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EUROPEAN MASTER'S DEGREE
IN HUMAN RIGHTS
AND DEMOCRATISATION

The Difficult Path towards the Recognition of Refugee Status based on Sexual Orientation and Gender Identity

Analysing Brazil and the United Kingdom

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Abstract

The situation of some LGBT people is of oppression. In some countries, they are at risk of suffer even death penalty. Thus, the Convention Relating to the Status of Refugees (1951) is very important. However, as the Convention does not mention the grounds of sexual orientation and gender identity, it has generated different interpretations. Moreover, the researches have been focus on few countries. In the South American States, such as Brazil, have little information about it, even though recently the asylum seekers have highly increased.

The objective of this thesis is to identify what are the main obstacles for the recognition of a refugee status based on these grounds and why there is no standard between the States. Such analysis is relevant to contribute to the better acknowledge of the LGBT asylum seekers vulnerability. The research is based on legal and political aspects. The selected countries are the United Kingdom and Brazil. I conclude that besides the legal weakness and lack of guidelines, the link to the refugee's policies, are relevant to comprehend the denial or the recognition of the refugee status for LGBT people.

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List of Abbreviations

AIDS: Acquired Immunodeficiency Syndrome

AP: Appellant

Art.: Article

CEDAW: Convention on the Elimination of All Forms of Discrimination against Women

CONARE: National Committee for Refugees

ECtHR: European Court of Human Rights

ECHR: European Convention of Human Rights

ECRE: European Council on Refugees and Exiles

HIV: Human Immunodeficiency Virus

ICCPR: International Covenant on Civil and Political Rights

ILGA: International Lesbian and Gay Association

INS: Immigration and Naturalization Service

LGBT: Lesbian, Gay, Bisexual, Transsexual and Transgender

LGBTI: Lesbian, Gay, Bisexual, Transsexual, Transgender and Intersex

UK: United Kingdom

UN: United Nations

UNAIDS: United Nations Programme on HIV/AIDS

UNDP: United Nations Development Programme

UNDP: United Nations Educational, Scientific and Cultural

UNESCO: United Nations High Commissioner for Human Rights

UNHCHR: United Nations High Commissioner for Refugee

UNHCR: United Nations High Commissioner for Refugee

UNICEF: United Nations Children's Fund

US: United States

WHO: World Health Organization

OAS: Organization of American States

CONARE:

SP: São Paulo

RJ: Rio de Janeiro

IMHR: Institute of Migration and Human Rights

NGOs: Non-Governmental Organizations

CDDH: Centro de Defesa dos Direitos Humanos

UPR: Universal Periodic Review

DRC: Democratic Republic of Congo

EU: European Union

Introduction

Firstly, it is relevant to define the meaning of sexual orientation and gender identity in the context of this thesis: *“sexual orientation is understood to refer to each person’s capacity for profound emotional, affection and sexual attraction to, and intimate and sexual relations with, individuals of a different gender or the same gender or more than one gender”* and *“gender identity is understood to refer to each person’s deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms”*.¹

I believe the freedom to openly express one’s sexual orientation and/or gender identity should be upheld and respected by all institutions and persons. Individuals should be free from discrimination or harm based upon this fact. Unfortunately, in all regions of the world, discrimination openly exists and has excluded the LGBT people from fully enjoying their fundamental rights. The main cause of this injustice is the lack of State protection against this form of discrimination. Even worse, is the existence of laws which criminalize homosexual behaviors. Sadly, in some countries, the punishment remains the death penalty.

In most parts of the globe, oppression exists on the basis of sexual orientation and gender identity by political and societal spheres. In the United Kingdom (UK) for example, this extreme prejudice remained until the middle of the XX century. A clear case in point would be the Sexual Offences Act of 1956², which stated that: *“It is an offence for a man to commit an act of gross indecency with another man, whether in public or private (...)”*.

¹ The Yogyakarta principles, Principles on the application of international human rights law in relation to sexual orientation and gender identity, March 2007, available at <http://www.refworld.org/docid/48244e602.html> (consulted on 1 May 2013).

² Sexual Offences Act, 1956. Available at: http://www3.worldlii.org/uk/legis/num_act/1956/ukpga_19560069_en.pdf (consulted on 7 May 2013).

Fortunately, after some years, the freedom of an individual to openly disclose or even embrace their sexual or gender preference, without governmental persecution, has been achieved in the UK and in other countries as well. Therefore, the cycle of oppression has been slowly shifting, especially since the eighties, when the freedom of sexual orientation and gender identity started to be recognized as a fundamental human right.

The change in societal perception, when this topic converted from a criminal act to a fundamental right, happened primarily because of changing international human rights laws. Said laws have been strengthening the principle that all human beings have the right to be treated equally and live free from discrimination. Even though this idea has gradually materialized, and has gained more momentum at the international, regional and national levels, it is not of unanimous opinion and the process is not a linear one. Consequently, most of the instruments put in place to protect the freedom of sexual orientation and gender identity, and to keep individuals from suffering discrimination and/or harm, are still based on soft law and recommendations, mainly at the international level. Some regional systems have established a legal framework to protect the right to sexual orientation and/or gender identity. An example of this would be the European Court of Human Rights (ECtHR).

As the notion of fundamental human rights developed, and as prejudicial norms were replaced by more tolerant ideals, international refugee law finally encountered the issue of sexual orientation. In the 1990, a refugee³ was finally officially recognized on the grounds of sexual orientation. Since then, the premise has been fiercely debated. However, the protection of LGBT asylum seekers has not been given equal consideration by the States, nor has it been made comparable to other grounds such as race, nationality and colour.

After this brief overview, I highlight three main points that will summarize the importance of this research. First, is the need for international protection for these individuals who represent a vulnerable minority, and that suffer persecution in many

³ *Matter of Toboso-Alfonso* [1990] (United States Board of Immigration Appeals).

countries. Second, is the reinforcement of the non-discrimination principle and equality before the law. Third, is to emphasize that this is a relatively “new” area of research, especially in South American countries like Brazil, where there is almost no publication about this particularity of refugee status policy. Furthermore, Brazil is one of my selected countries of analysis, making this research even more important and pertinent to this thesis. Europe, The United States, Australia and New Zealand are the most thoroughly researched locations on the subject of refugee status based on sexual orientation and/or gender identity. I have chosen to analyse the UK, which can offer a larger contextual framework for the examination of Brazil.

This research seeks to better understand and identify the main obstacles on the recognition of refugee status based on sexual orientation and/or gender identity and why it has not been established a standard among the countries.

In the first chapter, I will illustrate, by descriptive analyses, the often unfortunate situation of the LGBT individual in the world and I will explain how the perception of sexual orientation and gender identity has been developed, largely in legal terms. In order to support the significance and validity of this research, I will discuss the 1951 Convention, identifying and studying the primary obstacles in the recognition of a refugee status based on sexual orientation and/or gender identity. In order to isolate the problems encountered by this specific asylum seeker, I will analyse relevant cases-law, the 1951 Convention, research from experts in the field and the United Nations High Commissioner for refugee (UNHCR)’s guidelines for reference .

After identifying these core difficulties, I will start my second chapter by analysing the developments of the European System and the United Kingdom on the issue of sexual orientation and gender identity. I will then focus on the refugee law in Europe in regards to this specific category of individual, and assess the position of the UK in legal and practical terms as it relates to the main obstacles found in chapter 1. I will also include a section with a political vision for the refugee policy in the EU and UK in order to add a new perspective to the issue and raise some important questions for deeper reflexion.

In my third chapter, I will analyse my home country of Brazil, beginning with an explanation of the developments of sexual orientation and gender identity within the country. Secondly, I will examine how Brazil transferred the contents of the 1951 Convention into its national legislation. In Brazil, there is a lack of publication about this specific topic. Therefore, I opted to do interviews with professionals who work in the fields of refugee determination and human rights. The organisations they work for are UNHCR Brazil, Caritas Sao Paulo and Rio de Janeiro, Institute of Human Rights and Migration (IDHM) and others that are not allowed to publish their name. The objective of the interviews is to better understand the current practices in Brazil and to contribute to better understand the obstacles for the recognition of a refugee based on sexual orientation and/or gender identity. Last but not least, I will also include a more political view on the refugee policies in Brazil.

In the last section, I will present my conclusions. Thereby, the outcome of the research will be from combining two perspectives, the legal and political ones, with the aim of contributing to a better understanding of the specific problems with the recognition of refugee status based on sexual orientation and/or gender identity. My objective and hope is that this will add to a deeper understanding of the reasons for the differences among the countries.

Chapter I:

Sexual Orientation and Gender Identity: International Human Rights and the Refugee Status

1.1 A worldwide picture on the situation of individuals LGBT

In order to give proper attention to the alarming situation of the LGBT individual in the world, I opted to briefly show, in the first part of my analysis, a general view with statistics on discrimination laws and practices against LGBT persons.

For the first time in the history of the United Nations (UN) High Commissioner for Human Rights (UNHCHR)⁴, a report on sexual orientation and gender identity was finally made in 2011. The report stated that all around the world people have been victims of violence or discrimination because of their sexual orientation and gender identity.⁵ According to this study: “*violations include – but are not limited to – killings, rape and physical attacks, torture, arbitrary detention, the denial of rights to assembly, expression and information, and discrimination in employment, health and education.*”⁶

Regarding these laws, which criminalize people according to their sexual orientation, a report from the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) shows that in at least 76 countries homosexual acts are illegal.⁷ The legal status of homosexual acts and practices are unclear in Bahrain and Iraq. Nevertheless, various reports have revealed that in Iraq “*self-proclaimed Sharia judges have sentenced people to death for committing homosexual acts and that militias frequently have kidnapped, threatened and killed LGBT persons*”.⁸ Five countries within Africa and Asia see homosexual acts as punishable by the death penalty. These include: Mauritania, Sudan, Iran, Saudi Arabia, and Yemen. This also includes the 12 northern states in Nigeria and the southern parts of Somalia.⁹

Only 54 countries prohibit discrimination based on sexual orientation in employment. This includes Italy, the United Kingdom (UK)¹⁰ and some federative states of Brazil and the federal district.¹¹ The prohibition of discrimination in employment based solely

⁴ ILGA, ILGA applauds the first ever Report on Sexual Orientation and Gender Identity issued by the UN High Commissioner for Human Rights. Available at: <http://ilga.org/ilga/en/article/njkiWuq1C5>. (consulted on 15 June 2013).

⁵ UNHRC, UN Doc A/HRC/19/41, 17 November 2011, p.3.

⁶ Idem, 2011.

⁷ Bruce-Jones & Itaborahy, 2011, pp.9-10.

⁸ Idem, p.39.

⁹ Idem, p.10.

¹⁰ Bailiwick of Guernsey (2005), Gibraltar (2004), Isle of Man (2007). Idem, p.12.

¹¹ Bahia (1997), Federal District (2000), Minas Gerais (2001), Paraíba (2003), Piauí (2004), Rio de Janeiro (2000), Rio Grande do Sul (2002), Santa Catarina (2003), São Paulo (2001). Idem.

on gender identity exists in only 19 countries.¹² Constitutional prohibition on sexual orientation discrimination appears in only 7 countries, including some federal states of Brazil and the federal district.¹³

It would be relevant to mention the conclusion of Wintemute and the importance of the political consensus about sexual orientation and gender identity discrimination. In his words: *“There is no necessary connection between the existence or use of strong argument that sexual orientation discrimination prima facie violates a principle of constitutional and international human rights law and a court’s concluding that such violation has occurred. Where there exist a political consensus against such discrimination (as in Canada), a court may reach that conclusion regardless of which argument is used, or whether any argument is used at all. Where does not exist a sufficient political consensus (as in US and the Council of Europe countries), a court may reject that conclusion, in spite of intellectually rigorous arguments that a principle of constitutional and international human rights law compels it”*.¹⁴

This observation indicates that one extremely important element of analysis is, in fact, the political one. Nonetheless, the presence of clear laws, which explicitly prohibit discrimination, will help to strengthen the argument that discrimination on the basis of sexual orientation and/or gender identity violates constitutional principles.

In some cases the government policies have a direct discriminatory impact; in others, the absence of applicable national laws facilitates discrimination by private actors.¹⁵

Quite frequently discrimination is present in family and community structures, which can represent an obstacle for LGBT persons. The UNHCHR highlights that *“such discrimination manifests itself in various ways, including through individuals being excluded from family homes, disinherited, prevented from going to school, sent to*

¹² Idem, p.13.

¹³ 73 Alagoas (2001), Distrito Federal (1993), Mato Grosso (1989), Pará (2003), Santa Catarina (2002), Sergipe (1989). Idem.

¹⁴ Wintemute, 1995, p.251.

¹⁵ UNHRC, UN Doc A/HRC/19/41, 17 November 2011, p.16.

psychiatric institutions, forced to marry, forced to relinquish children, punished for activist work and subjected to attacks on personal reputation”.¹⁶ Moreover, the laws which have criminalized the LBGT community and the unfortunate perpetuation of these discrimination practices have negatively influenced other important spheres of human rights. These include freedom of expression, of association and of assembly, the right to education, health care, employment, etc.¹⁷

Effectively, we can observe that few countries have taken adequate measures to ensure the protection of LGBT persons. Most of them still provide discriminatory laws and convict homosexual acts. Even in countries where laws exist to prevent or regulate discrimination, these individuals are still facing injustice, violence and homophobia. My intent is to illustrate how these people, because of their sexual orientation and/or gender identity, are unable to fully exercise and enjoy their human rights. Some of them are at risk of suffering arbitrary violence due to homophobia, becoming a target of organized abuse, or even being sentenced to death.¹⁸

These prevalent scenarios of repression and discrimination will force LGBT individuals to ask for refugee status abroad. In the words of Vitucci, “(...) *the homosexuals who live in States where their intimate conduct is penalized have a dual alternative: to hide their condition or leave the country*”.¹⁹ Next, it will be analyzed the extent to which the “condition” of sexual orientation and/or gender identity is recognized as a prohibited ground of discrimination in the international human rights laws and how this recognition might influence the inclusion of this specific category into refugee protection.

¹⁶ Idem, p.3.

¹⁷ Idem, pp.16-21.

¹⁸ Idem, p.8.

¹⁹ Vitucci, 2012, p.153.

1.2 Changes of perceptions about sexual orientation and gender identity: from disease to fundamental rights?

The premise that sexual orientation and gender identity are fundamental human rights is a relatively new concept, at least at an international level. In 1990, homosexuality was still considered a mental illness by the International Classification of Diseases of the World Health Organization (WHO) until that same year when it was removed.²⁰

Prior to this, in the 1980's, the theme of sexual orientation and gender identity appeared at a Regional International Human Rights instrument, the European Court of Human Rights (ECtHR). After more than 20 years of rejection, finally a case related to homosexuality was accepted by ECtHR.²¹ The judgment of the well-known case *Dudgeon v. the United Kingdom* (1981)²² was a major example to all human rights institutions, as it was the first international human rights Court to find that criminal laws against sexual orientation violate human rights.²³ The Court held that criminalization of homosexuality affects the private life of the claimant (Art. 8)²⁴.

Another well known example, at the United Nations (UN) level, was the case of *Toonen v. Australia* in 1994.²⁵ Here, the United Nations Human Rights Committee (UNHRC) undoubtedly declared that the prohibition of discrimination, under Art. 2²⁶ and Art. 26²⁷ of the International Covenant on Civil and Political Rights (ICCPR) (1966) should be

²⁰ May 17 th is the Intl Day Against Homophobia, 5 May 2005. Available at: <http://ilga.org/ilga/en/article/546> (consulted on 10 Jun 2013).

