SOCE at times, it is inarguable that SOCE is, at least on some occasions, cause severe suffering, and would thus be considered torture.

As for the second criterion, the purpose of an act defined as torture has to be, according to the UNCAT, obtaining information or a confession, punishment, intimidation, or discrimination.[78] The first purpose is not exactly applicable here, as no information or confession is being obtained through SOCE. One could make an argument that SOCE fits under the punishment and intimidation description, however, as the practice is intended to punish victims for their sexual orientation and gender identity while it also attempts to intimidate them into no longer exhibiting those traits, often coming from religiously motivated family members who pressure victims into taking part in SOCE.[79] This would already classify it as torture, but there is an even stronger case to be made regarding this point.

The purpose of discrimination would be the primary purpose of SOCE, as the specific targeting of LGBTQ+ individuals for SOCE singles them out in a way that would be considered discriminatory.[80] This firmly establishes SOCE as having a purpose that fulfils the criteria of

[75] Baruh Sharvit, 1993, p. 153
[76] OutRight Action International, 2019, p. 20
[77] International Justice Resource Center, available at https://ijrcenter.org/thematic-research-guides/torture/
[78] Article 1, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987
[79] OutRight Action International, 2019, p. 46
[80] Nugraha, 2017, p. 190

torture; there is no way to possibly argue that the practice does not specifically target a certain group which is treated in a discriminatory manner. Thus, the second of these criteria to define torture is fulfilled; it can be guaranteed to fit the criteria of torture at least on this point without a doubt.

The third of the criteria is perhaps the primary point of contention, as it requires either a public official or another person acting in official capacity to be the one who performs the act. According to a global survey, 45.8% of practitioners of SOCE are medical and mental health providers. Notable other actors who provide the practices include religious authorities and traditional healers at 18.9%, conversion camps and rehabilitation centres at 8.5%, parents at 6.9% and state authorities at 4.4%, though it is worth noting that the categories can overlap, especially where religion is concerned, as it may still have an influence in categories that are not specifically religious authorities, especially in areas where religion has a significant influence on society in general.[81]

It is thus clear that the range of practitioners of SOCE is wide and that these practices do not necessarily have any connection to public officials, which would lie outside the scope of this thesis in any case. In other words, the notable amount of private actors filling the role of the majority of the providers of the service, as well as the distinct lack of the involvement of public officials for the most part, makes it difficult to firmly pin down SOCE as torture, even if the other two criteria of the definition are sufficiently fulfilled.[82] This thesis also specifically does not address cases where the state is the perpetrator.

The fulfilment of these two criteria can, in itself, be difficult to determine, as even if the second is fulfilled on account of SOCE being discrimination, the first is a bit more difficult to pin down except in the most severe cases, as suffering is subjective. It is clear that the third of the criteria remains the most difficult to surpass in order to classify SOCE as torture according to the definitions contained within the UNCAT, however. Despite this, there is still a possibility to fit SOCE into being condemned by the UNCAT despite the fact that the act may not technically be able to be defined as torture according to some of the criteria.

3.2. Other cruel, inhuman or degrading treatment or punishment

Article 16 of the UNCAT notes that acts that do not amount to torture under the criteria can be classified as other cruel, inhuman or degrading treatment or punishment, and should similarly

[81] UN Doc. A/HRC/44/53, 2020, p. 7
[82] Nugraha, 2017, p. 190

be followed by action from the state just as acts of torture should.[83] What exactly fits into this category is not very clearly defined within the UNCAT, however, and the case law surrounding this area also remains similarly unclear, which makes it hard to make use of this article in practice.[84] The UNCAT equally condemns other forms of cruel, inhuman or degrading treatment or punishment just as it condemns torture, yet it does not attempt to give a clear definition that can be easily determined.[85] To determine the difference between the two and see how SOCE fits into the equation, it seems a more in-depth examination is necessary.

In addition to the purposive element, the main factor that separates an act of torture from an act of other cruel, inhuman or degrading treatment or punishment, while not explicitly defined, seems to primarily be the severity of the suffering that the act causes; in other words, the act would be less extreme than torture in terms of the pain caused to the recipient but would still be enough to fit into the criteria provided in Article 16.[86] This would make it easier to make SOCE fit into the definition provided by the UNCAT as the definition is broader, though it still remains hard to determine when the level of suffering is high enough, as the level of suffering still remains a vague and subjective concept that can only truly be defined through the experience of the recipient.[87] At this point, however, it seems clear that at least the more extreme forms of SOCE could fit under this description if not under torture itself, and this at least gives more room for slightly less severe iterations of SOCE to fall into the category of other cruel, inhuman or degrading treatment or punishment rather than having to fit in under the label of torture along with the more severe forms of SOCE.

Regarding the lack of a proper definition of the concept in Article 16, the UN Committee Against Torture seems to hold the position that further defining the term would be restricting, in case certain acts would then end up falling outside the definition that is provided within the UNCAT as a consequence of the definition.[88] While this could very well be the case, it also makes it harder to explicitly specify what exactly falls inside the definition of these other forms of cruel, inhuman or degrading treatment or punishment in the first place, which means that this could potentially be limiting the applicability of Article 16 rather than making its usage more effective, though this is hard to determine for certain.

[83] Baruh Sharvit, 1993, p. 171
[84] Baruh Sharvit, 1993, p. 174
[85] Huntington, 2014, p. 293
[86] UN Doc. A/HRC/44/53, 2020, p. 15
[87] Smith, 2013, p. 14
[88] Huntington, 2014, p. 293

There are, however, situations where case law has come to establish some examples that can be used as a frame of reference. For example, both the European Court of Human Rights and the Inter-American Court of Human Rights have adopted a trend of identifying corporal punishment as a form of cruel, inhuman or degrading treatment or punishment, in more severe cases even amounting to torture, making steps towards prohibiting it in public institutions, such as schools and prisons.[89] With this angle, it is possible to consider SOCE as something similar, as a form of cruel, inhuman or degrading treatment or punishment that could potentially amount to torture in especially severe situations, and thus it would be possible to argue for its prohibition on a more widespread level as with these other practices.

The European Convention of Human Rights, similarly to the UDHR and ICCPR, does not further define torture or cruel, inhuman or degrading treatment or punishment despite outright prohibiting these practices in its third article.[90] Thus, one must look to case law if one expects to find a way to define these concepts and the line between them more concretely. In the case *Wainwright v. the United Kingdom*, the European Court of Human Rights addresses the line where a practice becomes unacceptable as such:

> Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and health of the victim. In considering whether a treatment is "degrading" within the meaning of Article 3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Article 3. Though it may be noted that the absence of such a purpose does not conclusively rule out a finding of a violation (…). Furthermore, the suffering and humiliation must in any event go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment, as in, for example, measures depriving a person of their liberty (…).[91]

Specifically, it is noteworthy that there is room given for how the victim is affected by the practice to affect the outcome of a judgment. It could also be argued, based on the definition of a practice being "degrading" that is provided here, that SOCE is indeed degrading to those who participate in it, as the participants are basically shamed into changing aspects of their personality. SOCE is also not a legitimate treatment or punishment so the practice cannot be explained away by interpreting the measures as necessary, since SOCE itself is simply not necessary for the individual's well-being. One can thus draw the conclusion that SOCE as a

[89] Nowak, 2018, p. 38
[90] Article 3, European Convention on Human Rights, 1950
[91] Wainwright v. the United Kingdom, 2006

treatment should be severe enough in its effects on the victim that it should sufficiently fit under the definition of cruel, inhuman or degrading treatment or punishment.

However, there still remains the issue that the concept of these other forms of cruel, inhuman or degrading treatment or punishment is only relevant and the acts can only be classified as such if according to the UNCAT, as previously addressed, the perpetrator is acting in any sort of official capacity, such as in the form of a state official.[92] With this requirement remaining, it is difficult to claim that SOCE would entirely fit into the definition of torture as provided by the UNCAT as long as private non-state parties are the ones who are providing the service in the majority of cases, rather than the state itself being the one responsible for advocating the use of SOCE, as this would remove the applicability of one of the criteria to define torture as well as other cruel, inhuman or degrading treatment or punishment entirely.

As this thesis is focusing on SOCE performed by private service providers rather than the situations where SOCE is being perpetuated by the states themselves, the ill-treatment argument may seem somewhat weak in this specific context due to this requirement. However, due to comparisons often being drawn between SOCE and torture, as well as the severe nature of some of the acts committed within the more extreme versions of these practices and the harm they cause to those who partake in them, it is still worth addressing that the parallels that are being drawn between SOCE and torture are far from unfounded.[93]

It is also worth noting that despite the UNCAT having a more in-depth definition of torture that contains the state official as part of the definition, the ICCPR lacks the criteria that the UNCAT sets up regarding the actions being performed by state officials. The Human Rights Committee has even shared the following comment regarding Article 7:

> As appears from the terms of this article, the scope of protection required goes far beyond torture as normally understood. It may not be necessary to draw sharp distinctions between the various prohibited forms of treatment or punishment. These distinctions depend on the kind, purpose and severity of the particular treatment. In the view of the Committee the prohibition must extend to corporal punishment, including excessive chastisement as an educational or disciplinary measure. Even such a measure as solitary confinement may, according to the circumstances, and especially when the person is kept incommunicado, be contrary to this article. Moreover, the article clearly protects not only persons arrested or imprisoned, but also pupils and patients in educational and medical institutions. Finally, it is also the duty of public

[92] Article 16, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987
[93] UN Doc. A/HRC/44/53, 2020, p. 15

> authorities to ensure protection by the law against such treatment even when committed by persons acting outside or without any official authority.[94]

In other words, this implies that the obligation of the state to protect victims of torture and other cruel, inhuman or degrading treatment or punishment could still be stretched to include acts committed by non-state actors, as long as the circumstances are otherwise befitting of the term torture or other cruel, inhuman or degrading treatment or punishment. States are required to protect the individual from this treatment regardless of who is responsible.[95] There are situations where the perpetrator of certain forms of violence, such as domestic violence, is a single person and the characteristics of torture and other cruel, inhuman or degrading treatment or punishment otherwise remains the same.[96] In other words, it seems there is a case to be made regarding SOCE being classified under this category.

The role of the state in these circumstances has already been previously discussed; the positive obligations of the state would require an interference, as seen in the legal cases that were discussed earlier in the thesis. It is hard to argue that states would not be aware of such a widespread practice when information about it exists out in the open, and thus the principle of due diligence should be applicable here. The state should be obligated to interfere to prevent a practice that is condemned and prohibited internationally through treaties and customary human rights law. Once all of the issues with SOCE have been clearly outlined, the discussion can return to the role the state plays in these circumstances, but for now, there are other issues with SOCE to address in order to see which other rights could be relevant to the topic.

3.3. Other human rights issues

While the issue of torture and other forms of ill-treatment have been a primary focus in this thesis, having already been discussed thoroughly and continuing to remain a central theme throughout, it should still be noted that there are various other human rights issues that could also be discussed in the context of SOCE. Even so, they are still worth discussing, despite not being strictly necessary due to torture already being a severe enough violation of human rights that classifying SOCE as such would immediately prohibit it. The inclusion of other human rights issues is simply a choice to provide a wider perspective on the issues of SOCE, as there are also other points that could be addressed when criticising the practices beyond the torture argument.

[94] UN Doc. HRI/GEN/1/Rev.1, 1986, p. 8
[95] UN Doc. HRI/GEN/1/Rev.1, 1986, p. 7
[96] Nowak, 2018, p. 44

Another point alongside torture and other forms of cruel, inhuman or degrading treatment or punishment that is often discussed regarding SOCE by its opponents is its questionable relationship with the right to health. The often non-consensual nature of the practices, where a person is forced into participating without explicit consent or by being pressured into consenting, as well as SOCE often being advertised as a legitimate medical service by its proponents, suggests that there are issues with how the practices are conducted that should be examined through a human rights perspective.[97]

The International Covenant on Economic, Social and Cultural Rights (hereafter the ICESCR) describes the right to health in its twelfth article, which states that everyone has the right to the highest attainable standard of physical and mental health.[98] Of course, Article 12 of the ICESCR does not mean that everyone is guaranteed the right to live a healthy life, as that would be completely unrealistic and impossible to attain, but instead, it exists to encourage states into doing their utmost to protect and promote the health of their citizens so that it can reach these standards.[99]

In a commentary that was provided on the ICESCR by the Committee on Economic, Social and Cultural Rights, the following was said when it was explained what the right to health actually indicates:

> The right to health is not to be understood as a right to be healthy. The right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom, and the right to be free from interference, such as the right to be free from torture, non-consensual medical treatment and experimentation. By contrast, the entitlements include the right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health.[100]

As was stated earlier, this also clarifies that the article does not guarantee every single individual a completely healthy life. However, what must be noted about it is that the right to health includes the freedom to be free from non-consensual medical treatment, along with the right to be free from torture. Torture and other forms of ill-treatment, of course, have already been thoroughly addressed in their relevance to SOCE in the previous section, while the non-consensual medical treatment is a point that is more specific to the right to health. One must then ask the question of how the right to health could potentially line up with SOCE.

[97] OutRight Action International, 2019, p. 19
[98] Article 12, International Covenant on Economic, Social and Cultural Rights, 1966
[99] Rosenthal & Sundram, 2002, p. 494
[100] UN Doc. E/C.12/2000/4, 2000, p. 3

Of course, one could make the argument that SOCE is not a legitimate medical practice, which would make its relevance here questionable. However, it still presented by its proponents as such, which means that it should be held to the same scrutiny as legitimate medical practices. SOCE does also have an impact on the health of its participants, even though that may be in a negative way, which does make it important to address exactly how SOCE and the right to health conflict with each other.

Regarding whether the practices are consensual or not, almost two thirds of the participants in a survey reported that they had been forced or coerced into SOCE by others rather than choosing to participate in the practices on their own initiatives. This force or coercion was perpetrated by various actors, primarily including examples such as religious leaders, mental health providers, family, surrounding community, employers, or school or state authorities. Out of the categories mentioned here, it was family, religious leaders and surrounding community that were specifically the three most common causes of this force and/or coercion among those participating in the survey.[101] Thus, the issue of non-consensual SOCE is very prevalent and worth addressing in order to create a full picture of the issues that SOCE presents.

As a sidenote, this survey does not explicitly address whether the remaining participants thus claimed to have voluntarily agreed to participate in SOCE, in opposition to those participants who declared that they had been forced or coerced into partaking. Considering the complicated societal circumstances many victims of SOCE may exist under, it is hard to say for certain whether these cases in the survey were then actually completely voluntary cases of SOCE, or if there was still some more subtle levels of coercion going on in the background. However, the point still remains that it is not uncommon for SOCE to be non-consensual due to force or coercion being involved, which is exactly what the right to health forbids, and thus would make it a violation of it even if the practices did not fall under the classification of torture.

Beyond the issue of consent, it has been documented that generally, the prejudice that LGBTQ+ individuals experience affects their health, particularly their mental health. Facing rejection from society and from your own family is naturally very likely to have a detrimental effect on your well-being.[102] Severe mental health issues all the way to the point of suicidal thoughts are statistically more likely to be found among LGBTQ+ individuals when comparing them to their heterosexual and cisgender peers.[103] Transgender youth in particular are as much as ten times

[101] UN Doc. A/HRC/44/53, 2020, p. 6
[102] Boucai, 2005, p. 25-26
[103] Uppalapati et al, 2017, p. 670

more likely to experience suicidal tendencies when held in comparison to cisgender youth, and the detrimental effects that a non-supportive family has on young transgender individuals is made very clear here, as having supportive parents seems to decrease the frequency of these tendencies.[104] In other words, it seems that to guarantee a young LGBTQ+ person's mental health, support from the family seems to be a better alternative than SOCE, with its documented wealth of negative effects that can leave a long-lasting impact.

When taking the general health of LGBTQ+ individuals in comparison to the general population into account, along with the statistics that display the clear negative side-effects of SOCE, provided by the previously mentioned survey, it becomes evident that SOCE practices and their harmful effects impact a minority group that consists of already vulnerable individuals. The health of the recipients is very clearly negatively affected by these practices in a majority of cases, with a variety of negative side-effects occurring as a direct consequence of the practices, as confirmed by the recipients themselves. Thus, it could be argued that the existence of these practices, particularly when they are being performed on non-consenting participants, prevents LGBTQ+ individuals from reaching their highest attainable standard of health that they would be entitled to, according to the right to health as defined in the ICESCR.

It should also be noted that SOCE is, as previously stated, not a legitimate medical practice, as it has no proof of effectiveness and has been condemned by medical professionals internationally. With this in mind, one could easily draw comparisons between SOCE and other outdated medical treatments that are no longer accepted in modern times. Just as licensed medical professionals should not be performing SOCE, they should not be performing either bloodletting, trephining, forced sterilizations, nor any other forms of pseudoscientific practices which have no medical legitimacy in modern society.[105] Through a medical perspective, there is simply no justification for the fact that these practices still exist in modern society, and like other archaic methods, they would be better left in the past.

One could also make a case that there are other human rights violations at play here beside the ones that have already been discussed within this thesis, as the issues that can be found with the practices are numerous. Other human rights that are potentially relevant to address when discussing SOCE include rights such as the right to non-discrimination and the right to privacy, as well as the rights of the child in the cases where the recipients of the service are under the

[104] Priest, 2019, p. 46
[105] Lapin, 2020, p. 260

age of 18.[106] While the latter is not relevant in every case simply due to the existence of recipients of SOCE that are over the age of 18, and will be discussed in-depth later on in the thesis with the specific context of being compared to the rights of the parents, the former two have a much broader applicability in regards to this topic, as these two sets of rights are connected to the themes of sexual orientation and gender identity that will inevitably be relevant in any case discussing SOCE.

Discrimination has already been established as the potential purpose of an act of torture, which is what purpose most cases of SOCE would likely fall under when trying to apply the criteria of torture that were defined in the UNCAT, as it seems the most fitting. As SOCE is aimed exclusively towards individuals with a sexual orientation or gender identity that falls outside the heterosexual cisgender standard, this would immediately indicate that it should be classified as discrimination.[107] Despite the lack of explicit rights for LGBTQ+ individuals that has been previously discussed in this thesis due to activists taking issue with it, this separate and clearly negative treatment of a specific category based on prejudice should make it simple to define the practices as being discriminatory in nature with or without explicit rights.