²¹ Sumner, 2004, p.876.

²² *Dudgeon v. the United Kingdom*, (ECtHR 1981).

²³ Study guide, Sexual Orientation and Human Rights. Available at: <http://www1.umn.edu/humanrts/edumat/studyguides/sexualorientation.html> (consulted on 14 June 2013).

²⁴ Art. 8 of the European Convention of Human Rights (ECHR).

²⁵ *Toonen v. Australia*, (UNHRC, 1994), cited in Viviani, 2010, p.245.

²⁶ Art. 2 ICCPR: "1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the right recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

²⁷ Art. 26 ICCPR: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

interpreted to include the sexual orientation ground.²⁸ Regarding this issue, Vitucci indicated that despite the fact that the Committee had affirmed discrimination based on sexual orientation to be unlawful, the legal foundation of this specific discrimination is not as clear once the Committee leaps from discrimination based on sex to some other ground.²⁹

Therefore, the case *Toonen v. Australia* became a species of guideline on this matter, opening the door for discussion on this theme at the UN level. At the conclusion of this case, sexual orientation and gender identity made it onto the agendas for the Reporting Mechanism and several UN Organizations such as UNHCHR, United Nations High Commissioner for Refugee (UNHCR), United Nations International Children's Emergency Fund (UNICEF), United Nations Educational, Scientific and Cultural Organization (UNESCO), Joint United Nations Programme on HIV/AIDS (UNAIDS) and the United Nations Development Programme (UNDP).³⁰

In 2003, the rights of transsexuals were affirmed in the case of *Van Kuck v. Germania* at the ECHR. It was declared that the internal tribunal violated “the applicant’s freedom to define herself as a female person, one of the most essential roles of the ECHR being to respect human dignity and human freedom”. It also ensured “*the right of transsexuals to personal development and to physical and moral security*”.³¹

In short, the development of this issue which started in the eighties definitely gained momentum and strength over the last several years. It was not until 2003 that a project related to Human Rights and Sexual Orientation was proposed by Brazil, recommending the condemnation of discrimination based on sexual orientation.³² However, it was not adopted immediately. This issue was mentioned again in 2005 by New Zealand, which delivered a joint statement on sexual orientation and human rights

²⁸ Vitucci, 2012, p.245.

²⁹ Idem, p.11.

³⁰ Idem, p.10.

³¹ *Van Kuck v. Germania*, (ECtHR, 2003), cited in Viviani, 2010, p.246.

³² Vitucci, 2012, p.13.

on behalf of a cross- regional grouping of 32 States.³³ In 2007, the document titled the “*Yogyakarta Principle*”,³⁴ drafted by human rights experts, was published. This document, despite of being a soft law, helped to reinforce the application of the right to freedom of sexual orientation and gender identity under the international human rights laws.

This document is relevant to the topic of refugee status, as it states in principle 23, in regards to seeking asylum, that: “*Everyone has the right to seek and enjoy in other countries asylum from persecution, including persecution related to sexual orientation or gender identity*”.³⁵ The document recommends that States take measures to guarantee the acceptance of sexual orientation or gender identity as a ground for the recognition of refugee status.³⁶ Two years later, the UNHCR finally published the first guidance note on “*Refugee claims relating to Sexual Orientation and Gender Identity*”.³⁷ In 2011, a resolution was adopted by the Human Rights Council entitled, “*Human Rights, Sexual Orientation and Gender Identity*”, where the serious concern at acts of violence and discrimination, in the entire world, committed against individuals because of their sexual orientation and gender identity was expressed.³⁸ In that same year, the UNHCHR published their first report on this issue, as we have previously discussed. In 2012, another guideline was added regarding the same issue which contained more recommendations.³⁹

These facts demonstrate how relatively “new” this issue is in terms of recognition of sexual orientation and gender identity as a human rights issue and the application of the international human rights law. In some countries or regions within the EU this notion

³³ O’Flaherty & John Fisher, 2008, p.230.

³⁴ International Commission of Jurists (ICJ), Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity, March 2007. Available at: <http://www.refworld.org/docid/48244e602.html> (consulted on 6 July 2013).

³⁵ Idem, p.27.

³⁶ Idem.

³⁷ UNHCR, UNHCR Guidance note on refugee claims relating to sexual orientation and gender identity, November 2008. Available at: http://www.justice.gov/eoir/vll/benchbook/resources/UNHCR_Guidelines_Sexual_Orientation.pdf (consulted on 02 July).

³⁸ UNHCR, UN Doc A/HRC/RES/17/19, 14 July 2011, p.1.

³⁹ UNHCR, UN Doc HCR/GIP/12/09, 23 October 2012.

has developed better. In contrast, Syria and others 59 States are against considering this topic as a human rights matter.⁴⁰ Another example that demonstrates how the sexual minority rights have not been fully accepted is the fact that the WHO still considers transgendered people mentally ill. Opposing this attitude of ignorance, the European Parliament adopted a resolution in 2011, where they pressured the WHO to stop considering transgendered people as such.⁴¹ This demonstrates that the theme of universal rights is still not a consensus and at the UN level is merely a recommendation rather than something strictly enforced.

Seemingly, the right of a person to freedom of sexual orientation and/or gender identity has been formulated under the perceptions of fundamental rights, such as private life, non-discrimination and equality before the law.⁴² However, the oppression towards LGBT persons can be expanded to violate other human rights as well. As it can be seen, and as Vitucci recognised, the process of affirmation, of the right to not be discriminated against based on sexual orientation, at the international level, is very slow and the acceptance is not unanimous.⁴³

The link between sexual orientation, gender identity and the fundamental human rights is slowly gaining attention, even though it is not completely widespread. This seems to explain why protection against sexual orientation discrimination has been established. Consequently, this protection may spill over to refugee laws and is representative of the hope present for the LGBT community who have a well-founded fear of persecution. Its purpose would be to protect these individuals by recognizing them as part of the “membership of a particular social group” under the 1951 convention.

⁴⁰ Vitucci, 2012, p.14.

⁴¹ Intergroup on LGBT Rights, European Parliament: World Health Organization must stop treating transgender people as mentally ill. Available at: <http://www.lgbt-ep.eu/press-releases/who-must-stop-treating-transgender-people-as-mentally-ill/> (consulted on 10 June 2013).

⁴² For example Art. 1. and Art.55 (Charter of United Nations 1945), Art.2 (ICCPR), Art. 17 ICCPR (Privacy right). Art. 26 ICCPR (Equality before the law).

⁴³ Vitucci, 2012, pp. 2-16.

1.3 The 1951 Convention Relating to the Status of Refugees: sexual orientation and gender identity

The 1951 Convention Relating to the Status of Refugees (1951 Convention)⁴⁴ and the 1967 Protocol⁴⁵ are, without a doubt, the most important international legal instruments for the protection of refugees. These instruments establish the rights of refugees and the obligations of the 148 States part to one or both of these instruments.⁴⁶

The 1951 Convention is also connected with human rights protection as we can see in the preamble: “*Referring to the High Contracting Parties (...) Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination.*”

In spite of good intentions, the 1951 Convention is not completely clear in some of its definitions, which have been generating different interpretations that might influence the level and equality of protection. A vivid example showing this lack of a clear definition is in Art. I A (2), which describes who qualifies under refugee status:

“a refugee is a person who is outside his or her country of nationality or habitual residence; has a well-founded fear of being persecuted because of his or her race, religion, nationality, membership of a particular social group or political opinion; and is unable or unwilling to avail him or herself of the protection of that country, or to return there, for fear of persecution”.⁴⁷

It is evident that the category of “*membership of a particular social group*” is not as clear as the other grounds of the Convention.⁴⁸ The biggest challenge is in determining who should be included in this category and, therefore, be classified under a refugee

⁴⁴ Ghandhi, S., 2012, pp. 18-27.

⁴⁵ Idem, pp.28-29.

⁴⁶ Guterres, 2011, pp.1-12.

⁴⁷ Article I A (2) of the 1951 Convention.

⁴⁸ Hathaway & Foster, 2003, p.477.

status. The Convention does not include, explicitly, the grounds for sexual orientation and gender identity, but the question then becomes, should they be considered members of a particular social group?

This gap in the 1951 Convention opens the door for many interpretations and conflicting opinions. As was pointed out by Oliva, the Convention is subject to interpretation in part by the States themselves, which compromise a uniform standard for the recognition of refugee status.⁴⁹ This statement is confirmed by the challenges that courts around the world have been facing on clearly defining who should be included in the “*membership of a particular social group*”.⁵⁰ The cases of asylum claims based on sexual orientation and/or gender identity perfectly illustrate this limbo of protection. As we have noted, sexual orientation and gender identity are still in the process of international legal recognition in terms of non- discrimination, as there is not a complete international consensus.

In conclusion, the “*membership of a particular social group*” under the context of the 1951 Convention, can be read in either a restrictive or a broad sense. Certainly the broadest interpretation is typically the most advantageous for the protection of this group. Nevertheless, it largely depends on the interpretations of the Convention, where the development of conceptions, values and politicians play an important role in the decisions of the countries and their courts. The next section of this paper will focus on sexual orientation and gender identity as a possible “*Membership of a particular Social Group*” for the purposes of the Convention.

1.3.1 Sexual orientation, gender identity, social group and the refugee status

In the article entitled “*Sexual Orientation in Refugee Status determination*” from 2011, Webels, after a very detailed analysis considering many cases of asylum seekers,⁵¹

⁴⁹ Oliva, 2012, p.7.

⁵⁰ ‘In the earliest cases the view that the ground of a sexual orientation and gender identity as a membership ground was not unanimity and the jurisprudence has given rise to various differing interpretations’ Webels, 2011, p.9.

⁵¹ The author analyses cases of 8 countries of asylum destination: Australia, Canada, Germany, New Zealand, Norway, Switzerland, United Kingdom and United States of America. Idem.

concluded that “*some courts have defined the relevant social group in restrictive ways, wrongfully excluding claimants*”.⁵² The fact that the concept of social group is not clearly defined definitely increases the likelihood of multiple interpretations, including restrictive ones. Therefore, the debate about how jurisprudence have construed the meaning of “*membership of a particular social group*” under the 1951 Convention, and its relation to the recognition of one’s refugee status based on sexual orientation and/or gender identity, is extremely relevant.

To address this issue, I will first consider two main difficulties exemplified in the following questions: What was the purpose of the 1951 Convention at the time of its draft, regarding the meaning of a social group? How the meaning of a social group should be interpreted nowadays?

The meaning of social group is fairly complex and thus not easily defined. Perhaps the intention of the 1951 Convention was to keep the term vague in order to extend protection to other groups not covered under race, religion, nationality or political opinion. Goodwin-Gill and McAdam assert that the notion of social group should have an element of “*open-endedness capable of expansion, as the jurisprudence shows, in favour of a variety of different classes susceptible to persecution*”.⁵³

Goodwin-Gill and McAdam argue that the meaning of social group has to be progressively developed. Their urging is based on the analyses of the “*travaux préparatoires*” and its meaning of social group, as well as the development of the jurisprudence related to this ground. Their first observation was: “*The ‘travaux préparatoires’ provide little explanation for why ‘social group’ was included (...) The lack of substantive debate on the issue suggests that contemporary examples of such persecution may have been in the minds of the drafters, such as resulted from the ‘restructuring’ of society than being undertaken in the socialist states and the special*

⁵² Idem, p.48.

⁵³ Goodwin-Gill & McAdam, 2007, p.76.

*attention reserved for landowners, capitalist class members, independent business people, the middle class and their families”.*⁵⁴

In other words, they argue that the lack of debate about the definition of social group during the time of the preparation for the Convention could be interpreted as proof of the drafter’s intentions. With this logic, the real intention was specifically not to define the social group, probably because of the perception that a new group, or groups already established, could suffer persecution in the future; For example, the landowners and capitalist class members. The author points out that: *“The initial intention might have been to protect known categories from known forms of harm; less clear is whether the notion of ‘ social group’ was expected or intended to apply generally to the unrecognized group facing new forms of persecution”.*⁵⁵

Still, our knowledge surrounding this issue is based primarily on assumption since there is little explanation on the *“travaux préparatoires”* about the notion of a social group. Therefore, the real meaning may never be completely revealed to us. The only thing that is relatively clear is that the term *“social group”* does not include, in any specific detail, particular factions of people. After concluding that there is no way to know the drafters specific intentions, or the definition they would have assigned to the concept, the authors argue that this should not keep the term from being progressively developed.⁵⁶

This opinion is supported by the development of the jurisprudence and the Art. I A (2) of the Convention. One example of this progressive development is the application of this article to the well-founded fear based on gender in the mid-eighties.⁵⁷ Author Oliva highlights that this possibility was recognized in correspondence with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1979.⁵⁸ The CEDAW helped to configure women as a separate *“social group”*. One that

⁵⁴ Idem, p.74.

⁵⁵ Idem, p.76.

⁵⁶ Idem, p.74.

⁵⁷ Oliva, 2012, p.6.

⁵⁸ Idem.

required protection from the gender discrimination that led women to a position of “social inferiority” in many countries compared to their male counterparts.⁵⁹

The recognition that women around the world have been suffering from a generalized prejudice certainly strengthened the belief that women needed protection under the 1951 Convention. Goodwin-Gill and McAdam explain that “The need for protection in this field has been recognized, as claims began to be made by women seeking refuge from ‘domestic violence’ and from violence against women in society”.⁶⁰ The violence was initiated not by the State or other political structures, but by private actors. Nonetheless, one broad approach prevailed in that: “*all violence against women should be presumed to be political unless and until the State is shown to provide effective protection*”.⁶¹ This fact reinforced the need for ample protection for women under the law.

Years later, in the 1990’s, the demand for protection for LGBT persons, specifically under the 1951 Convention, started to appear. Thus, the debate emerged on whether or not LGBT persons should be considered a social group in the context of refugee status. It was presented before that LGBT individuals suffer from discrimination, violence and repressive laws in many parts of the world. However, have they been accepted as refugees because of their sexual orientation and/or gender identity? Have the jurisprudences of the States and other international organizations such as the UNHCR applied or interpreted the article 1 A (2) using a progressive approach as they have for women? Is there a standard of application for this article meant for the countries themselves?

UNHCR upholds that the States have been recognizing women, families, tribes, occupational groups, and homosexuals as constituting a particular social group for the purpose of the 1951 Convention.⁶² However, the process of recognition for LGBTs can be challenging as will be discussed in greater depth.

⁵⁹ Idem, p.10.

⁶⁰ Goodwin-Gill & Mc Adam, 2007, p.81.

⁶¹ Idem.

⁶² UNHCR, UN Doc HCR/GIP/02/01, 7 May 2002, p.2.

The first successful case based on sexual orientation in the US was concerning Mr. Toboso- Afonso on 12 March 1990. He was a Cuban man who was suffering arbitrary prison and faced two years of forced labor because he was exposed as a homosexual in Cuba. In the case documentation, *“He submits that homosexuals form a particular social group in Cuba and suffer persecution by the government as a result of that status”*.⁶³ Later he was convicted and sentenced to 4 years imprisonment, but instead, ran away and asked for protection in the US.⁶⁴

The case was accepted and raised significant attention and debate surrounding the definition of social group, or the concept of *“social perception”*, which focuses on the social view of a group. After this case, social perception became very important in the analysis of an asylum claimant because often the applicant's perception of sexuality or his sexual activities per se, are not sufficient to deny the refugee status for him or her.