Article 2 of the UDHR brings up specific categories that can be used to define people, such as "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status", when expressing that people should all have access to the rights contained within the declaration.[108] While LGBTQ+ rights are not explicitly mentioned within these categories, the "other status" provided within the UDHR makes it easier to include LGBTQ+ people as a category despite this lack of mention. As has been stated previously, the UN seems to have taken this approach regarding LGBTQ+ rights, indicating that the "other status" mentioned in the UDHR is inclusive of sexual orientation and gender identity.[109] Thus, LGBTQ+ people should be sufficiently protected from discrimination as a protected category classified as "other" under the UDHR despite the lack of direct mention.

As for the right to privacy, this is another right which occurs commonly within different international law treaties. Article 17 of the ICCPR forbids interference with the privacy, family, home or correspondence of individuals, and declares that everyone has the right to be protected

[106] OutRight Action International, 2019, p. 19
[107] Nugraha, 2017, p. 190
[108] Article 2, Universal Declaration of Human Rights, 1948
[109] Combatting discrimination based on sexual orientation and gender identity, available at https://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx

under law from such occurrences.[110] Article 12 of the UDHR contains a nearly identical statement that protects the privacy of individuals.[111] The European Convention for the Protection of Human Rights and Fundamental Freedoms and the American Convention on Human Rights also have their own similar regional versions of the right to privacy, with Article 8 of the former and Article 11 of the latter being dedicated to privacy, using similar terminology when compared to the two that were already mentioned. Thus, this right is one that remains relatively consistent throughout human rights law, no matter which treaty one chooses to examine, and is thus applicable with a wide range.

The right to express one's sexual orientation, especially in private, has typically been a common argument used to support legalising same-sex relationships throughout the fight for LGBTQ+ rights. This was the case back when same-sex relationships were still considered widely taboo, illegal and perceived as morally wrong internationally. With issues such as sodomy laws having commonly existed, and in some areas of the world still existing today, to prevent LGBTQ+ people from expressing themselves fully as their true selves, it became important to at least establish having the right to express one's sexuality and gender identity in private, if expressing it in public cannot be an option.[112]

Thus, according to this sentiment, it could be argued that the targeting of LGBTQ+ people specifically for their sexual orientation and/or gender identity and attempting to interfere with their expression of it in order to change it into something else would be classified as violating LGBTQ+ people's right to privacy. The sexual orientation and/or gender identity of the recipients is, after all, a part of their personal identity that can have a large effect on their personal life and their ability to form relationships with their peers, which would then be negatively affected by SOCE, affecting their private lives in general in negative ways as a consequence of the practices.[113] As such, LGBTQ+ people's right to privacy is yet another right that could be used as an argument against the existence of SOCE, with the practices being intrinsically invasive to these people's privacy.

As has been previously noted, the rights of the child are not always going to be relevant to this topic because SOCE does not only affect individuals under the age of 18, but it is still worth briefly addressing that minors are considered a group that is particularly vulnerable to SOCE

[110] Article 17, International Covenant on Civil and Political Rights, 1966
[111] Article 12, Universal Declaration of Human Rights, 1948
[112] Wojcik, 2016, p. 522
[113] OutRight Action International, 2019, p. 19

and, as a consequence of this, especially require protection from the practices even more than adults in the situation might.[114] LGBTQ+ minors are, after all, not just LGBTQ+ people but also children, making them part of not only one but two groups that require particular protection. Some states, such as a number of US states, have specifically only been able to prohibit SOCE from being used against individuals who are still under the age of 18 for this reason.[115]

As these issues regarding SOCE are not in any way exclusive to minors, however, this is not relevant in many cases of these practices, where the recipients are, despite many of them being relatively young, still considered legally adults. This topic is thus not as important to the overarching discussion as the other potential human rights violations that have been addressed within this chapter, as the others are more general to all cases of SOCE. However, the topic of the rights of the child will be addressed further when discussing how parental rights may clash with those of their children, as it will be more relevant to that discussion of conflicting rights.

In other words, there are a number of different potential human rights issues that could be relevant in the context of discussions about SOCE, even if the prohibition of torture is not taken into account, as the issues that can be found with the practice are much broader than that. However, while it is important to address all of these issues in order to get the full scope of what exactly the impact of SOCE is, it is not always strictly necessary to include all of them in a legal discussion about the problems of SOCE. Torture is already, by itself, an extremely serious offense whose prohibition is seen in international customary law as binding under any and all circumstances with no exceptions to be found.[116]

Thus, simply the act being defined as torture or other cruel, inhuman or degrading treatment or punishment would already identify SOCE firmly as a human rights violation, without any additional knowledge about other potential violations needed. As has been established, there is a possibility that SOCE could be identified as torture or said other forms of cruel, inhuman or degrading treatment or punishment depending on the exact circumstances of what occurs during the session, even if the state is not the actor who is directly performing SOCE on the participant.[117]

[114] Nugraha, 2017, p. 178
[115] Larsen, 2019, p. 289
[116] Huntington, 2014, p. 284
[117] UN Doc. A/HRC/44/53, 2020, p. 15

Despite the fact that it may be hard to exactly define where to draw the line for torture, it becomes clear upon examination that there are at the very least potential risks for severe mistreatment to occur during these practices. Arguably, this means that there are grounds to examine SOCE as a practice with more scrutiny in order to prevent further harm from occurring, especially considering that more severe cases of SOCE can definitely inflict levels of harm that would amount to torture or cruel, inhuman or degrading treatment or punishment, as has been addressed already.

If such is the case, this would imply that these private actors are allowed to get away with acts that amount to torture against the recipients. One must then ask the question of how exactly the state comes into the picture here, as these practices should not be allowed to continue in accordance with international human rights law. In order to reach a conclusion about what exactly the state should be doing in these circumstances, one must then examine what exactly the state's obligation is in regards to protecting individuals from this type of ill-treatment in this situation.

Based on what has been discussed already, the state's positive obligations would require it to interfere with human rights violations it is made aware of, even if it has no direct involvement in the violations being committed. States do have the duty to use their powers to attempt to prevent human rights violations committed by private actors, even if they cannot be expected to be omniscient.[118] In the cases that have been previously discussed within this thesis, this lack of omniscience was the reason that the state could not always be held responsible for a private actor's actions. The state cannot see the future or monitor every single suspicious individual constantly in order to prevent human rights violations from being committed; this is not a realistic approach.

In the case of SOCE, however, it is hard to argue lack of awareness on the state's behalf, considering how widely documented the negative side-effects of SOCE are and how much criticism has been directed at the practice, as has been addressed within this thesis already. Considering that the UN has requested states to look into their framework on torture through examining cases of SOCE,[119] all the necessary pieces of information are clearly there and easily accessible for anybody looking to find information on the topic, so it is hard to argue that the state would still not be aware of the practices after all of this.

[118] Hofstotter, 2004, p. 534
[119] UN Doc. A/HRC/44/53, 2020, p. 21

Especially when one takes into account that SOCE is not a singular case involving only a few individuals whose actions could not possibly be predicted, but a widespread category of practices with clearly documented negative effects on an international level, it becomes harder to argue that a state could justifiably claim complete ignorance of the topic. Following on from this, one can then draw the conclusion that there is no reason that the state should not be interfering and preventing SOCE if one examines it from this perspective.

It instead seems likely that one major reason that the problem has not been further addressed in many states is the actions of those who are in favour of SOCE, who would protest against these bans as they would see it as an infringement of their rights if the state were to ban the practice. Legal challenges against attempted bans of SOCE are, in fact, not at all unheard of, especially in the United States where Christian groups have actively challenged new legislation against SOCE.[120] In order to address this issue properly, the topic of conflicting human rights that may arise between those who perform SOCE on others and those who are exposed to it will have to be discussed in greater detail.

4. The dilemma of conflicting rights

4.1. Freedom of religion and expression

One problem that comes up frequently in discussions regarding SOCE is the problem of the different sets of human rights which end up coming into conflict with each other when one attempts to discuss the prohibition of the practice. Most often, those who perform SOCE or support its existence in general will argue that it is within their rights as individuals to enforce the practices, due to the individual rights that they hold as human beings to do so. Their claim is, in other words, that the state would not be entitled to interfere in their activities based on what they are entitled to as individuals, and that SOCE is such an activity that the state should have no control over.

One common method used to motivate this is to bring forth the argument that individuals have freedom of thought, conscience and religion. This is then used by these individuals to motivate their belief that sexualities and gender identities outside the norm are wrong, which in turn justifies their attempts at changing these traits when it is not enough to attempt to frame the practices as medical and scientific in nature. This is the most commonly used argument by religious groups in the United States when they try to prevent laws that would prohibit SOCE

[120] Bracken, 2020, p. 328

from coming into existence.[121] While this discussion is often centred around the United States in particular due to most of the material analysing the phenomenon having been written from that perspective, it is still worth addressing in a wider context due to the relevance that religion often ends up having in many situations regarding SOCE.

The relevance of religion in SOCE does, of course, vary by region. For example, in a survey conducted involving participants from all over the world, 80% of participants from South American and Caribbean countries as well as 76% of participants from African countries claimed that religion was an important reason used to justify SOCE, while this was only the case for 21% of participants from Asian countries.[122] Religion is, in other words, more important in some regions in the context of defending SOCE as a practice, presumably due to cultural reasons. As it is clear that religious beliefs have a large effect on treatment of LGBTQ+ individuals in many different areas around the world, it is necessary to address it in a discussion about SOCE.

Freedom of thought, conscience and religion is, of course, a human right, which is clearly established in the UDHR, more specifically in Article 18. The exact wording that this article provides on the topic is the following:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.[123]

A similar mention of the right to freedom of thought, conscience and religion is addressed in Article 18 of the ICCPR, with its first section expressing similar sentiments to the UDHR. Within this article, the right to freedom of thought, conscience and religion is phrased as follows:

> Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.[124]

The UDHR and ICCPR arguably express very similar sentiments about the human right to thought, conscience and religion, upon which it is easy to construct a foundation for the freedom

[121] Larsen, 2019, p. 291
[122] OutRight Action International, 2019, p. 38
[123] Article 18, Universal Declaration of Human Rights, 1948
[124] Article 18, International Covenant on Civil and Political Rights, 1966

of religion as defined within international law. Religion is something that everyone has the right to, in various shapes and forms that are also described within the articles. The significance of religion as a personal choice, as well as its nature as a communal practice is emphasised within them, establishing the different meaning religion can have for different individuals and the fact that it can be shared with others, making it relevant on both an individual level as well as on a larger scale.

There are three important factors that can be picked out from the UDHR and the ICCPR to clearly define what exactly the right to freedom of religion includes. The first factor that one can find here is the right of someone to entertain a religious belief, the second is the right to change this belief if you so choose, and the third is the right to manifest this belief in teaching, practice and worship.[125] These are consistent between the UDHR and the ICCPR, so it is clear that freedom of religion as a concept has a wide reach with consistency throughout. In summary, the right to religion includes the right to entertain a belief, to change that belief, and to manifest your belief.

What must be established, then, is whether SOCE can be considered to fall into this category of manifestation of belief that can be defended as a religious right. To do this one must examine what the religious angle of SOCE is. Proponents of SOCE often attempt to frame non-heterosexual orientation and non-cisgender identities as something immoral and unnatural according to their belief system, which naturally holds a lot of importance to them due to their strong belief in their religion. Non-heterosexual orientations are described as "sexual brokenness" while non-cisgender identities are framed as "gender confusion", framing them as problems to be fixed in order to live religiously, problems which can of course then be fixed through SOCE.[126]

SOCE has not always existed in its current form. This movement as it exists today had its origins in the 1970s, at least in the Anglo-American world; generally, the practices have not been very well-documented in other parts of the world, which thus makes it easier to use Anglo-American countries, particularly the United States, as the blueprint of discussions about SOCE. When general medical consensus began to move in favour of these marginalised identities during that time, the reaction was a counter-movement due to moral panic from religious organisations.[127] Based on this background, the religious angle of SOCE is thus noteworthy enough that it should

[125] van der Vyver, 2005, p. 500
[126] UN Doc. A/HRC/44/53, 2020, p. 12
[127] OutRight Action International, 2019, p. 10

be addressed in discussion about the practices. One must then question whether the belief that sexual orientations and gender identities that differ from the norm are immoral is such a conviction that can be defended under the scope of this article.

Using Christianity as the example due to its strong association with SOCE, many Christians believe that being LGBTQ+ is something that is explicitly condemned in the Bible itself. However, as religious texts can often be vague, this is technically a matter of interpretation. There have also been counter-arguments from pro-LGBTQ+ Christians about this. According to these counter-arguments, the writings in Leviticus, which are commonly used as the main argument to justify the belief that homosexuality is wrong, are actually specifically about pederasty, which is the practice of sexual exploitation of younger men by older men, something that commonly occurred and was normalised in the time these texts were written and was thus relevant to condemn, rather than consensual relationships between a same-sex couple as they are defined today.[128]

Similarly, there are arguments on the topic of transgenderism that note that the so-called traditional gender binary with the two strict categories of cis man and cis woman was not nearly as firmly established in the time when the Bible was written as many Christians seem to think that it was.[129] One could thus argue that this belief may not be intrinsic to the religion itself due to differing opinions on the topic based on interpretations of the religious texts. However, as religious texts do not and should not dictate the law, since this would directly counteract the separation of law and religion that democracy is founded upon,[130] deeper discussion of this belongs elsewhere, in a more theological context.

Even when putting the point of interpretation of religious sources aside, it must also be noted that the right to freedom of religion is not in any way absolute. As with many other human rights, there are limitations that must be taken into account in order to create a functional system of rights.[131] If this was not the case, the right to freedom of religion could very likely be used to excuse a number of different human rights violations simply due to the perpetrators claiming that they were just following what their religious belief says no matter what harm that may cause to their surroundings. This right simply would not be functional or useful if it was

[128] HRC Foundation, available at https://www.hrc.org/resources/what-does-the-bible-say-about-homosexuality
[129] HRC Foundation, available at https://www.hrc.org/resources/what-does-the-bible-say-about-transgender-people
[130] Wintemute, 2002, p. 132
[131] van der Vyver, 2005, p. 503

completely absolute. Oftentimes there is a balance between several sets of rights that must be upheld in matters of freedom of religion.[132]

The third section of the aforementioned Article 18 of the ICCPR also addresses this specific issue in a straightforward way, making it clear that the right to freedom of religion is in no way completely absolute. This section clearly points out what restrictions and limitations exist to this right:

> Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.[133]

It is, in other words, clear that it is harm to other individuals or the general public that may limit the right to freedom of religion. This is worth taking into account when considering the effects of SOCE on the individuals participating in it, as it is a solid argument to make in favour of prohibiting SOCE. If there is severe harm being done within religious communities and the individuals in question are using their belief to motivate this, the state should not hesitate to interfere. A hypothetical example that one could use to explain this concisely is that a religious group would not be permitted to use a dangerous illegal drug just because that drug is a part of their belief system, simply because this drug is a danger not only to them but to the rest of society.[134] It is also worth addressing that not only religious forms of SOCE should be held under scrutiny here, as they would fall not under the freedom of religion but instead the freedom of expression.

The ICCPR also continues to give further input on a more general level, in regards to the freedom of expression. In its following article, Article 19, it continues to phrase itself similarly to Article 18, defining that everyone has the right to freedom of expression before continuing in order to point out the limitations to this freedom as well. The article in its entirety reads as follows:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

[132] International Commission of Jurists, 2011, p. 227
[133] Article 18, International Covenant on Civil and Political Rights, 1966
[134] van der Vyver, 2005, p. 510

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.[135]

The UDHR contains a similar phrasing in its own Article 19, though continuing the pattern it already set in Article 18, it does not include anything about limitations of the right, the way the ICCPR does. It reads as follows:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.[136]

This establishes that religion is not the only belief that individuals are entitled to, according to both the UDHR and the ICCPR. Taking the ICCPR and its limitations into account, religion is also not the only belief that may end up being limited by its effect on people other than the individual holding the belief. After all, if the freedom of expression was absolute, it would be likely to carry similarly harmful effects as the freedom of religion. In other words, these two rights should both be taken into account when discussing something that involves one of them, due to their similarities in nature and in terms of what the state can do to ensure that the rights are upheld as well as limited as necessary.

On a more regional level, Article 9 of the European Convention on Human Rights similarly addresses freedom of thought, conscience and religion with the broader perspective of not simply including religion, but also other forms of belief that may not be directly religious, further implying the connection between freedom of religion and freedom of expression. It reads as follows:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.[137]

[135] Article 19, International Covenant on Civil and Political Rights, 1966
[136] Article 19, Universal Declaration of Human Rights, 1948
[137] Article 9, European Convention on Human Rights, 1950

The sentiment in this article remains very similar to that of the UDHR and ICCPR, though it applies largely the same principles to any sort of belief, not simply religious ones, where the same point in the ICCPR is expressed in two separate articles. The similarities between how the right to religion and the right to other beliefs are established legally is crucial, as in the context of SOCE specifically, the fundamental rights and freedoms of others may be the most central argument to focus on here, whether the homophobic and transphobic beliefs would be considered to be connected directly to religion or not. Arguably one could also turn it into a health or moral question depending on which one of these perspectives one chooses to approach the question with.

In order to best address the situation, some actual examples of legal cases could help further establish how exactly SOCE fits within the freedom of religion and the freedom of expression. In the end, it is arguable that there are two angles to approach SOCE from with the perspective of conflicting rights. The first of these is the question of whether homophobic and transphobic beliefs that are displayed by proponents of SOCE can be justified and viewed as acceptable through the argument of religious belief. The second angle that would be useful to discuss is whether the acts themselves within SOCE, that could amount to torture, are still a crime if the person participating has consented, assuming in this case that they are a legal adult, as the rights of children in this situation must be discussed separately.