This statement becomes extremely relevant when examining the case above; since the claimant alleged that the Cuban government kept a list of known homosexuals that was constantly being updated by law enforcement since the sixties. Further inquiry shows that: *“The applicant testified that there was a municipal office within the Cuban Government which registers and maintains files on all homosexuals. He stated that his file was opened in 1967, and every 2 or 3 months for 13 years he received a notice to appear for a hearing”*.⁶⁵ These examples help to further understand the necessity and desperation he felt in abandoning his home country. He was convinced that he would continue to be persecuted by the government. The relevant fact is that even if the applicant was not a homosexual, the government had the perception that he was homosexual.

⁶³*Matter of Toboso-Alfonso*[1990] (United States Board of Immigration Appeals).

⁶⁴ Idem.

⁶⁵ Idem.

The contention that sexual orientation could be an adequate reason for developing a fear of persecution, and the notion of social perception are repeated in other cases⁶⁶ and ultimately culminated with the case of *Karouni v Gonzales*. In this case, was stated that “*all alien homosexuals are members of a ‘particular social group’*”.⁶⁷ In the case *Hernandez-Montiel v INS*.⁶⁸, the claimant’s gender identity was the reason to recognize him as a membership of social group. But the recognition of refugee status based on sexual orientation and/or gender identity has not been standardized among all of the tribunals in the US. Statistically, the tribunals of the 9th District have recognized many claims based on this criterion whilst the District of the 8th District denied many solicitations, but never denied the inclusion of sexual minorities into a social group, mentioned by Oliva.⁶⁹

The strong differences in the outcomes of these cases based on the “*membership of a particular social group*” were not just among US jurisdictions, but among many others. Goodwin-Gill and McAdam affirmed that “*during the 1990s, the social group category produced several, not always easily reconcilable judgments in different jurisdictions, particularly in Canada*”⁷⁰ but also in the UK, Australia and New Zealand. Millbank, after considering 1.000 cases from 1994 to 2007 relating to sexual orientation and gender identity, found many incongruences and divergences in interpretation, which culminated in various different decisions.⁷¹ Indeed, decisions have often been the result of personal (or western) perception of sexual orientation and gender identity.⁷² This fact has negatively affected the level of protection for LGBT persons under the Convention.

Three remarkable cases helped to better define the meaning of social group:⁷³ The Canadian case *Attorney General v Ward* (1993), the Australian case *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) and the UK case *Islam (AP) v*

⁶⁶ Oliva, 2012, p.15.

⁶⁷ *Salkeld v. Gonzales* [2005] (United States Court of Appeals for the Eighth Circuit).

⁶⁸ *Hernandez-Montiel v INS* [2000] (United States Court of Appeals for the Ninth Circuit).

⁶⁹ Oliva, 2012, pp.16-17.

⁷⁰ Goodwin-Gill & Mc Adam, 2007, p.77.

⁷¹ Millbank, 2009, pp.1-33.

⁷² *Idem*.

⁷³ Webels, 2011, p.9.

Secretary of State for the Home Department; R v Immigration Appeal Tribunal ex parte Shah (AP) (1999).

The Supreme Court in the *Ward* case considered that there were three possibilities in determining the definition of social group: “(1) Groups defined by an innate, unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status due to its historical permanence”.⁷⁴

Understanding what the fundamental rights are is key point to defining “social group” as it relates to the Convention. This model will offer protection according to its link with fundamental rights. For example, a terrorist group would not be protected because it is not necessary to ensure fundamental rights and freedoms, typically the opposite, in fact.

The approach taken during the (1997) Australian case was much more restrictive in its determination of “social groups” as it found that: “A particular social group (...) is a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large. That is to say, not only must such persons exhibit some common element; the element must unite them, making those who share it a cognizable group within their society (...) however, one important limitation (...) is that the characteristic or element which unites the group cannot be a common fear of persecution”.⁷⁵

This idea of “cohesion of the group” can be dangerous when it determines the level of protection one is entitled to. If read and interpreted in a restrictive way, it might exclude many claimants from receiving adequate defense, as occurred in the UK Home Office in 2005. They dismissed a case arguing that without evidence of persecution, gay people

⁷⁴ *Canada (Attorney General) v. Ward* [1993] (Canada: Supreme Court).

⁷⁵ *Minister for Immigration and Ethnic Affairs v Guo Wei Rong and Anor* [1997] (Australia: High Court).

could not constitute a social group because they would not be a “*cohesive group*”.⁷⁶ It seems obvious that this should not be a valid reason to exclude an individual from granting the refugee status, since homosexuals may not think themselves as part of a social group. However, since society might have a pre conceived opinion of the individual belonging to a group, that judgment often prevails. Therefore, the meaning of “*cohesion of the group*” can only be argued to further support the applicant when they are, or have been, involved in LGBT movements or something similar, but can never be a condition for the applicant.

The case *Islam v Shah* raised the question of whether “*cohesiveness*” should be a requirement for the existence of a particular social group. To answer this question, let us look at one of the main arguments taken from the “*Matters of Acosta*” Case which illustrates the doctrine of the *ejusdem generis approach (protected characteristics)*⁷⁷ and concludes that: “(...) *persecution that is directed toward an individual who is a member of a group of persons, all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color or kinship ties, or in some circumstances it might be a shared past experience such as former military leadership or land ownership (...) Whatever common characteristics that define the group, it must be one that the members of the group either cannot change because it is fundamental to their individual identities or conscience*”.⁷⁸

After these considerations, the idea that cohesiveness is necessary for membership into a particular social group was rejected and it was explicitly expressed that homosexuals were most certainly not a cohesive group in the following statement: “*But homosexuals are, of course, not a cohesive group (...)*”⁷⁹ This account, together with the others mentioned above, contribute considerably to our understanding of the meaning of “*membership of a particular social group*”. Yet, there is no rule or enforcement for it.

⁷⁶ Webels, 2011, p.9.

⁷⁷ Hathaway & Foster, 2003, p.480.

⁷⁸ Case *Matter of Acosta*, cited in Hathaway & Foster, 2003, p.480.

⁷⁹ Opinion of Lord Steyn in Judgments: *Islam (A.P.) v. Secretary of State for the Home Department Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.) (Conjoined Appeals)* [1999] (United Kingdom: House of Lords-Judicial Committee).

1.3.2 The UNHCR's guidelines on social group

In order to create a standard for the interpretation of social group, in 2002, UNHCR published guidelines on the “*membership of a particular social group*” within the context of the 1951 Convention and/or its 1967 Protocol. This document is based pretty much on the development of the Court's cases-law, and tries to compile their best approaches to establish some application rules. In its first paragraphs, the document expresses how the States should interpret the term as follows: “*There is no ‘closed list’ of what groups may constitute a ‘particular social group’ within the meaning of Article 1A(2). (...) the term membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms*”.⁸⁰

Afterwards, UNHCR presented two approaches, which the States should base themselves. The first is the “*protected characteristics*” approach or “*immutability*” approach, which takes into consideration whether a group is united by an immutable characteristic,⁸¹ or by a characteristic “*so fundamental to human dignity that a person should not be compelled to forsake it*”.⁸² In addition, UNHCR stated that: “*Human rights norms may help to identify characteristics deemed so fundamental to human dignity that one ought not to be compelled to forego them*”.⁸³ The second approach is that of “*social perception*”, which “*examines whether or not individuals share a common characteristic which makes them a cognizable group and sets them apart from society at large*”.⁸⁴

UNHCR informed that in both approaches homosexuals have been recognized by the jurisprudences,⁸⁵ and also considers that the two approaches have to be reconciled, thus preventing different results. The first approach should be the guideline to the second approach and as it follows: “*The protected characteristics approach may be understood*

⁸⁰ UNHCR, UN Doc HCR/GIP/02/01, 07 May 2002, p.2.

⁸¹ Idem.

⁸² Idem.

⁸³ Idem.

⁸⁴ Idem.

⁸⁵ Idem.

to identify a set of groups that constitute the core of the social perception analysis.”⁸⁶

The social approach is broader, and can also recognize a group that is neither fundamental to identity nor immutable characteristic. Decision-makers should nonetheless determine whether they are perceived as a cognizable group in that society. Therefore, a social group could be a type of a profession for example.⁸⁷ Also UNHCR made it clear that *“there is no requirement that the group be ‘cohesive’”*⁸⁸, as a precondition to the group being recognized.

Hathaway and Foster are very critical of the social perception approach. They argue that the social perception approach it is too flexible and it is very difficult for decision - makers to have adequate data on the country of origin and also expertise on analysing its sociology.⁸⁹ Therefore, they defend an approach based more on international human rights law. They explain that the notion of *“social perception”* might influence decision makers to consider some groups *“which might not have been protected under classic legal notions of non-discrimination, or which exist for reasons not related to pursuit of any purpose related to core human rights norms”*.⁹⁰

In Hathaway and Foster’s opinion, the notion of human dignity and human rights norms are essential to the interpretation of the Convention, these norms: *“Must be interpreted in line with accepted standards of international construction rather than simply by reference to rules which prevail in a given asylum state”*. For them a possible solution is *“to combine or sequentially apply the two conceptual approaches”*.⁹¹ But they also have argued that might be premature to conclude that a merger the both approaches would be the best solution.⁹²

⁸⁶ Idem, p.3.

⁸⁷ Idem, p.4.

⁸⁸ Idem.

⁸⁹ Hathaway & Foster, 2003, p.484.

⁹⁰ Idem, p.487.

⁹¹ Idem, p.485.

⁹² Idem, p.490.

Would then LGBT people, with well-founded fear of persecution, be recognized as a social group if only the standards of international human rights law and non-discrimination principles were applied? It would probably depend on the specific country and on individual interpretation, because there is no consensus about sexual orientation and /or gender identity as being international human rights. Usually, protection is based on recommendation. For example, In Canada, a decision maker, argued in favour of denying the recognition of homosexuals as forming a ‘particular social group’ based on the fact that the Universal Declaration on Human Rights does not mention sexual orientation.⁹³ This is “*proof*” that homosexuals are at risk of not receive protection under the 1951 Convention, with the justification that they are not part of the fundamental human rights.

US Courts are applying a method which requires that both approaches be applicable in order to be considered a part of a social group. Because of this, it is easier to deny refugee status to the claimant because they need to prove both: the immutability or essentiality for the human identity and the social perception or what’s called the “*social visibility test*”.⁹⁴ The problem is that sexual minorities, frequently, are not visible because they are oppressed. As La Violette explains, “*the US cases put forward a new approach that diverges from UNHCR’s sequential test and from the ‘protected characteristic’ approach previously followed by US decision makers*”.⁹⁵ In this sense, La Violette argues that the UNHCR should have made clear, and emphasized, that the cumulative testing, as some US Courts are performing, must be avoided.⁹⁶ Only in 2012 did UNHCR touch on this issue by declaring that: “*The two approaches – ‘protected characteristics’ and ‘social perception’ - to identifying ‘particular social groups’ reflected in this definition are alternative, not cumulative tests. (...) The determination rests simply on whether a group is ‘cognizable’ or ‘set apart from society’ in a more general, abstract sense*”.⁹⁷

⁹³ La Violette, 2010, p.189.

⁹⁴ Idem, p.191.

⁹⁵ Idem.

⁹⁶ Idem, pp.192-193.

⁹⁷ UNHCR, UN Doc HCR/GIP/12/09, 23 October 2012, p.13.

1.4 Challenges for the recognition of refugee status based on sexual orientation and/or gender identity

After debating the definition of social group, some other main difficulties for the recognition of refugee based on sexual orientation and/or gender will be in this chapter further analysed. This is done in order to create a list of problems from which the comparative analyses between Brazil and UK will primarily focus.

UNHCR recognized that although there is now more awareness surrounding sexual orientation and gender identity under the refugee convention, the application of the refugee definition remains inconsistent in this area.⁹⁸ Only few countries have mentioned sexual orientation in their national's refugee legislation.⁹⁹ Consequently, the application depends much more on the administrative procedures and the practices/knowledge of the decision makers worldwide, than on what is guaranteed by the law.

The sexuality-based cases are generating major challenges for decision-makers because typically, there is very little evidence to support the applicant's sexual orientation and/or gender identity and also to support the well-founded nature of their fear, as Webels expounds.¹⁰⁰

How does one prove sexual orientation and/or gender identity? Since this is not largely conspicuous, and most asylum-seekers have little or no evidence to prove their sexuality,¹⁰¹ most claims are being analysed upon the personal narrative of the applicant.¹⁰² In regards to the burden of proof, the UNHCR guidance note (2008) states that the asylum seeker does not have to document activities within the country of origin to indicate their sexual orientation and/or gender preferences. Referring to the

⁹⁸ Idem, p.2.

⁹⁹ UNHCR, 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity', 21 November 2008, p.6.

¹⁰⁰ Webels, 2011, p.40.

¹⁰¹ La Violette, 2010, p.193.

¹⁰² Berg & Millbank, 2007, p.196.

Handbook,¹⁰³ they recommend applying the benefit of the doubt “*if the applicant’s account appears credible, unless there are good reasons to the contrary*”.¹⁰⁴

The 2012 UNHCR Guidelines on international protection no. 9 stress the same point but also add that it is unsuitable to request a physical demonstration by photo, for example, as a way of proving sexual orientation. “*Applicants should never be expected or asked to bring in documentary or photographic evidence of intimate acts.*”.¹⁰⁵

Decision- makers have been using the criteria of coherence and plausibility to assess credibility. This tool is used in most receiving country centres and rests upon speculation or assumptions.¹⁰⁶ Some studies show that there is a tendency to disbelieve¹⁰⁷ the sexual orientation of the applicants and thus, they are often at risk of receiving a negative determination. The denial of ones refugee status on these grounds is many times related to the “*western conception of the linear formation and ultimate fixity of sexual identity*”,¹⁰⁸ the “*pre- formed expectation of how gay-lesbian or bisexual sexual identity is understood*”,¹⁰⁹ the judgment based on appearance¹¹⁰, and the lack of knowledge about the complexity of the sexuality issue itself, etc.¹¹¹ One example of how the stereotypes of gay culture or “*life style*” can influence the determination of an individual’s refugee status is illustrated in the case of *Leke v Canada* (2006).¹¹²

¹⁰³ UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, January 1992, available at: <http://www.refworld.org/docid/3ae6b3314.html> (consulted on 6 July 2013).

¹⁰⁴ UNHCR, UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity’, 21 November 2008, p. 16. Available at: http://www.justice.gov/eoir/vll/benchbook/resources/UNHCR_Guidelines_Sexual_Orientation.pdf (consulted on 02 July 2013).

¹⁰⁵ UNHCR, UN Doc HCR/GIP/12/09, 23 October 2012, p.17.

¹⁰⁶ Millbank, 2009, p.2.

¹⁰⁷ Millbank, 2009, pp.1-33; Berg & Millbank, 2007, pp.195-223.

¹⁰⁸ Berg & Millbank, 2007, p.197.

¹⁰⁹ Millbank, 2009, p.5

¹¹⁰ Idem.

¹¹¹ Barry O’ Leary, 2008, p.94.

¹¹² About the Canada case: “In a 2006 decision the Canadian tribunal held that a claimant from Nigeria could not be gay because he had marriage and it was ‘highly improbable’ that a homosexual would father two sons in such circumstances. While the Federal Court overturned this decision, holding that the tribunal had erred in ignoring the wealth of evidence on the need to live a double life in Nigeria”. *Leke v Canada* 2007, cited in Berg & Millbank, p.2007.

In regards to the development of these stereotypes, UNHCR guidelines (2008) stated that *“In the assessment of LGBT claims, stereotypical images of LGBT persons must be avoided, such as expecting a particular ‘flamboyant’ or feminine demeanour in gay men, or ‘butch’ or masculine appearance in lesbian women”*.¹¹³ La Violette maintains that accounts on stereotyping could have been further strengthened with an explanation that there are no universal characteristics or qualities that typify sexual minorities, especially because the context of a refugee hearing room is usually very multinational and multicultural.¹¹⁴ This argument was not mentioned in the 2012 UNHCR guidelines. However, at least the guidelines adds that the stigma and shame sometimes experienced are elements that could help the decision maker ascertain the applicant’s sexual orientation or gender identity.¹¹⁵

Claimants who have faced persecution because of their sexual orientation may have difficulty speaking about their private experiences. The questions asked do not always take into consideration the sensitivity of the issue, which may further disrupt the claimant narrative.¹¹⁶ Both UNHCR guidelines bring awareness and clarity to appropriate inquiry and interview techniques. In 2008, it was suggested that interviews be conducted by officials who are well informed about the problems facing the LGBT community and for whom training and advisement sessions were recommended. In 2012, they gave more practical suggestions and assistance on these areas of questioning and how they should be specifically performed.¹¹⁷

The individual’s development of self-identity is not always so effortlessly discussed. Interviewees may have feelings of shame that can lead to a sort of self repression, and which may make revealing information, particularly to a stranger, very difficult.¹¹⁸

¹¹³ UNHCR, ‘UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity’ 21 November 2008, p.17. Available at: http://www.justice.gov/eoir/vll/benchbook/resources/UNHC_Guidelines_Sexual_Orientation.pdf (consulted on 02 July 2013).

¹¹⁴ La Violette, 2010, p.194.

¹¹⁵ UNHCR, UN Doc HCR/GIP/12/09, 23 October 2012, p.15.

¹¹⁶ Millbank, 2009, p.3-4.

¹¹⁷ UNHCH, UN Doc HCR/GIP/12/09, 23 October, 2012, pp.16-17.

¹¹⁸ Berg & Millbank, 2007, p.196.

Both UNHCR guidelines place emphasis on an applicant's reluctance to talk about such matters. Furthermore, in the 2008 guidelines, it adds that people experienced hesitance "*particularly where his or her sexual orientation would be the cause of shame or taboo in their country of origin*".¹¹⁹ La Violette urges that these guidelines be revised to include that this sense of shame, self-hatred and/or embarrassment might come about from the very personal and private nature of the topic.¹²⁰ Consequently, in the 2012 guidelines, the following statement was developed to include that: "*Some LGBTI¹²¹ individuals, for example, may harbour deep shame and/or internalized homophobia, leading them to deny their sexual orientation and/or to adopt verbal and physical behaviours in line with heterosexual norms and roles. Applicants from highly intolerant countries may, for instance, not readily identify as LGBTI*".¹²²

Another important factor that requires examination (in order to avoid coming to erroneous conclusions) is that: "*LGBT persons may be unable to forge meaningful relationships, be forced into arranged marriages or experience extreme pressure to marry*".¹²³ Therefore, the reality that some individuals may have children or a family cannot be adequate reasoning to deny refugee status, as both guidelines explain. Specifically, though, the 2012 guidelines provide more detailed advice on the marital issue.¹²⁴ Unfortunately, none of these guidelines address the topic of bisexuality and marriage/family. La Viollete considers, with reason, that this omission is a failure of the guideline.

¹¹⁹ UNHCR, 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity', 21 November 2008, p.17. Available at: http://www.justice.gov/eoir/vll/benchbook/resources/UNHCR_Guidelines_Sexual_Orientation.pdf (consulted on 02 July 2013)

¹²⁰ La Violette, 2010, p.195.

¹²¹ Notice that intersex people was included in the Guideline (2012). The LGBTI means Lesbian, Gay, Bisexual, Transgender and Intersex. To know the meaning of each one see: UNHCR, 2012, pp.4-5.

¹²² UNHCR, UN Doc HCR/GIP/12/09, 23 October 2012, p.2.

¹²³ UNHCR, 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity', 21 November 2008, p.8. Available at: http://www.justice.gov/eoir/vll/benchbook/resources/UNHCR_Guidelines_Sexual_Orientation.pdf (consulted on 02 July 2013).

¹²⁴ UNHCR, UN Doc HCR/GIP/12/09, 23 October 2012, p.16.

In short, one main problem is that decision-makers are not taking into consideration the proper cross-cultural, psychological, and sociological contexts of these narratives.¹²⁵ In doing so, officials would be able to examine and reflect on the difficulties of an LGBT claimant in order to avoid stereotypes and mistakes.

Other specific problems of claims based on sexual orientation and/or gender identity are related to the well-founded fear of persecution. Considering that the element of discrimination is frequently the core component of the claims made by LGBT persons, commonly revealing experiences of serious physical and, in particular, sexual violence,¹²⁶ the debate surrounding differences between discrimination and persecution is relevant. La Violette describes the tendency for decision-makers to focus their analysis on whether a sexual minority claimant would be subject to less serious discrimination.¹²⁷ The decision makers in Canada are increasingly evaluating this way.¹²⁸

In order to clarify to what extent discrimination can be understood as persecution, the UNHCR advises that a pattern of harassment and discrimination could, on cumulative grounds, reach the edge of persecution.¹²⁹ The UNHCR acknowledges that: *“Discriminatory measures may be enforced through law and/or through societal practice, and could have a range of harmful outcomes. Discrimination will amount to persecution where such measures, individually or cumulatively, lead to consequences of a substantially prejudicial nature for the person concerned”*.¹³⁰

¹²⁵ Millbank, 2009, pp.1-33.

¹²⁶ UNHCR, ‘UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity’, 21 November 2008, p.7. Available at: http://www.justice.gov/eoir/vll/benchbook/resources/UNHCR_Guidelines_Sexual_Orientation.pdf (consulted on 02 July 2013).

¹²⁷ La Violette, 2010, p.185.

¹²⁸ Idem.

¹²⁹ Idem.

¹³⁰ UNHCR, ‘UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity’, 21 November 2008, pp.7-8. Available at: http://www.justice.gov/eoir/vll/benchbook/resources/UNHCR_Guidelines_Sexual_Orientation.pdf (consulted on 02 July 2013).

The guidelines also highlighted that a forced heterosexual marriage or relationship may in fact represent a persecution. However, it was not specifically detailed that medical abuse or forced marriage inflicted upon LGBT persons with the intention of “*curing*” or “*treating*” them would constitute persecution, although it certainly would reinforce La Violette.¹³¹ Fortunately in 2012, the UNHCR guideline acknowledged that any forced treatments to change “*an individual’s sexual orientation or gender identity may constitute torture or inhuman or degrading treatment, and implicate other serious human rights violations, including the rights to liberty and security of person*”.¹³² This further suggests that these treatments can and should be considered persecutory.

Given that violence against sexual minorities is usually executed by non-state actors, such as family members, this observation is worth further investigation. The UNHCR explains that acts of persecution can be performed by non-State actors, (for example the family), if the State is unwilling or unable to protect against the violence. They give some examples of what could characterise persecution by a non- State actor as follows: “*Non-State actors, whether family members, neighbours, strangers or work colleagues, can either be directly involved in persecutory acts, including through physical abuse and forced marriage, or indirectly by exposing the individual concerned to harm, for example, by reporting his or her conduct or sexual orientation to the authorities*”.¹³³

A claimant must produce clear and convincing evidence showing the State’s inability to protect him or her. The question becomes: how can a claimant ask for protection if in their country of origin, exists laws which criminalize homosexuality or sexual activities. The UNHCR acknowledges the obstacles faced by LGBT persons when asking for the protection of the State. “*For example, a LGBT person who has been exposed to violence may hesitate to approach the police for protection because he or she may be regarded as an offender instead of a victim*”.¹³⁴

¹³¹ La Violette, 2010, p.185.

¹³² UNHCR, UN Doc HCR/GIP/12/09, 23 October 2012, p.7.

¹³³ Idem, pp.13-14.

¹³⁴ Idem, p.11.

This is a topic that La Violette is concerned with. She questions whether it is realistic or even reasonable for LGBT victims to declare their sexual orientation and/or gender identity when asking for protection.¹³⁵ In many countries, homophobia and the consequent discrimination that occurs, is common even at the institutional level¹³⁶. The UNHCRH report also complained about the difficulty in obtaining accurate information and further states that: *“Quantifying homophobic and transphobic violence is complicated by the fact that few States have systems in place for monitoring, recording and reporting these incidents. Even where systems exist, incidents may go unreported or are misreported (...)”*.¹³⁷

The lack of information regarding State protection and the incidence of discrimination and violation against LGBT individuals has become a huge obstacle in the determination of refugee status. This is especially pertinent because the analysis of well-founded fear of persecution depends much on the objective element as opposed to merely the subjective one. Webels emphasizes that the objective evidence is a decisive element in any refugee claim, including sexuality-based cases.¹³⁸ A huge problem, in fact, is that many decision makers do not have access to adequate and reliable information about sexuality, or often the information found is not sufficient or relevant to particular cases.¹³⁹

La Violette admits that some decision makers have interpreted the absence or shortage of reports showing persecution based on sexual orientation or gender identity as proof of an overall lack of persecution.¹⁴⁰ Citing Amnesty International, she explains that it is common for lesbian and gay individuals who have suffered torture or ill treatment to have little to no access to documented evidence. Also, in many countries, these

¹³⁵ La Violette, 2010, p.198.

¹³⁶ One example is Jamaica, where there are numerous violent and abusive incidents by the police authorities, information published by: Human Rights Watch. *Hated to Death: Homophobia, Violence, and Jamaica's HIV/AIDS Epidemic* (New York: Human Rights Watch, 2004), available at <http://www.hrw.org/reports/2004/11/15/hated-death>, cited in VIOLETTE, 2010, pp.198-199.

¹³⁷ UNHCHR, UN Doc A/HRC/19/41, 17 November 2011, p.9.

¹³⁸ Webels, 2011, p.37.

¹³⁹ Idem.

¹⁴⁰ La Violette, 2010, p.186.

experiences are often not well known or publicized.¹⁴¹ After this important acknowledgment, La Viollete advises decision – makers to thoughtfully consider the reasons why reports on persecution are not available.¹⁴² In 2012 UNHCR, addressed this issue: “ (...) *Information can be especially scarce for certain groups, in particular bisexual, lesbian, transgender and intersex people. It is critical to avoid automatically drawing conclusions based on information about one group or another; however, it may serve as an indication of the applicant’s situation in certain circumstances* ”.¹⁴³

Another question that emerges in many Courts regarding to the denial of refugee status based on sexual orientation and/or gender identity is that of avoiding persecution by hiding sexual or gender orientation.¹⁴⁴ It is not difficult to imagine that an individual might hide their sexual orientation/gender identity for fear of persecution and social oppression.¹⁴⁵ As Vitucci explained the context, which the person lives, influences he or she to hide their sexual orientation and/or gender identity.¹⁴⁶

Nonetheless, after some very recent cases, we can see that this statement is not reflective of some Courts. The first to encounter the subject of discretion were the British and Australian’s courts.¹⁴⁷ In several Australian cases, the idea was accepted that gay and lesbians might choose not to attract public attention in order to avoid persecution.¹⁴⁸ In 2003, the Australian High Court had a different approach as follows: “*the Court decided that the tribunal had erred in failing to consider the future-focused question of what would happen if the applicant was in fact discovered to be gay, and furthermore, whether the need to act ‘discreetly’ to avoid the threat of serious harm itself constitutes persecution* ”.¹⁴⁹

¹⁴¹ Idem.

¹⁴² Idem.

¹⁴³ UNHCR, UN Doc HCR/GIP/12/09, 23 October 2012, p.17.

¹⁴⁴ La Violette, 2010, p.188.

¹⁴⁵ Idem, pp. 188-189.

¹⁴⁶ Vitucci, 2012, p.160.

¹⁴⁷ Idem, p. 163.

¹⁴⁸ La Violette, 2010, pp.187-188.

¹⁴⁹ Appellant S395/2002 above n.84 cited in Webels, 2011, p.19.

Webels explained that shortly after the Australian Courts had determined that discretion was not always appropriate or just, many other Courts also supported the idea that: “(a) *hidden right is not a right*”.¹⁵⁰ Above, UNHCR clearly expressed that the question of discretion cannot be a justification for the denial of a refugee status and the fact: “*That an applicant may be able to avoid persecution by concealing or by being ‘discreet’ about his or her sexual orientation or gender identity, or has done so previously, is not a valid reason to deny refugee status*”.¹⁵¹ Nevertheless, some Courts, such as those in the UK have not paid attention to the UNHCR guidelines since they continue to use the discretion justification.¹⁵² In 2012 the UNHCR once more stated that: “*A person cannot be expected or required by the State to change or conceal his or her identity in order to avoid persecution. (...)*”.¹⁵³

Even after instituting guidelines (which are still not complete but offer some important instructions) and the subtle and gradual shift of general viewpoints and perception, some countries remain hesitant to change. I agree with many authors who have supported that the main reasons for the constantly denial of the refugee status based on sexual orientation and/or gender identity are based on a lack of information, guidelines, laws, stereotypes, and sadly, homophobia. But why now, even with new information and guidelines and the raising on the recognition of sexual orientation and gender identity as fundamental rights, do some States and jurisdictions not show a change of perspective and are applying a very restrictive approach in respect with the 1951 Convention? Are the explanations of these authors not enough to understand the obstacles to recognize a refugee status based on sexual orientation and/or gender identity? In regards to the question of discretion, Vitucci made a very convincing point when she stated that it: “*Would be very easy to sustain the demand of having the status of refugee because of their sexual orientation if their countries persecute*

¹⁵⁰ Idem, p.19.

¹⁵¹ UNHCR, ‘UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity’, 21 November 2008, p.9. Available at: http://www.justice.gov/eoir/vll/benchbook/resources/UNHCR_Guidelines_Sexual_Orientation.pdf (consulted on 02 July 2013).

¹⁵² Webels, 2010, p.21.

¹⁵³ UNHCR, UN Doc HCR/GIP/12/09, 23 October 2012, p.13.

homosexuality. This could be a reason for the justification of the discretion tendency".¹⁵⁴ This statement suggests that may be another reason behind, such as the Country's restrictive policy regarding to the acceptance of refugees as a whole.

This perspective involves examining also the political issues. This is what might be missing in the attempt to better understand the differences in the jurisprudence's approaches and the tendency to deny the recognition of refugee status based on sexual orientation and /or gender identity. Therefore, It will be analysed the UK and Brazil, in both the legal and administrative perspectives and It will be also included a political view while considering the approach of the States and their refugee policies in general.

Chapter II

Sexual Orientation and Gender Identity: Human Rights and the Refugee Status in the European System and the United Kingdom

2.1 Overview on the Human Rights in the European System and the UK

2.1.1 European Convention on Human Rights (ECHR) and the European Court of Human Rights (ECtHR)

The European Convention on Human Rights and Fundamental Freedoms (1950)¹⁵⁵ provides a set of rights for each individual and lays down the obligation of the countries that have signed it, to guarantee these rights to each individual within their jurisdiction.

None of the articles in the Convention mentions sexual orientation and/or gender identity. Nevertheless, some of these articles have been applied in cases-law relating to sexual orientation and gender identity. Mostly because the judges of the ECtHR understand the Convention as a 'living instrument', the rights can be interpreted

¹⁵⁴ Vitucci, 2012, p.168.

¹⁵⁵ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html> (consulted 02 June 2013).

according to the social developments and changes in the Member States (MS) of the Council of Europe.¹⁵⁶ Until recently, the most important Articles evoked by LGBT individuals are: Art. 3 (Prohibition of torture), Art. 8 (Right to respect for private and family life), Art. 10 (Freedom of expression) and Art. 14 (Prohibition of discrimination). Some cases concerning sexual orientation and gender identity issues were selected to illustrate the approach about this issue on the ECtHR.