The first approach, examining how far religious beliefs can go before they become unacceptable, is tangential to the discussion about the limitations of freedom of expression. The question of hate speech is commonly raised when discussing attitudes against LGBTQ+ people. Hate speech as a term is not widely used in international human rights law as terminology, as most instruments tend to instead refer to "incitement to discrimination, hostility or violence". Internationally, however, advocating for national, racial or religious hatred that is considered incitement to discrimination, hostility or violence along with incitement to genocide are condemned and viewed as severe hate speech.[138]

Traditionally speaking, terms such as homophobia and transphobia are relatively recent additions to this discussion, due to their more recent relevance in human rights conversations overall. However, this does not mean that no case law on the topic exists yet. An example one could bring up here in order to discuss the freedom of expression coming into conflict with LGBTQ+ rights is the 2002 case *Vejdeland and others v. Sweden* in the European Court of

[138] United Nations, available at https://www.un.org/en/hate-speech/united-nations-and-hate-speech/international-human-rights-law

Human Rights, where far-right activists spread homophobic propaganda by leaving leaflets on school premises, which in turn got Swedish law enforcement involved.[139]

The applicants claimed that the Swedish court system had violated their freedom of speech by sentencing them for these actions and thus attempted to get the European Court of Human Rights to overturn the decision that their national court had made. This was, however, unsuccessful, as the Court did not accept their appeal that the leaflets were simply meant to initiate discussion rather than encourage hate. It also emphasised LGBTQ+ people's status as a protected group and that hate speech against this group should be taken seriously, and concluded that Sweden had not made a mistake in convicting the applicants with the following statement:

> The Court notes that the applicants distributed the leaflets with the aim of starting a debate about the lack of objectivity of education in Swedish schools. The Court agrees with the Supreme Court that even if this is an acceptable purpose, regard must be paid to the wording of the leaflets. The Court observes that, according to the leaflets, homosexuality was "a deviant sexual proclivity" that had "a morally destructive effect on the substance of society". The leaflets also alleged that homosexuality was one of the main reasons why HIV and AIDS had gained a foothold and that the "homosexual lobby" tried to play down paedophilia. In the Court's opinion, although these statements did not directly recommend individuals to commit hateful acts, they are serious and prejudicial allegations.[140]

In this case, of course, it seems the applicants were primarily motivated by political beliefs rather than religious ones. However, it still remains clear that there are limitations to what sort of speech is considered acceptable to promote. This case is important because it clarified that anti-LGBTQ+ rhetoric should be given the same treatment under law as xenophobic statements, establishing it undoubtably as hate speech.[141] This would then serve as a limitation for what sort of religious beliefs are acceptable as discussed in the third section of Article 18 of the ICCPR. The Court also elaborated further on what should be defined as hate speech as follows here:

> Moreover, the Court reiterates that inciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner (…). In this regard, the Court

[139] Belavusau, 2015, p. 377
[140] Vejdeland and others v. Sweden, 2012
[141] Belavusau, 2015, p. 377

> stresses that discrimination based on sexual orientation is as serious as discrimination based on "race, origin or colour" (…).[142]

In other words, the Court held the opinion that simply spreading harmful messages in the form of propaganda like the applicants in the Vejdeland case were doing can be considered hate speech even if they were not actively advocating for harming LGBTQ+ individuals or anything equally severe. This significantly broadens the scope of what sort of speech is considered unacceptable and comparing the sort of rhetoric that is on display here with SOCE does not seem to be entirely unreasonable, as they both promote homosexuality and transgenderism as inherently negative concepts. In fact, it could technically be argued that SOCE is more violent than propaganda in its attempts to directly change the orientation and/or gender identity of LGBTQ+ people in harmful ways of varying severity, rather than simply engaging in negative rhetoric.

Taking this into account, it is arguable that SOCE should not be accepted due to the fact that it promotes harmful actions towards LGBTQ+ people, despite freedom of religion as well as freedom of expression being existing rights. With the European Court of Human Rights establishing through the Vejdeland case that hatred towards LGBTQ+ people should be treated the same as hatred towards the groups that are explicitly protected through international law, it puts LGBTQ+ people as a group in that same category. Hatred incited against them should thus be treated as any other form of discrimination.[143] At least in accordance with European standards, it is arguable that SOCE as a practice is prohibitable through the use of the Vejdeland case as an argument, and setting this standard could come to reflect on international law as a whole.

In regards to the second approach that one can have in terms of freedom of beliefs regarding SOCE, the question largely becomes one about consent, and whether practices that would otherwise amount to torture or other forms of cruel, inhuman or degrading treatment or punishment fail to fall into that category because all those involved have consented to it. This is a more difficult discussion to have, as it is naturally harder to define something as a breach if all participants are willing. Though coercion by different actors is reported in many cases of SOCE,[144] one must still consider what would be applicable in a case where the participant

[142] Vejdeland and others v. Sweden, 2012
[143] Belavusau, 2015, p. 377
[144] UN Doc. A/HRC/44/53, 2020, p. 6

chooses to take part willingly, and whether it would still be considered an issue when approached from a human rights perspective.

There definitely are individuals who make the choice to take part in SOCE willingly, or at least it seems that way on the surface. Some individuals may be unhappy with their sexual orientation for whatever reason and thus choose to pursue SOCE in order to become heterosexual, or they may be suffering from gender dysphoria and try to find a way to become satisfied with the gender they were assigned at birth rather than pursuing transition. Those who bring up this point in order to justify the existence of SOCE often argue that instead of a prohibition, there should be a distinction between consensual and non-consensual SOCE.[145] While it may be true that there is a difference between being coerced into SOCE and willingly participating in it, it must be noted that what the practices entail still remains the same, along with any harmful effects it may have on the individual.

An interesting case to use as an example here for the sake of comparison would be the case of *Laskey, Jaggard and Brown v. the United Kingdom*. To summarise this case, the applicants had been engaging in sado-masochistic sexual activities that were considered to be problematic through a lens of the health and safety of the participants, while the applicants argued that their sexual activities were a matter of their private lives that the state should not be allowed to interfere in. The European Court of Human Rights expressed the following opinion about the matter in its judgment:

> For the Government, the State was entitled to punish acts of violence, such as those for which the applicants were convicted, that could not be considered of a trifling or transient nature, irrespective of the consent of the victim. In fact, in the present case, some of these acts could well be compared to "genital torture" and a Contracting State could not be said to have an obligation to tolerate acts of torture because they are committed in the context of a consenting sexual relationship. The State was moreover entitled to prohibit activities because of their potential danger.
>
> The Government further contended that the criminal law should seek to deter certain forms of behaviour on public health grounds but also for broader moral reasons. In this respect, acts of torture - such as those at issue in the present case - may be banned also on the ground that they undermine the respect which human beings should confer upon each other. In any event, the whole issue of the role of consent in the criminal law is of great complexity and the Contracting States should enjoy a wide margin of appreciation to consider all the public policy options.[146]

[145] UN Doc. A/HRC/44/53, 2020, p. 16
[146] Laskey, Jaggard and Brown v. the United Kingdom, 1997

In the end there is, in other words, a limit to what sort of consensual activities one can engage privately in as well. There is a cutoff point to what an individual can do in their private life if there is significant harm that is being caused by one's activities, and in these situations it could be that the state will have to step in to assure that no one is harmed further, even if all parties involved had agreed to said activities. Notably, the Court mentions torture as the underlying issue in this specific case. However, the case of *Laskey, Jaggard and Brown v. the United Kingdom* is also treated as a matter of public health and public morals, limiting by law what should be seen as acceptable in the public eye.[147] Considering that the Court has left open a wide margin of appreciation for cases like this, one must see how SOCE would compare to this case.

Since SOCE has been noted to cause harm in various different iterations and has no scientific legitimacy as a medical treatment to speak of, it is possible that it could be argued that the state could step in with similar motivations as in the case of *Laskey, Haggard and Brown v. the United Kingdom*, seeing the practices as harmful due to their association with torture and unscientific medical practices. Even if a hypothetical participant over the age of 18 did technically consent to having SOCE performed upon them, it is difficult to say for certain whether the state would accept this justification when it did not in this example case, even though sado-masochism and SOCE may not be exactly the same thing.

The torture argument could arguably be used for SOCE as well, however, considering everything that has been established regarding the connection between SOCE and torture in this thesis, so going by previous logic, the necessity for state interference does not seem entirely unlikely, even in consensual cases of SOCE. The same is true for the question of public health, as SOCE and its questionable relationship to the right to health has been addressed previously as well.

All of this is only a relevant talking point if the recipient is a legal adult participating consensually, however. When discussing SOCE as a whole, it is extremely important to consider that in many of these cases, what occurs could in no way be considered consensual. If the practices are non-consensual, the details of *Laskey, Laggard and Brown v. the United Kingdom* make no difference, as SOCE already would be considered unacceptable through the human rights issues that have been previously discussed. Legislation against SOCE would serve to prevent people from being coerced into the practices,[148] but it would also protect people from

[147] van der Sloot, 2015, p. 81
[148] Larsen, 2019, p. 295

making the arguably harmful decision to expose themselves to SOCE, even if it may come at the cost of their personal freedoms. If someone is unhappy with their sexual orientation and/or gender identity, there are, after all, still licensed therapists without an anti-LGBTQ+ bias that one can go discuss this with, without having anyone perform SOCE.