The Case of *Dudgeon v the United Kingdom*¹⁵⁷ (1981) represents the opening for the theme of homosexuality in the ECtHR. As it was already mentioned the Court held that criminalization of homosexuality affected the private life of the solicitor. The Case *Rees v UK* (1985) was also important. The Court took the case to analyse whether or not a transsexual could claim the right to marry under Art. 12.¹⁵⁸ The Court held that the right to marry is just for heterosexual individuals. But it declared that this interpretation may change in the light of the circumstances. The Art. 8 was also evoked by the applicant, once his gender reassignment was not accepted in legal terms in the UK, and so he could not marry the opposite sex (considering his gender reassignment). The Court did not hold violation of Art. 8 and gave the margin of appreciation for the UK, but emphasized that this decision was simply based on the fact that the UK was in better condition to verify that the necessary procedures for sex changing were correct. However, the Court declared that the transsexuals have the right to marry if, after changing gender legally, they want to marry someone of the opposite sex.

It is important to notice that at the time, the same-sex marriage was not allowed in the UK. The Court highlighted that transsexuals should have the right to change their sex legally. In the Courts words: *“the change in his sexual identity should be given full legal recognition by the United Kingdom. It was only with regard to the choice of the*

¹⁵⁶ George Letsas, The ECHR as a Living Instrument: Its Meaning and Legitimacy, available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2021836 (consulted on 07 July 2013).

¹⁵⁷ *Dudgeon v the United Kingdom*, 1981 (ECtHR).

¹⁵⁸ The Art 12 states that: *“Men and Women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right”*. Ghandhi, 2012, p.260.

*necessary measures that there could be any room for a margin of appreciation or for any balancing with countervailing public interests”.*¹⁵⁹

The right of a transsexual to marry will appear again in 2002 in the *Christine Goodwin v UK* case. The rights involved were under the Art. 8 (privacy), Art. 12 (marriage), Art. 13 (effective remedy), Art. 14 (discrimination). The applicant is a post-operative male to female, but legally, in England, she is still a man. Her complaint was about the lack of recognition of her post-operative sex and about her legal status of transsexual in the UK. Among other complains, the most important here is the one about her inability to marry.

The Court held violation of Arts. 8, 12 and 13 and declared not necessary to examine Art.14. The Court had a more positive approach comparing the case with the Rees Case and considered that the right to marriage had been infringed, because the right of transsexuals to marry had to be allowed and respected. However, the Court made it clear that a transsexual represents gender reassignment. These are some examples that illustrate the evolution of the Court that first offered a margin of appreciation to the UK and, some years later, declared a violation of Art. 8. This fact demonstrated a more positive approach relating to the rights of the transgenders.

A recent case is the *X. v. Turkey*, 2012.¹⁶⁰ The case concerned a homosexual prisoner who, after complaining about acts of intimidation and bullying by his fellow inmates, was left in solitary confinement for over 8 months in total. The Court understood that these detention conditions had caused him mental and physical suffering, thus representing “*inhuman or degrading treatment*” in breach of Art. 3 of the Convention. The Court further found that the main reason for the applicant’s solitary confinement was his sexual orientation. It thus concluded that there had been discriminatory treatment in breach of Art. 14.¹⁶¹

¹⁵⁹ *Rees v UK*, 1985, (ECtHR), p.8.

¹⁶⁰ *X. v. Turkey* (no. 24626/09)9 October 2012.

¹⁶¹ Factsheet - Sexual Orientation Issues, 2013.

Nonetheless, Art. 14 is still weak concerning the protection against discrimination based on sexual orientation and gender identity. Sumner¹⁶² points out some gaps in the ECHR in related with Art. 14. There are three main gaps. First, the Art.14 does not mention explicitly the ground of sex orientation, but the ground of sex, which is very ambiguous and unclear and opens the door for the restrictive interpretation of the sex ground as the biological sex. Second, Art. 14 is not an independent provision, which means that it has to be associated with another article to be invoked. Third, none of the articles mentioned sexual orientation. Therefore, it is almost impossible to invoke discrimination based on sexual orientation. These gaps turn to be a challenge for the full protection and equality for homosexuals by the ECtHR and make discrimination based on sexual orientation very weak. In this context, the opinion of the Parliamentary Assembly of the Council of Europe is that the ground in article 14 should include sexual orientation.

This is not a consensus due to the fact that the council of ministers refuses to adopt the assembly's opinion.¹⁶³ In short, the improvements in ECtHR regarding the protection of homosexuality have been developing in an evolutionary, but very slow and limited manner.

2.1.2 The Charter of Fundamental Rights of the European Union

Another important European instrument in the Human Rights field is The Charter of Fundamental Rights of the European Union. This Charter finally put sexual orientation in equal "*footing*"¹⁶⁴ by the Art. 21 (Non Discrimination). This provision is the first general European anti-discrimination guarantee, which explicitly includes sexual orientation as a ground for appeal. Sumner affirms that despite of Art. 21, there is still a strong and consistently refuse to protect the right of homosexuals in this regard.¹⁶⁵

In 2007, the Lisbon Treaty was created and in 2009 it came into force. It made the bill of rights of the Charter of Fundamental Rights legally binding. We can affirm that this

¹⁶² Sumner, 2004, pp. 878-879.

¹⁶³ Idem, 2004.

¹⁶⁴ Cfr. supra footnote 11, p. 883.

¹⁶⁵ Idem.

treaty is a development and it is quite possible that the protection of homosexuals in Europe undergoes positive changes. This treaty has influenced the European Refugee Law, specifically the 2004 and 2011 Directives as it was previously mentioned.

2.1.3 Sexual orientation and gender identity in the UK

The ILGA Europe Review 2011¹⁶⁶ shows a general picture of the UK regarding homosexuality, which seems to be more inclusive in both legal and social aspects, but it is not perfect yet. The Constitution does not explicitly prohibits discrimination on the grounds of sexual orientation or gender identity, but the laws related to employment, access to goods and services and other spheres of life do. Also, the National Human Rights Institutions are legally mandated to tackle discrimination on these grounds and so is the National Equality Action Plan, which contains measures with the same responsibilities.¹⁶⁷

An example of these developments are: the existence of legal and administrative procedures for changing names and legal gender is not needed anymore; no Gender Identity Disorder Diagnosis or medical/psychological opinions, compulsory medical/surgical intervention are required; no compulsory divorce or single status is required, and no sterilization or proof of infertility is required anymore. All of these procedures were required few years ago when a person wanted to legally change his/her gender. In regard with the police and law enforcement, in 2011 the Protection of Freedoms Bill finally removed from police records any convictions for consensual gay sex that were prosecuted under the 1956 Sexual Offences Act.¹⁶⁸

The available for homosexuals legal institutions related to family are the cohabitation law and partnership registered until 2011. Marriage was not available for homosexuals yet. This picture changed in 2013, when UK legalized same-sex marriage.

¹⁶⁶ ILGA-Europe Annual Review, 2011.

¹⁶⁷ Idem, p.165.

¹⁶⁸ ILGA-Europe Annual Review, 2011, p. 171.

2.2 The Recognition of Refugee Status based on Sexual Orientation and Gender Identity in the UK

2.2.1 The Directive (2004/83/EC) and the position of the UK

The 2004 Directive is part of the project of building a Common European Asylum System (CEAS), based on the full and inclusive application of the Geneva 1951 Convention and the 1967 Protocol.¹⁶⁹ The document affirms the principle of non-refoulement and makes sure that no one is sent back to persecution. The major objective is to ensure that Member States apply common criteria for the identification of persons honestly in need of international protection and also to ensure that a minimum level of benefits is available for these persons in all Member States (MS).¹⁷⁰ This analysis will focus on the recognition of the Refugee status, specifically for the claims based on sexual orientation and gender identity and will not analyze other kind of international protection, such as subsidiary protection or the principle of non-refoulement.

The 1951 Convention is not so clear and has generated many different interpretations as it was discussed before. Therefore, the intention of this Directive is a good attempt to cover the gaps of the 1951 Convention. Art. 1 of the 1951 Convention is the most important but also the most problematic one, because it is the one that defines who is able to require the refugee status, but simultaneously is also the one that has the most unclear definition of “*membership of a particular social group*”. In this context, one of the main concerns of the Directive is to set up a minimum standard for definition and content of refugee status¹⁷¹, introducing a common criteria for recognizing applicants for asylum as refugees within the meaning of Art. 1 of the Geneva Convention¹⁷² and introducing a common concept of “*membership of a particular social group*” persecution ground.¹⁷³

¹⁶⁹ Directive 2004/83/EC.

¹⁷⁰ Idem, p.6.

¹⁷¹ Idem, p.16.

¹⁷² Idem, p.17.

¹⁷³ Idem, p. 21.

The Directive correctly addresses the UNHCR as an important organization which offers valuable guidance in the definition of refugee status according to Art. 1 of 1951 Convention.¹⁷⁴ However, in terms of sexual orientation this Directive is more developed and broader, since explicitly had already included this group before the first UNHCR guideline had been published on the topic. Probably because EU has already developed the concept of sexual orientation as a human right and as a protection ground against discrimination by The Charter of Fundamental Rights of the European Union and the ECtHR jurisdiction. Although some restrictive interpretations relating to the concept of family are still present, the tendency is to affirm sexual orientation and gender identity as a fundamental right since the eighties.¹⁷⁵

Some relevant aspects of arts. 4, 6, 9, 10, of the Directive and briefly articles 7, 8, 20 and 23¹⁷⁶ are going to be analyzed deeper. In order to point out some problematic or positives views concern these articles and to see its transportation and application in UK, it will base mostly on “*The Impact Assessment conducted for the purposes of the recast of the qualification Directive*” by ECRE¹⁷⁷, the European Commission Report 2010¹⁷⁸ and the studies of ECRE (2010).¹⁷⁹

¹⁷⁴ Idem, p.15.

¹⁷⁵ See cases.

¹⁷⁶ This selection was based on the influence of these articles on the sexual orientation claimants when applying for refugee status, in part because of the limited space of this research. But it does not mean the other provisions are less important.

¹⁷⁷ ELENA/ECRE, 2008.

¹⁷⁸ This Report is part of the Commission's obligation under Article 37 of the Directive 2004 to identify possible problematic issues of the transposition and implementation of the Directive by Member States and it is based on some studies of the same Commission and other organizations and experts such as the studies of UNHCR "Asylum in the European Union, A study on the implementation of the Qualification Directive", November 2007 (the "UNHCR study") and the article "The impact of the EU Qualification Directive on International Protection" by ELENA/ECRE.

¹⁷⁹ ECRE 2010.

2.2.1.1 Charter II: Assessment of Applications for International Protection

2.2.1.1.1 Article 4 - Assessment of facts and circumstances

The analysis of this article is very relevant for the claimants who based their claims on sexual orientation and/or gender identity. This is because they usually have no or only a few evidences about their sexuality as well as their well founded fear of persecution.

Art. 4 (3) (c) states that the assessment of an application for international protection is to be carried out on an individual basis and takes in account the personal circumstances of the applicant, including factors such as background, gender and age.¹⁸⁰

Nonetheless the Directive fails to explicitly include the sexual orientation. This is extremely important to understand the particular problems that LGBT people may encounter in terms of proving their membership of a particular social group and their well-founded fear of persecution.

The article (4) (5)¹⁸¹ among other things, states that when the applicant's statements are not supported by documentary or other evidence, those aspects shall not need confirmation when the following conditions are met:

- (a) the applicant has made a genuine effort to substantiate his application;
- (b) all relevant elements, at the applicant's disposal, have been submitted, and a satisfactory explanation regarding any lack of other relevant elements has been given;
- (c) the applicant's statements are found to be coherent and plausible and do not run counter available specific and general information relevant to the applicant's case;
- (d) the applicant has applied for international protection at the earliest possible time, unless the applicant can demonstrate a good reason for not having done so; and
- (e) the general credibility of the applicant has been established.

¹⁸⁰ Directive 2004/83/EC.

¹⁸¹ Idem, p. L304/16.

In some countries it was observed the use of Country of Origin Information (COI) for the individualized assessment of facts and circumstances. In the UK, the requirements for establishing a COI database and using COI are provided by law and it is a very developed instrument.¹⁸² This is positive because it helps the decision makers to assess information about the origin country. However, specific information about sexual orientation and gender identity are usually very scarce.

In many countries, the implementation of Art. 4 brought rules of evidentiary assessment into asylum law for the first time. One example is the implementation for the first time of the article 4(5)¹⁸³ by Italy, Slovakia and the UK. According to the European Commission regarding the 'general credibility' of the applicant, domestic law in some MS such as the UK is more restrictive because it raises the standard of the level of credibility required by Article 4(5).¹⁸⁴ For example the UK obliges applicants to submit all elements required to substantiate the application. Therefore, failure to provide all necessary elements can often lead to a determination that the applicant is not credible.¹⁸⁵ This also happens in the Netherlands and Poland. Some countries just require an asylum seeker to take the initiative to provide all information relevant to the claim.¹⁸⁶

The problem is that most of the LGBT asylum seekers do not have any evidence and they find it difficult to talk about their sexual orientation as observed in the previous chapter. Regarding this point, in 2000 ECRE as well as UNHCR¹⁸⁷ stressed the duty of the decision-maker to give the benefit of some doubt to the refugee claimant, especially in view of the difficulty in obtaining corroboration of evidence.¹⁸⁸ However, this was not mentioned in any EU Directives. They stated: “*At the moment this is not the case in all Member States*”.¹⁸⁹

¹⁸² ECRE/ELENA, 2008, p.12.

¹⁸³ Idem, p.10.

¹⁸⁴ European Commission, p.4.

¹⁸⁵ Cfr. supra footnote, p.10.

¹⁸⁶ Cfr. supra footnote, p.4.

¹⁸⁷ UNHCR, 2008, pp.1-18.

¹⁸⁸ ECRE, 2000, p.3.

¹⁸⁹ ECRE, 2010, pp.15-16.

Regarding the Art. 4 (5) (d) that fixed the time for the presentation of evidence, it established: “*the earliest possible time*”. In the United Kingdom “*documentary evidence should be submitted within 5 days of the substantive interview, unless good reasons can be given for the delay*”¹⁹⁰. Considering the many problems these refugees have faced, this rule is not favorable to any of them. ECRE has recommended that “*asylum seekers be granted reasonable time to prepare and provide all necessary evidence for the determination procedure*”.¹⁹¹ In contrast with this recommendation, in major part of the countries the lack of evidence or its late submission is in practice understood as against the applicant’s credibility.¹⁹²

2.2.1.1.2 Article 6 - Actors of persecution or serious harm¹⁹³

This article includes non- State actors, which usually are the persecutors of the LGBT people, when it can be demonstrated that the State or parties or organizations controlling the State or substantial part of the territory of the State are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7.¹⁹⁴

The UK transposed article 6 literally.¹⁹⁵ In most of the countries surveyed, groups such as families, clans, tribes, mafias, rebel groups, etc., are recognized as non-State actors.¹⁹⁶ This is positive for the claimant based on sexual orientation and /or gender identity because most of them are persecuted by non-Sates actors, such as family and society in general, and the State does not offer any protection.

2.2.1.2 Chatter III Qualification for being a Refugee

¹⁹⁰ ECRE/ELENA, 2008, p.11

¹⁹¹ ECRE, The Way Forward: Towards Fair and Efficient Asylum Systems in Europe, September 2005, <http://www.ecre.org/files/ECRE%20WF%20Systems%20Sept05.pdf> cited in ECRE/ELENA, 2008, p.11.