Another factor about SOCE that is important to consider is that the recipients, while not always, are often underage. This means that the rights of the child are also worth taking into account at least partly, especially if one decides to compare them with those of the child's parents. To address the full extent of what SOCE can mean for and the effect it can have on an individual, the circumstances where it is inflicted on an individual under the age of 18 must also be taken into account.

4.2. The rights of parents and children

According to a global survey about SOCE, results imply that the practices disproportionately affect primarily young people over any other age group. Reportedly, four fifths of those being subjected to SOCE are under 24 years of age, and around half of them in total are under 18.[149] Within the United States alone, it is reported that nearly 700,000 adults have experienced SOCE, and half of them experienced while they were still minors.[150] In many cases, different states have prohibited SOCE only for recipients who are minors.[151] This suggests that the age of the recipients of SOCE is something worth taking into account in this discussion, due to the nature of underage individuals as a legal group and the legality of actions that concern them in particular.

One important factor to consider when discussing cases of SOCE is that the person going through the experience is often doing so under pressure from family. It is not at all uncommon for children to be forced or coerced into partaking in SOCE by parents or other relatives who want to change the child's sexual orientation and/or gender identity into what they consider to be normal. Pressure from family is, along with cultural and religious pressure, reported in a majority of SOCE cases, though the exact numbers vary depending on which region of the world the recipients are from.[152]

The role of the parents or legal guardians as those who encourage SOCE is a particularly crucial case to discuss. Many parents will refer to their right to raise their children according to their

[149] UN Doc. A/HRC/44/53, 2020, p. 9
[150] Lapin, 2020, p. 253
[151] OutRight Action International, 2019, p. 21
[152] OutRight Action International, 2019, p. 43

own beliefs, which would then include making their children participate in SOCE if this is what they have decided that they want for their children, whether that is due to a religion or simply some other set of morals that prevents them from supporting the child's LBGTQ+ identity. The right of parents to raise their children as they want is addressed clearly in the fourth section of the previously mentioned Article 18 of the ICCPR:

> The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.[153]

In other words, there is a basis for parents and/or legal guardians to raise their children within their own belief system. A common manifestation of this legal basis is that parents are permitted to choose to send their child to a religious school if that is the sort of education they want their child to have.[154] One must then ask the question of whether this motivation would be enough to make SOCE an acceptable expression of this faith specifically in the context of children and their legal guardians, considering how the practices are already controversial as a justifiable belief outside that context. Again, the right to freedom of religion is not absolute. Specifically when the matter involves children, children's individual rights as a vulnerable group must be taken into account as well.

An example of what has been discussed here that could be seen as similar to SOCE would be a situation where a parent or legal guardian attempts to do something directly contradictory to their responsibilities for their child's well-being and the child ends up being harmed as a consequence. In the United States alone, there were 172 cases documented where a child died as a consequence of their guardians refusing to allow them healthcare on religious grounds only between the years 1975 and 1995, with the true number of cases likely being even higher due to the difficulty of documenting any occurrences that may have been purposefully kept out of the public eye to avoid raising awareness to the phenomenon.[155]

These types of cases notably occur in different Christian groups such as Jehovah's Witnesses due to their belief that blood transfusion is immoral, as the Bible prohibits the consumtion of the blood of others and they interpret this so that blood transfusion is considered consumtion. There is also a wide variety of groups that either believe in some form of faith-healing or traditional natural healing methods.[156] Blood transfusion is only one example of what sort of

[153] Article 18, International Covenant on Civil and Political Rights, 1966
[154] van der Vyver, 2005, p. 516
[155] Catalano, 2009, p. 158
[156] Catalano, 2009, p. 163

treatments may be refused by parents; in the United States in 2017, a fourteen-year-old girl was found to have a brain tumour which the religious parents refused to have treated with chemotherapy, instead pursuing treatment with frankincense, turmeric, and tea. This led to a legal battle which lasted for months, where the parents argued that they had the right to make these medical decisions for their child. In the end, a judge reached the conclusion that the girl was due to begin chemotherapy immediately, unaware that the girl had passed away only two days prior.[157]

It could be argued that the treatment of children in these cases are irresponsible similarly to SOCE, though obviously to an even more severe degree. Still, even if SOCE does not directly cause death, particularly its mental effects and possible path to suicidal tendencies should be taken into account here, as while its effects may not be directly killing the child, it may still be causing long-lasting consequences, the effects of which may still linger years later. In order to sufficiently discuss the rights that children are entitled to, it would be best to examine these rights in detail.

The United Nations Convention on the Rights of the Child (hereafter the UNCRC) is the most widely ratified human rights treaty in the world, establishing childhood as a vulnerable time in one's life during which one must be protected.[158] Due to its wide relevance, what it has to say about the rights of children as a protected group is important to consider in any matters related to international issues such as this one. The UNCRC addresses many of the topics that have been previously mentioned in regards to SOCE and specifically how to ensure the safety of children in different circumstances, and thus several of its articles could be used as an argument against SOCE. It should be noted that the United States specifically has, of course, chosen not to ratify the UNCRC, meaning that the previous example that was used to compare SOCE to would not be directly obligated to follow the instructions given in the UNCRC. Despite this, all other state parties would still be obligated to do so, which is why the UNCRC remains important.

In other words, this does not change the fact that there are numerous states which have ratified the UNCRC, signifying its relevance, and while the United States is the only UN state party to not have ratified it, it has still signed it. In total, the UNCRC has 196 state parties, definitely acknowledging the importance of this convention as the most ratified human rights treaty in the

[157] Stern, 2019, p. 88
[158] UNICEF, Convention on the Rights of the Child, available at https://www.unicef.org/child-rights-convention

world.[159] Due to this, it is safe to assume that anything that becomes an issue due to something that is addressed in the UNCRC is relevant to any state party that aims to protect children as described in said convention. State parties owe it to children to create legislation that will ascertain that they can be kept safe, even if this safety is against the wishes of their legal guardians in certain cases.

To immediately address the matter of religion due to its importance in the context of conflicting rights, Article 14 of the UNCRC says much the same as the treaties that have been mentioned earlier regarding limitations of the freedom of religion. If the expression in question threatens public safety, order, health or morals, or the fundamental rights and freedoms of others, it does not fall under freedom of manifestation of one's religion or belief.[160] As has already been established, this affects the legitimacy of SOCE as performed on children, due to the negative effects that it has on the child's health as well as the child's fundamental rights and freedoms as defined within CRC and within international human rights law overall.

Similarly, Article 13 of the same convention could also be discussed as being in favour of the child, as this entitles children to freedom of expression as long as it does not harm others in the same manner that is addressed in Article 14.[161] While parents are entitled to their own thoughts on the matter, so are children, even if that viewpoint may conflict with the viewpoint of the parents. In other words, this would suggest that individuals under the age of 18 should be allowed to express their thoughts about their own sexual orientation and gender identity provided they do so in a manner that is not harmful to them, just as heterosexual and cisgender children may present themselves as the gender they feel comfortable with and express their interest in whoever they are interested in, because if not, then they are not being treated as equally as they should be.

On that note, Article 2 of the UNCRC also establishes that children are not allowed to be discriminated against on the basis of any sort of status they might have. This includes race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.[162] The "other status" has previously already been established as applicable to LGBTQ+ individuals in this thesis, so it is natural to apply here as well that LGBTQ+ minors should not be treated in a discriminatory manner, with SOCE, of

[159] American SPCC, 2022, available at https://americanspcc.org/the-convention-on-the-rights-of-the-child/
[160] Article 14, Convention on the Rights of the Child, 1989
[161] Article 13, Convention on the Rights of the Child, 1989
[162] Article 2, Convention on the Rights of the Child, 1989

course, possibly being considered as such when taking into account the way in which it affects LGBTQ+ people specifically. The Committee on the Rights of the Child has also recommended that states make an effort to prevent discriminatory treatment of LGBTQ+ children through raising awareness and other preventative measures, specifically pointing out issues within six states examined in 2014 out of sixteen regarding this topic, and also criticising some states for lacking legislation and insufficient efforts being made to address these discriminatory practices.[163]

Article 8 of the UNCRC also makes a case that could be used to defend the rights of LGBTQ+ children from being forced into partaking in SOCE. The exact wording here does not explicitly mention sexual orientation or gender identity, but is instead simply discussing that children have the right to their own identity, without explicitly defining what the term "identity" means. The full article reads as follows:

> 1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
>
> 2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.[164]

While the article, as mentioned, does not explicitly classify being LGBTQ+ as a part of one's identity; however, if one were to consider it as such, a case could be made for SOCE being a violation of this article as it does not respect the child's right to preserve this identity.[165] Considering that being LGBTQ+ is often something that is seen as an important part of their identity for many LGBTQ+ people, this viewpoint seems worth taking into account when discussing this topic. Article 12 of the UNCRC also adds that children have the right to be heard and, once they are old enough to have the capacity to do so, express themselves about all matters that involve them.[166] Thus, if decisions are being made for the child that the child does not agree with, such as forcing the child to partake in SOCE, there may be a violation of Article 12 happening.[167]

In Article 16, it is also addressed that the child is entitled to privacy, which has of course already been established as potentially having a connection to LGBTQ+ rights, and the right to lawful

[163] Sandberg, 2015, p. 341
[164] Article 8, Convention on the Rights of the Child, 1989
[165] Nugraha, 2017, p. 184
[166] Article 12, Convention on the Rights of the Child, 1989
[167] Nugraha, 2017, p. 184

protection of this privacy.[168] Beyond this, other rights that are established include the right to health in Article 24, with special note taken to abolishing traditional practices that are harmful to children,[169] and the right to protection from torture and other cruel, inhuman or degrading treatment or punishment in Article 37.[170] When noting everything that has been addressed regarding SOCE within this thesis, it seems that the UNCRC is bringing up similar issues that would be relevant to the scope of SOCE, displaying that children in particular are being affected by these potentially harmful practices.

Above all else, Article 3 of the UNCRC has some very important points to take into account in regards to the safety of children and the responsibility for ensuring it that lies with state parties and actors associated with the state or otherwise somehow official actors in particular. The full article reads as follows:

> 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> 2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
>
> 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.[171]

Reading this, it can be summarised concisely as children's best interests always being supposed to be seen as the highest priority, above anything else, and that state parties have the responsibility to prioritise this just as the individuals legally responsible for the child have this same responsibility. The protection of children must also be held to certain health and safety standards that are not specifically defined in the article itself, but that they must be established by competent authorities implies some sort of officiality to these standards, whatever they may be in particular. Beyond this, the state is also required to take the child's best interests into

[168] Article 16, Convention on the Rights of the Child, 1989
[169] Article 24, Convention on the Rights of the Child, 1989
[170] Article 37, Convention on the Rights of the Child, 1989
[171] Article 3, Convention on the Rights of the Child, 1989

account at any time and has the obligation to maintain this position at all times no matter the context.[172]

Having addressed the UNCRC so thoroughly, it becomes clear that there are all sorts of perspectives on why SOCE violates the rights of the child as defined within this convention, if the already discussed issues were not enough to make that clear. If nothing else, the association between SOCE and torture should already be enough to motivate a standard of interference by the state, given the nature of torture as an absolute prohibition as was already clearly established in the UDHR.[173] The same goes for all the other potential dangers with SOCE that have already been addressed; these things are now doubly condemned within the UNCRC as well as within all the other previously mentioned treaties, which should make it even more clear that subjecting a child to practices such as SOCE should be seen as entirely unacceptable under international law.

There is, however, another side to the arguments that one can make with the help of the UNCRC that has a definite impact on what can be done in practice to prevent SOCE. While the role of the state as a proponent of SOCE lies outside the realm of the discussion within this thesis, it must be noted that even in states where SOCE is not actively encouraged by the state, anti-LGBTQ+ attitudes may still be prevalent as a part of the local culture and tradition, which could then affect how SOCE is perceived by the population at large, as some sort of positive practice to fix a problem. If homosexuality and transgenderism are seen as perversions that are harmful to society, then surely it would be in the child's best interests to attempt to change such a negative trait while the child is still young, in order to assure that the child can live as happy of a life as possible in this society.[174]

There is also the question of who decides what the best interests of the child are in the first place. Traditionally, scholars would argue that this is something that the parents should be deciding. However, it must be noted that the position of the family in society has been shifting as non-traditional family units are becoming more common, and that minors are becoming more prominently viewed as independent from their parents regarding their thoughts and opinions.[175] If the family and the rest of the society that the child is surrounded by thinks that it would be in the child's best interests to live life as a heterosexual cisgender person to avoid facing negative

[172] Nugraha, 2017, p. 183
[173] Article 5, Universal Declaration of Human Rights, 1948
[174] Nugraha, 2017, p. 186
[175] Basset, 2011, p. 413

repercussions from the local community, that viewpoint stands in direct contrast to the thought that living life as one's true sexual orientation and/or gender identity is what would be best for the child.

This does, however, still stand in contrast to the anti-discrimination principles the UNCRC includes, as well as the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, which cannot be so easily refuted. If there is an issue with how the majority culture at large treats a certain group, then perhaps there must be an interference from higher up to at least attempt to denormalise this sort of harmful attitude. The case of *Hajrizi Dzemajl et al. v. Yugoslavia* did not let discrimination against Romani people go unpunished, even though prejudices against this group were widespread enough in the community to cause them to perform this attack.[176]

To make the parallel clearer, the point is that Romani people should not be expected to disappear as a category simply because they are not like the majority which means a notable part of the majority does not accept them, and similarly, LGBTQ+ people should not be asked to stop being LGBTQ+ simply because that would satisfy the majority the most. Setting any and all personal beliefs aside, people are not entitled to make decisions for other people that affect them in such deeply personal and harmful ways simply because they do not approve of an aspect of their identity.

In other words, despite the legal guardians having the right to raise their children as they personally see fit and according to their own beliefs, this is not an unlimited right and also comes with obligations. If parents fail to fulfil these obligations or choose to directly contradict them, it is natural that another entity, in this case the state, will be forced to step in to ensure that the child is not harmed. The previously discussed prohibition of torture is one of few absolute rights, while many others contain limitations that states can make use of in order to prevent individuals from being harmed. The infringing on the rights of other people is one of the conditions where a limitation of an individual's rights may have to be considered.[177] As a consequence of this, one can draw the conclusion that just as with the right to freedom of religion, parental rights simply cannot be absolute, due to the risk of infringing on children's own human rights in the process of trying to fulfill their own.

[176] Hajrizi Dzemajl et al. v. Yugoslavia, 2002
[177] UNODC, 2022, available at https://www.unodc.org/e4j/en/terrorism/module-7/key-issues/limitations-permitted-by-human-rights-law.html

While it is indeed true that children are young and may not always be capable of making decisions that will benefit them in the long run, this does not give parents the rights to make similarly impactful decisions for them. Children may not be considered able to be autonomous enough to, for example, sign contracts, have a full-time job or to make independent decisions about their own compulsory education, but this does not mean that they are not capable of some level of autonomous decisions, especially the older the child gets. To say otherwise would imply that children have little to no capacity for rational thought or decision-making in the first place, which, while possibly somewhat accurate for an infant or a younger child, is clearly not the case for teenagers with awareness of their own sexual orientation and/or gender identity. Yet, in legal terms, they are both minors and have a similar status legally. Thus, perhaps the rights of the child would benefit from a maturity-based approach that is determined from case to case.[178]

However, it is arguable that knowing one's own sexual orientation and/or gender identity is not something that one needs to be very mature for. Gender dysphoria, a feeling of unease and discomfort with the gender one has been assigned at birth compared to one's own sense of gender identity, is often seen surprisingly early in young children.[179] It is seen as natural for children to have crushes on the opposite gender early in life as well, with nobody questioning if these children already know that they are heterosexual despite being so young, as they perhaps would if the child showed attraction to the same gender. It is not unreasonable to think that children can already be aware of what makes them different at a young age; if the parents notice this difference so clearly that they decide that the child needs treatment for it, the child will definitely be aware of it as well and can, in turn, be harmed by not only the negative side-effects of SOCE, but also by the parents' lack of respect for an important aspect of their own child's identity.

To summarise what has been established here, if the rights of the parents and/or legal guardians come into conflict with the rights of the children, one must call into question the authority of the parents if the child is at risk of being harmed by the parents' decision. It is the responsibility of the state to assure that this does not occur. With the many negative effects of SOCE as a consequence of it being forced upon children, it is worth questioning whether the state should not be interfering on these grounds. When taking into account that SOCE is commonly associated with creating mental health issues to the point of psychological trauma and suicidal

[178] Smolin, 2006, p. 93
[179] Priest, 2019, p. 47

ideation in young people,[180] its danger to LGBTQ+ individuals should not be underestimated by the state. Just as how cases where parents deny their children crucial medical health for religious reasons violate the rights of their children, so do cases where the parents are forcing their children to undergo harmful pseudo-scientific treatments, and the state should be making an effort to protect children from both.

The United Nations Independent Expert on Sexual Orientation and Gender Identity had the following to say regarding subjecting children to SOCE as well as what the child's best interests are, in a report that was made specifically about the practices, condemning the practices explicitly:

> The Independent Expert on Sexual Orientation and Gender Identity is convinced that the decision to subject a child to conversion practices can never truly be in conformity with a child's best interests. Parents must make decisions for their children under the premise of informed consent, which entails knowing the practice's true nature, its inability to actually achieve "conversion", and the mounting evidence pointing towards its long-term physical and psychological harm.[181]

While parents are entitled to choose how to raise their children, it could be argued that the limit should be drawn here, since they do need to be drawn somewhere in order for there to be a point to setting these limits in the first place. The religious or otherwise traditional beliefs of the parents cannot, according to international human rights law, be prioritised over the physical and mental well-being of the child. While parental rights extend to making choices about the religious upbringing of the child, it is another situation entirely when the parents are making decisions actively detrimental to the child's health, whether that be physical or mental.