¹⁹² Idem.

¹⁹³ Directive 2004/83/EC, p. L304/16.

¹⁹⁴ Article 7. Protection is generally provided when the actors mentioned in paragraph 1 take reasonable steps to prevent the persecution or the suffering of serious harm, *inter alia*, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection. Directive 2004/83/EC, p. L304/16.

¹⁹⁵ ECRE/ELENA, 2008, p.15.

¹⁹⁶ Idem.

2.2.1.2.1 Article 9- Acts of persecution

Art. 9 (1) defined acts of persecution:

- (a) be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular rights that do not allow derogation under Article 15 (2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or
- (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).

The art, 9 (2), the Directive provides a non-exhaustive list of persecutory acts, including of gender specific nature and focus on the legal, administrative, police and/or judicial acts which are based on discrimination.

The emphasis given to discrimination acts is relevant and beneficial for claims based on sexual orientation, because many of the persecutions of LGBT individuals rest upon a massive form of discrimination by society in general or by laws.

The definition of acts of persecution laid down by art. 9 (1) was transposed literally in the UK.¹⁹⁷ About article 9(2), only Germany, Hungary, Ireland, Italy, Luxemburg, Romania, Slovakia and Slovenia have transposed the examples of acts of persecution literally. Other countries have not implemented them or have done their own.¹⁹⁸

2.2.1.2.2 Article 10 - Reasons for persecution

Art. 10 (1) (d) defines that the reasons for persecution should be based on two well-known approaches, the “*protected characteristics*”¹⁹⁹ and the “*Social perception*”, without explicitly mentioning these approaches, but using their content. However it

¹⁹⁷ ECRE/ELENA, 2008, p.19.

¹⁹⁸ Idem, p.20.

¹⁹⁹ “Art. (10) 1(d) a group shall be considered to form a particular social group where in particular: members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and; that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.”

does not mention the method of application such as cumulative or alternative. In the Directive as it is written, one approach “and” the other suggests that both have to be true. About this provision: *“ECRE has previously expressed concern about this approach, as it can result in the denial of status to particular social groups who are defined by an innate characteristic but which are not seen as set apart from society, or vice versa”*.²⁰⁰

The absence of an application method might generate some restrictive interpretations that are not advantageous for the asylum seekers under the social group category, as it was showed previously, when the US and Canada used a restrictive interpretation, excluding some claims applications.

Under the same article and paragraph the Directive includes sexual orientation as a possibility of it being understood as social group in the following provision: *“(…) depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation (…)”*

In spite of being a positive novelty, the inclusion of sexual orientation under a Refugee law was mentioned in a vague way and not very clearly. The terms: *“depending”* and *“might include”* give a broad margin for the MS to interpret it in their own way. Besides it can be noticed a very clear limitation of this article in the following words: *“(…) Sexual orientation cannot be understood to include acts considered to be criminal in accordance with the national law of the Member States: Gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article”*.

Concerning this issue, Nadine El-Enany citing Teitgen-Colly highlights that *“the limitation attached to the basing of an asylum claim on grounds of one’s sexual*

²⁰⁰ ECRE/ELENA, 2008, p.20.

*orientation represents the 'limits of the harmonization exercise'*²⁰¹. Additionally, EL-Enany explains that the reasons of the limitations of the provision which includes the sexual orientation is actually the reflection of the *"true limits of refugee law"* in general, due to the fact that the provisions cannot be more developed than the host society in terms of acceptability of some rights and freedoms. This is a very wise argument, especially considering the issue of Sexual Orientation and Gender identity, which has slowly been recognized as fundamental rights, but not completely and evenly uniform. As the author puts forward: *" So for example, although sexual orientation can be considered a ground for determining persecution, this is limited to the extent that freedom of sexual orientation is protected in a Member State "*²⁰²

Art. (10) 2 explain that *"a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, religious, national, social or political characteristic which attracts the persecution, provided that such a characteristic is attributed to the applicant by the actor of persecution"*²⁰³. This means that the *"cohesive test"* is not a condition for the applicant, once this group might be just considered a group by the eyes of the persecutor. The ECRE²⁰⁴ believes that there should be no requirements about the members of a particular social group forming a cohesive group. The members of the social group may not know each other, may not even consider themselves part of the social group and the only thing which nominally unites them is the characteristic which gives rise to the persecution. The group should not be defined by its persecution, but the persecution is indicative that society as a whole perceives this group in a certain way and persecutes it because of this perception.

About the gender-related aspect of Art.10, ECRE argues that this part is not well formulated. They supported the recast of Article 10 (1)(d) specifying that gender-related

²⁰¹ EL-ENANY, 2008, p.323.

²⁰² Idem.

²⁰³ Directive 2004/83/EC, Art. 10 (2), p. L 304/17.

²⁰⁴ ECRE, 2000, p.9.

aspects of an asylum claim should be duly considered in terms of establishing membership of a particular social group²⁰⁵.

ECRE recommended that Art. 10 (1) (d) should be amended to specify that just one of the two requirements – either innate characteristic or social perception - is met for the purpose of defining a particular social group.²⁰⁶

Studies show that the practices in the Member States are not uniform around this issue. Most of the SM requires fulfillment of only one of the criteria from article 10 (innate characteristic or social perception), which is the majority view of international law. The UK require fulfillment of both criteria.²⁰⁷ A few MS such as the UK did not transpose the last clause of Article 10(1) (d) regarding the relevance of gender-related aspects.²⁰⁸

2.2.1.3 General considerations about the Directive 2004 and the UK position

By one hand, the 2004 Directive is broader than the 1951 Convention. The inclusion of sexual orientation as possible “*membership of a particular social group*”, instead of being vague and suffering the limits of the “*society development in the acceptability of some right and freedoms*”, still very welcome and shows a tendency to the understanding of sexual orientation as one of the human rights that must be protected. Even though the 2004 Directive still gives the States a broad margin of appreciation under this provision, the inclusion of sexual orientation can be seen as innovative under the refugee’s law and encouraging the States and other legislations to a more inclusive approach.

Anyway, the 2004 Directive in general presents some deficiencies and ambiguities which generate the possibility of a variety of approaches by the MS. The clearest example is the failure in not choosing a method for the application of the two approaches to define Social Group (Social perception and Protect Approach). The

²⁰⁵ ECRE, 2010, p.11.

²⁰⁶ ECRE, 2010, p.12.

²⁰⁷ ECRE/ELENA, 2008, p.20.

²⁰⁸ European Commission, 2010, p.8.

Directive gives room to the use of the cumulative or alternative approach, which opens the door for a very restrictive interpretation by the Countries. The cumulative method has been the rule for UK and other countries and, certainly, this method makes the denial of the refugee status easier to justify, especially in cases based on sexual orientation and gender identity, which is a theme not so well established regarding to human rights norms and social perceptions.

It is important to notice that the UNHCR guidelines and other organizations specialized in Refugee law have already expressed that the right approach is the alternative one. But even after the 2004 Directive update, they have not changed anything about this. In the 2011 Directive is still written: one approach “*and*” other. They should change the “*and*” by “*or*” in order to make sure that the cumulative approach would be banished by States Members. Indeed, as the Directive is a binding instrument, it has allowed the Countries to use the restrictive approach without any constrains. Other problem in the same direction is about the access of evidence, once some States such the UK oblige the applicants to submit all elements required in order to be sure of the claimant’s credibility. And the applicants also have to show all the evidences in a very short time. In contrast, other countries basically take into consideration the asylum-seeker initiative to provide all the relevant information to prove their credibility.

The 2004 Directive is an ongoing document, which has been updated in 2011. The inclusion of gender identity in the 2011 Directive was the greatest development but, unfortunately, has not improved as for sexual orientation, a point that remains very vague and ambiguous. About this point, the European Council²⁰⁹ fairly argues that both directives are still very vague and unclear about sexual orientation as membership of a Social Group, and this makes the protection of homosexual asylum seekers weak. It also says that the notion of particular social groups that remains unchanged in the second Directive, and that it favours the restrictive interpretation of Art. 10 (1) (d).²¹⁰ ILGA-

²⁰⁹ ECRE- European Council on Refugee and Exile. COMMENTS FROM THE EUROPEAN COUNCIL ON REFUGEES AND EXILES on the European Commission. Proposal to recast the Qualification Directive, March 2010.

²¹⁰ Idem, p.6.

Europe has the same point of view and feels disappointed that the process of revising the EU asylum directive did not allow some elements to be addressed and improved such as the sexual orientation.²¹¹

The European Commission stated: *“Deficiencies were identified in the provisions of several concepts such as actors of protection, internal protection, membership of a particular social group leaving room for widely divergent interpretations by the Member states”*.²¹²

But there are positive aspects as well such as the inclusion of sexual orientation, the fact that the Directive requires the recognition of Non-state actors of persecution and also includes the need to take into account gender-related aspects when analyzing the refugee claimants are very positive. Nonetheless, in general, the research about the European countries shows that there are much incomplete and incorrect transposition in the Member States national legislations. Some of them offer lower standards of protection.²¹³

The problem is not only the incorrect transposition of the Directive. Some States transposed correctly but are not offering the best protection. Sometimes they choose to apply a restrictive approach since the construction of many articles allows this space. The UK can be considered one of these Countries. For instance the UK has transposed literally Art. 4 and Art. 10, but apply them in a cumulative way, which is considered by International Organizations and most of the jurisdictions and experts very restrictive interpretation and application. The UK has transposed literally the Art. 6 about the inclusion of non- State actor of persecution. However, this article does not offer a list of possible non-State actors. Therefore, the States might have a margin of appreciation to decide which kind of non-State actors of persecution can be valid. Would members of

²¹¹ ILGA, Europe welcomes the adoption of a groundbreaking EU asylum directive covering both sexual orientation and gender identity, 2011, available at: http://www.ilga-europe.org/home/news/for_media/media_releases/ilga_europe_welcomes_the_adoption_of_a_breaking_eu_asylum_directive_covering_both_sexual_orientation_and_gender_identity (consulted on 03 Jun 2013).

²¹² European Commission, 2010, p.15.

²¹³ Idem, p.15.

family be considered? We will look through this information in an analysis of some UK cases. Anyway, it is very positive to understand that non-State actors can be persecutors.

On the other hand, the UK has also recognised NGO as a non-State actor of protection, which can become an obstacle for some asylum seekers to receive protection from the UK, once they can consider that some internal NGO could protect the claimant and thus the denial is justifiable.

The UK has partially transported by the national some other articles, such as the Art. 9, but has not transported the list of acts of persecution, which includes gender –specific. The UK has not transported Art. 20 (Vulnerable persons and minors) either. There is no certain conclusion about the reasons for this position, but it seems that the UK is reluctant to accept offering a better protection to vulnerable or specific groups. In contrast, the UK transported Art. 23, which protects the unity of members of a family considering unmarried partners in a stable relationship a family. Even though this provision seems to represent a broad protection, it is not so clear how the applicant will prove to be in a stable relationship. Based on what? Should the partners have some kind of legal document? This gap makes the applicability of this article doubtful.

In short, without devaluating the good intentions of both Directives (2004/2011), it still is a long way to the concretion of the first premise that establishes a standard in EU. Even after many recommendations of UNHCR and other experts, the 2011 Directive has not changed some important issues. Political reasons might be behind the fact that both Directives (2004 or 2011) give margin for different interpretations, especially in regards to sexual orientation. The reasons for choosing the cumulative method by some Countries such as the UK, suggest that behind this choice there is a political position relating to the acceptance of refugees in general. These measures can reduce the chances for the refugees status based on sexual orientation and gender identity be recognized.

2.2.2 The UK's practices in the recognition of refugee status based on sexual orientation and/or gender identity

2.2.2.1 Sexual orientation, gender identity and the “membership of a particular social group”

The possibility to recognize LGBT people as "*membership of social group*" is already set up in the UK legislation by the transportation of the article (10) (d) of the 2004 Directive. About gender identity, even though the UK have opted out of the 2011 Directive, which has included gender identity as a possible ground, it has added this category as a persecution ground in policy document.²¹⁴ It is important to emphasize that there is no legislation in the UK or EU that explicitly states that LGBT individuals are totally eligible, without any limitations, for protection under the asylum system. Nevertheless, the inclusion of these categories as "*members of a social group*" under the 1951 Convention has been made by the UK Coalition Government. This indicates that, in principle, LGBT people have at least a chance to apply for refugee status in the territory of the United Kingdom. However, there is no enforcement for that. It will depend on the UK political and judicial practices.

In 1999, the UK jurisprudence has determined in the case of *Islan and Shah v SSHD*²¹⁵ that persecution based on sexual orientation could constitute grounds for asylum. But how has this principle been applied in the UK in recent years? The general analysis is that some claims on the basis of sexual orientation and/or gender identity have had some success in the UK courts.²¹⁶ However, this is not so common. Many LGBT applicants have been denied the refugee status. The ILGA-Europe²¹⁷ shows that 98-99% of applications for asylum based on sexual orientation were rejected by the UK in 2009,

²¹⁴ Jansen & Spijkerboer, 2011, p.7. Also see UK Home Office, Asylum Instruction: Sexual Orientation and Gender Identity in the Asylum Claim, 6 October 2010, revised on 13 June 2011; Austria explicitly mentioned gender identity as part of a social group in the “Regierungsvorlage”, a binding document.

²¹⁵ *Islan and Shah V* [1990] (SSHD).

²¹⁶ JOHNSON, 2011, p.60.

²¹⁷ ILGA-Europe is the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association.

compared with an overall refusal rate of 73%.²¹⁸ In order to make such a scenario better understood, this research will observe the trends in the UK approach regarding the difficult areas in which a refugee claim based on sexual orientation and/or gender identity can face. The analysis will mostly be based on some recent law cases. Furthermore, I will also add some political perceptions concerning the refugee and immigration policy in the EU and the UK.

2.2.2.2 Persecution and discrimination

In the UK is discrimination on “*cumulative*” grounds²¹⁹ in the country of origin enough to make a well-founded fear of persecution of the refugee claimants, credible? Or only the criminalization of homosexuality in the country of origin is a reasonable ground?

It is known that the UK has not transported the article 9 (2) of the 2004 Directive, where it is established a list of acts of persecution based on discrimination practices. A clear example that UK does not consider discrimination as persecutory can be seen through the case *OO (Sudan) and JM (Uganda) v SSHD*, in 2009, when it was stated that discriminatory legislation interfering in private life does not mean persecution.²²⁰

The UK is even more restrictive in the interpretation of acts of persecution, since criminal laws need to be enforced to constitute persecution, according to its approach. The article “*Fleeing Homophobia*” stated that: “*The Court of Appeal ruled that unenforced criminalization did not amount to persecution as defined by Article 9(2) (c) as a discriminatory legal measure*”.²²¹

²¹⁸ UK Lesbian & Gay Immigration Group, failing the grade: Home Office initial decisions on lesbian and Gay claims for asylum (2010), available at <http://uklgig.org.uk/docs/Failing%20the%20Grade%20UKLGIG%20April%202010.pdf> cited in ILGA-EUROPE. United Kingdom, Available at: http://www.ilga-europe.org/home/issues/asylum_in_europe/country_by_country/gb. (consulted on 05 Jun 2013).

²¹⁹ UNHCR have explained that discrimination on cumulative ground should be enough to categorized persecution. UNHCR, 2008, p.7- 8.

²²⁰ *OO (Sudan) and JM (Uganda) v. Secretary of State for the Home Department*, [2009] EWCA Civ 1432 (United Kingdom: Court of Appeal /England and Wales).

²²¹ Jansen & Spijkerboer, 2011, p. 22.