Though SOCE exists in many shapes and forms, some of which clearly being more severe than others, its mere existence continues to pose a threat to LGBTQ+ people, particularly LGBTQ+ minors who are still particularly vulnerable to coercion and pressure from their legal guardians. Though many parents may believe that SOCE will be beneficial to their child's wellbeing in the end by making them fit in with their local community, they are actually causing more harm than good by attempting to change who their child truly is rather than accepting the child outright, and this rejection in itself can have a negative effect on top of the practices themselves.[182]

[180] Lapin, 2020, p. 252
[181] IESOGI, Report on Conversion Therapy, p. 3
[182] OutRight Action International, 2019, p. 14

Parents should take all of this into account before they make the decision to try to cure their child from something that is not an illness and cannot be cured. They are causing their child severe harm by putting them through SOCE. Not only that; it may very well be that they are destroying any positive relationship they may have had within the family beforehand by putting their child through this experience, as the child is likely to blame the parents for the extreme distress that was caused by the practices and feel that there is no trust left in the relationship afterwards.[183]

With this in mind, the negative effects of SOCE should be treated by the state with all the gravity that is necessary in order to make it clear how harmful the practices are so that the state can protect LGBTQ+ invididuals from being harmed. LGBTQ+ children in particular are at greater risk from SOCE and to make sure that underaged individuals are not being subjected to unnecessary harm, it should be expected of the state that it should, under its positive obligations, interfere with occurrences of the practices and draft legislation to ascertain that those who perform SOCE are not allowed to continue to harm LGBTQ+ individuals without facing any consequences for their actions in the future.

5. Conclusion

In the end, it is clear that SOCE is a very controversial practice which is plagued by many different potential human rights violations that call the validity of the practice into question, not to mention the medical community's issues with the practice. Despite the claims of its proponents, it does not change the fact that the legal and medical issues with the practices are difficult to ignore, as they would be with any practice that does not fulfil its intended purpose and instead causes mental and possibly even physical harm to the person experiencing the treatment. When one also takes into account that what is being treated is not an illness of any sort but simply a difference of sexual orientation and/or gender identity that constitutes a protected category, it becomes even harder to justify that SOCE as a practice should be allowed to exist at all in society as it exists today.

While the severity of SOCE may vary from case to case, it is evident that anyone undergoing this so-called "treatment" is in danger of being exposed to acts that could be considered torture as well as other cruel, inhuman or degrading treatment or punishment. While not every single case of SOCE involves the gruesome methods that have been described within this thesis which are easily defined as such, the suffering that is inflicted upon the participant could still be severe

[183] Bracken, 2020, p. 350

even if it is not as explicit, and the motivation behind the actions taken by those who perform SOCE is arguably discriminatory and punishing in nature. While the state may not be directly responsible for these actions in most cases, this is something that needs to be taken into account when discussing this practice, due to the absolute prohibition of the practices that it would entail.

Beyond the danger of being exposed to the terrible treatment that has been described already, there are other angles one could approach this from. LGBTQ+ people end up risking their health by participating in SOCE, putting their mental as well as their physical health on the line despite often not even having agreed to participate willingly. It is a discriminatory practice that only exists to try to force LGBTQ+ people back into the closet rather than actually helping them be comfortable with living their lives as they are, and disrespects LBGTQ+ people's privacy by attempting to influence their private lives so thoroughly. SOCE is overall a threat to the health and safety of LGBTQ+ individuals worldwide and there is a definite need for legislation that explicitly condemns it and increased active measures to prevent it from occuring in the first place.

Every single case of SOCE may not be as severe as the worst examples of the practice; however, it is still a slippery slope and if one were only to prohibit the worst forms of it, one must ask where the line would be drawn. It is impossible to decide at what level the suffering caused by SOCE would be too severe, since suffering is subjective. Especially considering that there is no point to the practice in the first place, given its ineffectiveness in achieving the desired results, it seems reasonable to assume that a blanket ban on the practice as a whole would be in line with international human rights law. If there are people who would have willingly sought out SOCE before a prohibition and would no longer be able to do so after this hypothetical prohibition, they could go discuss their issues with their identity with an actual medical professional and hopefully get more productive help to learn to accept themselves instead of relying on pseudo-scientific practices to attempt to change something that would likely not even be possible to be changed by SOCE in the first place.

While proponents of SOCE like to claim that their own personal rights make the practice acceptable due to it being a simple matter of opinion, this does not hold up when taking into account exactly how harmful SOCE can be. If one individual's rights infringes on another individual's rights, that individual can no longer be entitled to those rights. Even if a person holds homophobic and transphobic beliefs, religious or otherwise, those beliefs do not give that person the right to inflict harm upon a LGBTQ+ person. It goes against international human

rights law to harm someone from a minority group due to their status in any other circumstance, and thus it should be equally unacceptable to do so through SOCE. In the case of *Vejdeland and others v. Sweden*, it was determined that sharing anti-LGBTQ+ propaganda through words was already a breach of the state's international human rights law obligations. If this is the case, SOCE should be examined with similar scrutiny, as it contains the same type of propaganda and more.

This becomes even more poignant when one takes into account how often parents are the ones pushing their children into partaking in SOCE. Parents are harming their own children because they cannot accept that their child is LGBTQ+ in hopes that this will somehow make the child "normal" in their local community, justifying it through claiming that it is their rights as parents to do so, even when their treatment of their child clearly goes against what is considered acceptable according to the UNCRC as well as many other human rights treaties. It is clear that there needs to be accountability here, and it is not only those who are actively performing SOCE who have obligations here. Just like other outdated medical practices have been phased out of society, so too should SOCE, and any situation where parents are making decisions that seem to be directly harmful to their child's health should be thoroughly examined by the state, not only SOCE.

There are many state parties which also need to be held accountable for the lack of action taken regarding SOCE. While there are some states that have made an effort to combat SOCE, which should naturally be praised, there are many states that have not made any such attempts and are simply overlooking the problem and continue to let SOCE harm their LGBTQ+ citizens. When one looks at other legal cases which involve such widespread human rights violations, the state's positive obligations have often been taken into account. Thus, one can make the conclusion that the state would have similar obligations to interfere with SOCE, considering its widely known negative effects. Even though states have not explicitly allowed and do not explicitly perform SOCE, this does not entirely remove them of any and all responsibility regarding the matter.

In cases such as *Velásquez Rodríguez v. Honduras* and *González et al. ("Cotton Field") v. Mexico*, the state parties were held accountable for actions that they could not sufficiently be proven to be linked to. These cases both involved a number of victims of human rights violations that the state should have been aware of and interfered in under the principle of due diligence. Similarly, the state was shown to have failed in its responsibilities in *Hajrizi Dzemajl et al. v. Yugoslavia*, even if the state was explicitly not the actor directly committing the human

rights violation in this case. In other words, the state's positive obligations have a role to fulfil in cases like this, despite lack of direct involvement with the human rights violations being committed, whether the state is suspected in any way to be involved in directly committing the violation or not.

Obviously, the state cannot monitor every single potential human rights violation, as was made evident in the case of *Osman v. the United Kingdom*, where a single perpetrator was deemed responsible for the crime rather than holding the state accountable. However, if one compares this to the case *of E. and others v. the United Kingdom*, there was, again, a single person who was responsible for the crime, and yet the state was found to have failed in its obligations in this case. The simple difference is that this time, the person who committed the violations already had a distinct pattern involving a history of abuse that the state should have been aware of and taken into account. Similarly, SOCE has a documented pattern of causing harm, and thus, as has already been made clear, the state should be held accountable as well, for failing in its obligations to protect LGBTQ+ people from having their human rights violated.

In conclusion, society should move on from archaic practices such as SOCE. As LGBTQ+ people become more accepted around the world, the goal should be to draft legislation to ensure that they can live their lives safely and openly. This should include preventing malicious actors from trying to enforce their own perception of what an ideal normal person should be upon others with discriminatory intent. As states have already been made to take action in the past in order to prevent independent actors from committing human rights violations in cases involving xenophobically motivated crimes and crimes targeting women and other vulnerable categories in particular, so should they be stepping in to create legislation to prevent SOCE from causing further harm to LGBTQ+ people in this situation.

G.P., an anonymous gay man from Nigeria, shares the following message for parents, faith leaders and other perpetrators of SOCE when he, along with the other participants, was asked if there was anything that he would like to share with them at the end of a survey about the practice:

> It's got to stop. You are doing more harm than good. I've got mental issues I have to navigate now, because instead of being given love and support over something that's my nature, I was constantly harassed to change and made to feel like I am full of flaws. Conversion does not work. I have friends who have gone through worse than me (one was made to swallow a concoction with broken razor bits in it). He is still gay as hell. A lot worse has been done, and we are still gay as hell. There is tons of research out there disproving conversion therapy. Read up and educate yourselves... I believe visibility is important. The good kind. We

> have a few films that show us as deviants and demon-riddled. That informs how we are seen by other people. It encourages conversion therapy. We need media that show us in a different and more truthful light.[184]

LGBTQ+ rights may not be a part of the traditional trajectory of human rights, but LGBTQ+ individuals are a vulnerable minority nonetheless and should be treated as such by state parties and officials, with the respect and dignity they are inherently worthy of. While there is still a lot of work to do in this area, the awareness of practices such as SOCE is increasing worldwide and has gained more attention in recent years, with impressive progress being made in a relatively short time in many states. Along with this increasing awareness will hopefully come increased efforts on an international level to allow LGBTQ+ people freedom from living their lives in hiding. Through effective education and legislation, it could be possible to reach a future where they will no longer be forced to pretend that they are someone who they really are not.

[184] OutRight Action International, 2019, p. 63

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