As it was already discussed, there is often a lack of information concerning sexual minorities' violence, discrimination or criminal penalties in the countries of origin of the asylum seekers. Therefore, to know whether or not the criminal laws are enforced in the countries of origin, is not an easy task. For instance, the United Kingdom has a list of "safe countries", which wrongly contains homophobic countries.²²² Moreover, having the knowledge that in countries that criminalize sexual orientation or gender identity, there is always the possibility of enforcement of the criminal law and also the possibility of the government not to offer protection to LGBT people, it is recommended that these countries of origin cannot be considered as 'safe countries of origin', when analyzing LGBT claimants.²²³ I agree with the idea that the "*issue of (non-) enforcement of criminal provision against LGBTs is merely used as a mean applied by asylum authorities to reject LGBT application*".²²⁴

2.2.2.3 Country of origin information

It is well known that it is not easy to find information about violation of Human Rights based on Sexual orientation and/or Gender identity. It was found that in all COI Reports of UK has a specific section concerning the risk LGBTIs run. The document titled Operational Guidance is used as a source of documents on the UK Home Office's policy.²²⁵ The positive thing is that this COI have been made in collaboration with NGOS, for example the UK Lesbian & Gay Immigration Group (UKLGIG).²²⁶

Anyway, many mistakes are still made. One example is the case of a transgender asylum claim, in which the Court of Appeal in 2006 in Rahimi said that even though homosexual acts are criminal in Iran, there is a lack of risk on the existence of surgical procedures. The Court stated that "*Homosexual acts clearly are criminal, but there is little to suggest that a person who is homosexual in orientation is subject to serious ill-treatment or persecution as a result. The position of transsexuals seems to be very*

²²² Idem, p.24

²²³ Idem, pp.25-26.

²²⁴ Idem, p.26.

²²⁵ Idem, p.73.

²²⁶ Website: <http://www.uklgig.org.uk/>

similar. The condition is one that is recognised by the state and the state makes provision for appropriate treatment for those who wish to undergo it. There is little to support the suggestion that merely to be a transsexual in Iran will expose one to serious ill-treatment or persecution."²²⁷ In 2007 this position changed in the Court of Appeal, when it allowed the appeal of a trans woman and remitting the case back to the Tribunal as her lawyers "*had established the potential availability of objective evidence supporting the appellant's case that transsexuals in Iran may face harassment and even persecution from, among others, the police*".²²⁸ More recently in 2010, the United Kingdom Home Office in its Asylum Instruction changed completely the discourse accepting the risk transgender people run in Iran.²²⁹

It was also found a particular problem in finding evidences of the human rights situation for Lesbians in the country of origin. The consequences can be negative, for instance, the Immigration Judge in 2006, when dealing with a Ugandan lesbian asylum seeker, stated that the evidence only relates to homosexuals, not lesbians.²³⁰ Barry O'Leary explains that the difficulty in documenting the situation for lesbians can be even more than those for gay men, and she also puts forward that a lack of evidence does not necessarily mean that human rights abuses do not occur, but the most reasonable explanation for the lack of evidence could be the lack of reporting because of fear of harm.²³¹

2.2.2.4 Non-State Actors of persecution

The UK already transported the part of the Directive, which stated that non-State actors can be actors of persecution and can be the cause of a well-founded fear, if the State does not provide protection. In practice it seems that the UK is applying this provision

²²⁷ Idem.

²²⁸ Idem.

²²⁹ Idem.

²³⁰ Barry O' Leary, 2008, p.6.

²³¹ Idem.

well.²³² An example is the case where a Jamaican applicant was not expected to turn to the authorities for protection because of the prevailing homophobic climate.²³³

2.2.2.5 Internal Protection

Other examples were found in the United Kingdom “(before *HJ/HT*)”, where LGBTI applicants were rejected, on the basis of an internal protection alternative, which is allowed by article 8 (3) of the 2004 Directive.²³⁴

2.2.2.6 The question of “discretion”

Even though the question about discretion has already been banished by the UNHCR, many claims based on sexual orientation and gender identity were recently rejected with the justification that the claimant can exercise discretion in the expression of his/her sexuality in order to ensure self-preservation.²³⁵ In UK historical jurisdiction it was common the use of the idea of concealing identity to deny a refugee status.²³⁶ It was found that the United Kingdom applied a test as to whether discretion was ‘reasonably tolerable’ until 2006.²³⁷

The UK position partially changed in 2010 in the case *HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department*,²³⁸ where the question of discretion was partially rejected by the Supreme Court as illustrated by the following judgment: “*HT, a gay man from Cameroon, had a relationship with another man for three years. After he and his partner were caught by a neighbor kissing in his back garden, he was subjected to serious violence by way of mob ‘justice’. Instead of helping him, the police joined the assault. The British asylum authorities denied asylum, arguing that he could move to*

²³² Jansen & Spijkerboer, 2011, p.28

²³³ Asylum and Immigration Tribunal, *DW (Jamaica) v. Secretary of State for the Home Department*, CG [2005] UKAIT 00168 and UK Upper Tribunal, 24 June 2011, *SW (Jamaica) v. Secretary of State for the Home Department*, CG [2011] UKUT 00251. See also UK Home Office, Operational Guidance Note: Jamaica, 3 May 2011, v 9.0, paragraph 3.7.7.

²³⁴ *Fleeing Homophobia*, 2011, p.

²³⁵ Johnson, 2011, p.58.

²³⁶ Berg & Millbank, 2007, p. 196.

²³⁷ *Fleeing homophobia*, Sabine & Spijkerboer, pp.34-38.

²³⁸ *HJ (Iran) (FC) v. Secretary of State for the Home Department and HT (Cameroon) v. Secretary of State for the Home Department*, [2010] UKSC 31

another part of Cameroon where he was not known. It would be reasonably tolerable for him to conceal his sexual identity there. However, the Supreme Court annulled the decision, holding that lesbian, gay and bisexual people have a right to live freely and openly”.²³⁹

The Europe-ILGA provide the information that the new Conservative/Liberal Democrat coalition government guaranteed in its 2010 coalition agreement to “*stop the deportation of asylum seekers who have had to leave particular countries because their sexual orientation or gender identification puts them at proven risk of imprisonment, torture or execution.*”²⁴⁰

Nonetheless, the discretion is not totally rejected and can still be applied where it is voluntary and because of reasons of family or societal pressure.²⁴¹ In other words, when the applicant has been voluntarily discreet it is not considered a form of persecution. But according to Berg and Millbank this could lead to a problematic reasoning once the claimants not always have a clear notion about their lifestyle or about the social pressure (sem “which) they suffer. In the words of the authors: “*This kind of reasoning continues in part because claimants have not clearly presented a case articulating their mode of living as a conscious and coerced response to oppressive social forces or a lifestyle which may be subject to change over time or in a new social context: rather than life as lived is simply the way things are*”.²⁴² The authors have the opinion that a more complex approach is needed, taking into account the complexity of the psycho-dynamics of the client.²⁴³

The article *Fleeing Homophobia* agrees that the approach developed in HJ-HT, represent a good direction, which has to be followed by other countries, but also

²³⁹Jansen & Spijkerboer, 2011, p.13

²⁴⁰ ILGA- EUROPE. Status of Asylum Law in EU Member State: This document provides a summary of the way in which EU Member States respond to requests for asylum by LGBT applicants. It was written by Mathew Schutzer for ILGA-Europe, p.16.

²⁴¹ Jansen & Spijkerboer, 2011, p.34.

²⁴² Berg and Millbank, 2007, p.216.

²⁴³ Idem, p.217.

disagree with the opinion that discretion can be applied voluntarily. They put forward some pertinent arguments in the following words: *“The distinction concerning the reasons why someone plans to live discreetly is problematic. Firstly, it ignores that by the mere fact of submitting an LGBTI based asylum application, applicants express their desire to live openly as LGBTIs without fear of persecution. If the applicant wants to live openly as an LGBTI person, this is the legitimate exercise of a basic human right which an applicant cannot be required to give up. Secondly, this reasoning does not take into account the fact that, although the applicant might ‘simply’ want to live in a discreet way, persecution may still be imminent as soon as the applicant is discovered being LGBTI or is ousted against her or his will by others, due to their ‘difference’. The test of well-founded fear should be the risk ‘open’ LGBTI claimants run upon return to their country of origin, instead of focusing on her/his reasons for living a double-life”*.²⁴⁴

2.2.2.7 Credibility Assessment

The obstacles in the recognition of refugee status, based on sexual orientation and/or gender identity, are not overcome simply because of the rejection of the discretion requirement. After the abandonment of the discretion requirement, it was observed a wave of disbelief on the applicant’s credibility assessment in the UK.²⁴⁵ The justification for the *“disbelief”* was mostly based on the assumption that claimants based on sexual orientation and/or gender identity should have certain specific behaviours or manners for making plausibility judgment.²⁴⁶ One example is when the First-Tier Tribunal could not accept that a Ugandan lesbian woman was not familiar with lesbian books and magazines.²⁴⁷ In other case, a gay man was expected to know about the works of Oscar Wilde.²⁴⁸

²⁴⁴ Jansen & Spijkerboer, 2011, p.38

²⁴⁵ Idem, p.47

²⁴⁶ Idem, p.6.

²⁴⁷ Immigration and Asylum Chamber 30 January 2011, BN (Uganda), reported on LGBT Asylum News website.

²⁴⁸ Reported in Nathanael Miles, No Going Back, Lesbian and Gay People and the Asylum System, Stonewall, May 2010, www.stonewall.org.uk.

Anyway, the recent United Kingdom Asylum Instruction seems to be more sensitive about the specific problems with the claims based on sexuality when it holds it declares: *“Neither should (heterosexual) relationships or parenthood (both of which may need to be explored at interview) be automatically taken as evidence of lack of credibility”*.²⁴⁹ In 2011, the UK Border Agency Asylum Instruction on Gender Identity issues in the asylum claim stated that: *“The credibility of an individual’s claim and the degree of risk on return should primarily be tested by a sensitive enquiry into the applicant’s realisation and experience of gender identity. Altering one’s birth sex is not a one-step process, but a complex process that occurs over a period of time. Transition may include some, or all of the following personal, legal and medical adjustments: telling family, friends and colleagues, changing one’s name and/or sex on legal documents; dressing, behaving and/or living as a different sex; hormone therapy; and possible surgery. Interviewing officers should ask open questions that allow applicants to describe the development of their identity and how this has affected their identity and how this has affected their experiences both in their own country and in the UK”*.²⁵⁰

In contrast to the sensitive approach just mentioned above, it was found a case in the UK, in 2011, when questions that were inappropriate for interfering in the applicant’s private life and being embarrassing for him/her to answer were asked, such as asking sexually explicit questions to a lesbian woman, and asking a gay man about the first time he had committed *“buggery”* (anal intercourse) with his boyfriend.²⁵¹

As Berg and Millbank (2007) explained, this kind of practice is the result of a Western perception of homosexuality, which may not be applicable to other cultural contexts.²⁵² Therefore the decision-makers should understand the cross-cultural perception of sexuality. Johnson adds: *“An inability to disclose using specifically Western*

²⁴⁹ Jansen & Spijkerboer, 2011, p.60.

²⁵⁰ Idem, p.56.

²⁵¹ Idem, p.55.

²⁵² Berg and Millbank, 2007, p.207.

*terminology, cognizable to an immigration judge can also detrimentally impact on the perception and thus the credibility of an asylum seeker within a court space”.*²⁵³

There is a common opinion that sending the person back to their country, where she/he can be discreet about their sexuality is a way of perpetuating homophobia.²⁵⁴ Certainly, it is. Some authors believe that the jurisdiction in the UK, for using the discretion as a solution to send people back represent “*the macroscopic presence of homophobia in the UK asylum law*”.²⁵⁵ Indeed, most of the conclusion about the obstacles of recognition of sexual orientation and/or gender identity relies on homophobia issues, ignorance about this subject, etc. Undoubtedly, this may happen frequently, but the question which remains is the contradiction between the development of sexual orientation and/or gender identity as Human Rights in Europe and in the UK and, at the same time, homophobia and “*ignorance*” about sexuality or restrictive interpretations of the refugee law in UK. In this regard the present paper intends to offer another perspective for a better understanding of this scenario: the EU and the UK policy regarding refugees in general.

2.3 A political perspective on the EU and UK migration/refugee policies

Doubtless the sexuality-based claimants have a specific set of problems, which hamper the access of the LGBT people to grant refugee status. However, another relevant concern is the fact that they are even more vulnerable when the EU and the UK applies a restrictive immigration and refugee's policy. The hypothesis is that the generalized difficulty in granting the refugee status to anyone also might influence the restrictive interpretations towards sexual orientation and gender identity in the refugee context, even with an apparently broader protection offered by the 2004 Directive, compared to the 1951 Convention. Therefore, I will dedicate a brief section to the discussion of a more political view about the issue. The purpose of this section is not to deeply analyse the issue of migration and refugee policies, but more to reflect on how this topic can also dialogue with the recognition of the refugee status based on sexual orientation and

²⁵³ Johnson, 2011, pp.70-71.

²⁵⁴ Idem, 2011, p.58.

²⁵⁵ (Dauvergne and Millbank, 2003; Millbank, 2009b) cited in Johnson, 2011, p.58.

gender identity, so becoming an addition in the way of thinking the reasons for the massive denial faced by these categories.

In the article “*Who is the new Refugee*”, Nadine El-Enany adds a very important political perspective on the effectiveness of the 1951 Convention. She realized that the huge limitation in accessing EU because of the European Union’s restrictive migration policy makes the Refugee status a privilege for few people²⁵⁶. The effects of this restrictive policy are the almost total inefficiency of the 1951 Convention. The restrictive measures are also present in the application and interpretation of the 1951 Convention. She illustrates: “*Though the broadening of refugee law since the agreement of the Refugee Convention is to be welcome, there has evidently been a parallel tendency towards the implementation of increasingly restrictive practices designed to reduce the number of individuals arriving on European shores. As limitations on access to the European Union increase, the relevance of any refugee definition decreases*”.²⁵⁷

The host States suffer pressure because the number of refugee claims has grown in the last decades, and the State Members of the 1951 Convention are obliged to concede the refugee status to the individuals who are in accordance with the definitions and obligations set up in the Convention. Moreover, the State Members need to determine each application individually²⁵⁸. In the UK for instance, there were 4000 applications in 1986 and a decade later, the number had risen to 27.000.²⁵⁹ In this context, El-Enany highlights that the States are applying more migration control restrictive measures. She adds that such control “*has to do with the goal of Member states to try to keep out from Europe as many asylum seekers as possible*”. ECRE also noticed how immigration control measures, including efforts to combat trafficking and smuggling, undermine the right to seek asylum.²⁶⁰ The restrictive measures go far away from only restrictive

²⁵⁶ El-Enany, 2008, p.327.

²⁵⁷ Idem, p. 316.

²⁵⁸ Idem, p.319.

²⁵⁹ Kushner and Knox, *Refugee in an Age of Genocide* (London/New York: Routledge, 1999), pp.335-6.

²⁶⁰ ECRE, *the Promise of protection*, 2001, p.9.

legislative measures, since they use other tools to restrict access to the EU. About this tools, ECRE highlights: *“the asylum seeker are physically kept out by all the means available to modern states: fences, helicopters with heat-detectors, border guards with night-vision equipment, high-speed patrol boats, X-ray scanners and movement detectors to search for stowaways in lorries, etc”*.

In the UK, a clear example of this restrictive control is the fact that in 2007 the number of those claiming asylum was the lowest in 15 years,²⁶¹ however the decrease of application number does not necessarily mean the number of individuals in need of protection has decreased²⁶². In the view of El- Enany, the decrease in the refugee applications has a strong connection with the restrictive migrant policy, which make the entrance of the asylum seekers in Europe difficult.

Other responses against the numbers of asylum seekers, taken by the countries and the EU in general, is placing barriers such as using the concept of *“safe country”*, which has been used widely in Directive 2005/85.²⁶³ In the UK, as we saw previously there is a list of *“safe countries”*, which also include homophobic countries. Because of these restrictive measures the applicants of these countries are automatically considered manifestly unfounded or inadmissible for the refugee status. The other restrictive measure applied by the UK is the strict-time-limits under a new *“super fast track”* system for applicants from certain countries.²⁶⁴

The asylum policies in the UK are very restrictive. This can be demonstrated by the measures announced in 2001: *“the UK and Italy announced a joint initiative on South Eastern Europe to send immigration officers to countries of origin and transit to train local officials and gather intelligence on trafficking and smuggling networks (...) Without doubt, people in fear of persecution are being prevented from leaving their*

²⁶¹ See <http://www.bia.homeoffice.gov.uk/sitecontent/newsarticles/annualasylumapplications> El-Enany, 2008, p.324.

²⁶² El-Enany, 2008, p.325.

²⁶³ Idem, p.320.

²⁶⁴ Idem, p. 318.

countries, in violation of the 'right to seek and enjoy asylum' as prescribed in Article 14 of the Universal Declaration of Human Rights."²⁶⁵

In 2003, the UK put forward a "*New Vision for Refugees*" with the premise of increasing protection for refugees in their regions of origin and to process the applications of asylum seekers wishing to come to Europe from their source regions²⁶⁶. Nonetheless, this policy is very doubtful in terms of protection effectiveness. About this kind of policy: "*Hathaway has warned of the tendency of governments, such as the Australia, to use the exporting of protection to regions of origin as a justification for 'shutting down' the possibility of spontaneous arrivals and for limiting resources to asylum seekers present on their territory on the basis that these are not the most vulnerable individuals*".²⁶⁷

Other emblematic example of the restrictive control measures "*designed to deflect asylum seekers*"²⁶⁸ in the United Kingdom is the Home Office Asylum Statistical Bulletin of 2006, which included a section, entitled "Key changes to reduce the number of asylum applications"²⁶⁹. For instance, the so called "safe countries" are included in this section.

In summary, there is a visible effort to not accept people seeking refugees in the UK and in the EU, reflecting on restrictive measures in the migration policy or in the refugee legislation. It is not so clear how this influences the recognition of the asylum seekers based on sexual orientation and/or gender identity, because there are no evidences to prove it. But the reflexion is very relevant on this way. Some reasons make even stronger this connection between restrictive measures and the difficulty to accept the sexuality-based refugees. The main reason is the clear and latent contradiction between

²⁶⁵ ECRE, the Promise of Protection, 2001, p.9.

²⁶⁶ UK Government's "New Vision for Refugees" (March 7 2003), available at http://www.proasyl.de/texte/europe/union/2003/UK_NewVision.pdf (consulted on 7 July 2013).

²⁶⁷ El-Enany, 2008, p.314.

²⁶⁸ Idem, p. 325.

²⁶⁹ Heath, T; Jeffries; R. and Pearce, S. , Home Office Statistical Bulletin: Asylum Statistic 2005, August 22, 2006, p.8.

the development in the sexual orientation and gender identity rights in the EU and, especially, in the UK, and the limitations on these issues in terms of Refugee Status.

In fact, there have been some developments in the refugee laws and in the evolution of cases-law as well, concerning the sexual orientation in the refugee context, but they are very slow and present many limitations. The UK practices in this issue are not linear. Sometimes there is a very restrictive interpretation, other times it is considered an example for the others. However, in general terms, the practices have been restrictive, once they always use a gap or a restrictive instrument such as the “*safe countries*” or the “*voluntary discreet*” to not accept the refugee based on sexual orientation and /or gender identity.

Chapter III

Sexual Orientation and Gender Identity: Human Rights and the Refugee Status in Brazil

3.1 Sexual Orientation and Gender Identity in Brazil

*“Brazil hosts the largest Pride Parade in the world yet also has the world’s highest reported rate of homophobic and transphobic murders”.*²⁷⁰

Brazil’s situation in terms of being free from the discrimination based on sexual orientation and gender identity is contradictory. On one hand, the latest developments in the national legislation are towards the acceptance of the individual’s sexual orientation and gender identity and also, towards to its protection from discrimination and harm. On the other hand, this protection seems to be very weak, once Brazil reported one of the highest rate of, homophobic and transphobic murder, in the world. In contrast has its expression freedom granted, and hosts the largest Pride Parade in the world.

²⁷⁰Jordan & Morrissey, 2013, p.13.

In order to conclude a profile about the Brazilian situation in the recognition of refugee status for sexual orientation and / or gender identity, we chose to conduct interviews with professionals involved in the field of human rights and refugees.

In the interview with Rosita Milesi²⁷¹, from the Institute of Human Rights and Migration (IDHM), it was discussed the Brazilian's reality on sexual orientation and gender identity. In her point of view:

*“In Brazil there are still prejudice and taboos around this subject. Preconceptions surround either Brazilian's society or its sectors, and everyone knowledge the existence of the discrimination and violence against LGBT groups. However, we live in a constitutional system that assures their rights, meaning that tolerance and respect for the minorities prevail over the rest. In a prejudiced society, this should not influence the population right of recognition neither by the judiciary nor, as occurs in relation to the refuge, by the Executive”.*²⁷²

In fact there are rights granted to LGBT people. In May 2011 the Supreme Court of Brazil recognised equality of rights between homosexual couples and heterosexual couples, as an example, the right to be treated equally and not to be discriminated against.²⁷³ The Supreme Court of Brazil recognized same-sex union in May 2011.²⁷⁴ The Supreme Court of Justice recognized the possibility of same-sex marriage in October 2011.²⁷⁵

In 2012, Brazil's government presented the National Report to The Universal Periodic Review (UPR) where it is stated that: “The promotion of rights to the LGBT population is based on the achievements of the National Plan to Promote LGBT Rights, which involves several government agencies. The dialogue with the social movement was

²⁷² Interview with Rosita Milesi, Director of the IDHM, Sao Paulo, 02 July 2013. Natalia Medina, lawyer and consultant of the IMDH collaborated with this interview.

²⁷³ Carvalho, 2012, p.19.

²⁷⁴ Oliva, 2012, p.6.

²⁷⁵ Idem.

amplified by performing two National LGBT Conferences (2008 and 2011) and also reinforced with the creation of the National Council for Combating Discrimination and Protection of LGBT Rights in 2010, responsible for monitoring the implementation of public policies”.²⁷⁶ Brazil also highlighted the law improvement concerning to the transgender and transsexual terms. This law expansion permits that transgender and transsexual, who work at public entities, use their social name, assures the upgrading of the Health Plan benefits to same-sex partnership as dependents and also enlarges the Brazil’s Supreme Court recognition of the stable union, for same-sex partnership.²⁷⁷

There is a gap between legal improvements and reality. One clear demonstration is illustrated when the Inter-American Commission on Human Rights (IACHR) Condemns Murder of Trans Women in several States of Brazil, in September 5, 2012:

“The IACHR reminds the State of its obligation to investigate such acts on its own initiative and to punish those responsible. The Inter-American Commission urges the State to conduct an investigation that takes into account whether this murder was committed because of the gender expression, gender identity or sexual orientation of the victim”.²⁷⁸

Carvalho stated that: *“public policies in defence and in favour of LGBT people are neither sufficient nor effective in reducing homophobic violence in Brazil. Violence against gays and lesbians - including murder - continues to rise”*.²⁷⁹

According to Carvalho, this scenario of violence, that does not punish its perpetrator, can be related to the fact that Brazil has no Hate Crimes Law and, also lacks from a public institution or specific project that audits the occurrence of homophobic crimes

²⁷⁶“Relatório Nacional do Estado do Estado Brasileiro apresentado no mecanismo de revisão periódica universal do conselho de direitos humanos das Nações Unidas”, 2012, Paraf.36.

²⁷⁷ Idem, Paraf 37.

²⁷⁸OAS, IACHR Condemns Murder of Trans Women in Brazil, available at: http://www.oas.org/en/iachr/media_center/PReleases/2012/113.asp (consulted on 02 July 2013).

²⁷⁹ Carvallho, 2013, p.19.

and violence. The author explained that the bill criminalising homophobia has been pending in the National Congress over ten years.

However, the contradictions in the national scenario, do not affect the International Protection of LGBT people. As it was shown in chapter I, Brazil acts in favour of the Sexual Orientation and Gender Identity Rights. This can be seen in the elaboration of the Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity, an International accomplishment, where Brazil interpreted an important role.

Brazil has also determined that, as implicated in the 1951 Refugee Convention and Brazil's Refugee Law, sexual minorities, including homosexuals, should be considered a social group. Milesi's observation about Conare (Brazil's National Committee for Refugees): "It seems to me that, Conare, the agency responsible for this recognition, has been acted correctly in the protection of LGBT population and gender persecution".

It is very hard to understand these contradictions. But the fact is that Brazil is a "democracy" relative new. Even being able to develop the protection of the sexual orientation and gender identity in its national legislation and, also act as an international activist in the defence of LGBT rights, Brazil is still processing the ideas of equality and non-discrimination of any kind, in the society. Legal developments, such as the inclusion of the Hate Crimes Law and other policies, need to be approved. One of the reasons why the contradictions exist can be related to the fact that, by it, legal developments aren't capable to change the social view about the sexual orientation and gender identity.

3.2 Brazil and the Refugee Protection

The Refugee Protection system in Brazil is considered an example in the South America. Brazil was the first country in the region to ratify the 1951 Convention, in

1960, and to sign the 1967 Protocol, in 1972.²⁸⁰ However, until 1997 the application of these instruments was precarious²⁸¹, since Brazil did not have a national refugee law.²⁸² In 1997, this scenario changed with the creation of the Federal Law 947/97. This Law established a more efficient criteria and procedures to recognize the refugee status and also created an administrative structure to take care of their interest.²⁸³

The Law became an example to the region.²⁸⁴ Its purpose was the harmonization of the political and legal instruments for the American Latin Refugees and countries from other continents, such as Africa. The Law became an example mainly because of its broad approach towards the refugee protection. The approach is even more extensive than the 1951 Convention because it also includes the Cartagena Declaration (1984)²⁸⁵, expanding the definition of refugees, as it follows: "*...people who have fled their country because they had their safety or freedom threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances that have seriously disturbed the public order*". This broad approach regarding the refugee definition is much influenced by the African context, where many countries and/or regions observe the presence of a massive violation of the human rights.

3.2.1 Human Rights and the Refugee Protection

Brazil's positive approach on the refugee law has a strong link with the Brazilian State of Human Rights activism. Barbosa and Hora contextualized the international refugee

²⁸⁰ Comitê Estadual Intersetorial de Políticas de Atenção aos Refugiados do Rio de Janeiro, Plano Estadual de Políticas de Atenção aos(as) Refugiados(as), p.1, available at: http://download.rj.gov.br/documentos/10112/556509/DLFE47406.pdf/plano_estadual_politicas_atencao_refugiados_consulta_publica.pdf.pdf, (consulted on 02 July 2013).

²⁸¹ Idem.

²⁸² Idem.

²⁸³ Idem.

²⁸⁴ Idem.

²⁸⁵ "*The Cartagena Declaration on Refugees is a non-binding agreement which was adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia from 19-22 November 1984. While the Cartagena Declaration is not a treaty, its provisions are respected across Central America and have been incorporated in some national laws*". Idem.

law and the Brazilians "*progress in the deep policy of human rights*"²⁸⁶ very well. The illustration of this activism is the implementation of an important program called "National Program of Human Rights "²⁸⁷, in 1996. This program was the starting point of a proactive role of Brazil in the international human rights field.

After the 1988 Democratic Constitution of Brazil many international treaties have been ratified. As explained by Prof. Martins, the themes such as democracy, development and human rights were at the top of the Brazilian foreign policy.²⁸⁸ In 1992, Brazil joined the three general treaties of protection, two of the UN and the OAS Convention and also the specific international conventions: against racial and female discrimination, against torture and defending children and refugees rights. In 1997 Brazil recognized the jurisdiction of the American Court of Human Rights.²⁸⁹

It was exactly in this context of a positive approach regarding the human rights instruments, which Brazil created in the multinational forum, the Federal Refugee Law which, in the words of Barbosa and Hora, is one of the most modern legislation in the world.²⁹⁰

3.2.2 The Federal Law n° 9474/97

The Law establishes the rights and duties of the refugees in Brazil.

3.2.2.1 Chapter I: concept, extension and exclusion

3.2.2.1.1 Section I: the concept

Art.1- It will be recognized as a refugee the individual who:

I- Due to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is out of the country of his nationality and unable or unwilling to avail himself of the protection of that country;

286 Barbosa. Crf. Above footnote 2, p.12.

287 Barbosa & Hora, 2007, p.12.

288 Martins, 2001, p.6.

289 Barbosa & Hora, 2007, p.42.

290 Idem.

II- Not having a nationality and being out of the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

III- Due to serious and generalized human rights violation, he is forced to leave his country of nationality, seeking for refuge in another country.

The first and second sections are an implementation from the 1951 Convention and the third part is from the Cartagena Declaration. The National Committee for refugees (Conare) and UNHCR (Brazil) highlight that the inclusion of the third section is relevant because it combines the three spheres of the international protection of human beings: the humanitarian law, the human rights and the refugee law.²⁹¹ This combination is called “*Cartagena Spirit*”²⁹², and Brazil has been incorporating it in its domestic jurisdiction since the 1988 Constitution. Therefore this Law is an example of how Brazil has a “*greatly humanitarian character*”.²⁹³

3.2.2.1.2 Section II: extension

Art. 2 has a very broad approach towards the family, stating that the effects of the refugee conditions will be extended to their partner, relatives and descendants, as well as other family members who depend on the refugee economically, when they are in their national territory.

3.2.2.1.3 Section III: the exclusion

Art. 3, establishes a list of exclusions to individuals who seek refuge. Among others, I highlight the criminal background against peace, and humanity, odious crime, terrorism and drug traffic, acts against the ends and principles of the UN, all resulting in the denial of the application.

291 Leão, 2007, p.78.

292 Idem.

293 Idem. pp. 78-79.

3.3.2.2 Chapter II - Title II: the ingress in the national territory and the request of refugee

Art.7 sets that any foreign person who arrives in Brazil are allowed to express the willing to ask for refugee to any migration authority at the frontier. The restriction for the foreigners request for refuge is when they are considered dangerous for the national security. Afterwards, the authorities will provide all the necessary information for the application. Moreover, Art. 8 sets that the irregular ingress in the national territory is not an impediment to the foreigner's refuge request. These articles are very important for the effectiveness of the international protection law, because they facilitate the access to the refugee system.

3.3.2.3 Chapter V: the appeal

Art. 29 states that if denial has been the case , the claimant can appeal to the Minister of Justice in the time limit of 15 days after he/she receives the denial notification. This measure is positive because it assures the reduction of mistakes.

In general, the Law 9474/97 seems to have an ample and positive approach regarding to the Convention important areas, such as the broad definition of refugee and access to the refugee system. It is important to notice that my analysis is not related to economic barriers. The access, in terms of law and administrative measures seems fair enough, as well as the extension to relatives and the positive approaches concerning the right to appeal.

Even it is well intended, the scope is brief and does not offer a detailed and complex set of rules. For example, the European Council DIRECTIVE 2004/83/EC offers a more variety and a complex net of rules concerning the core problems on the interpretation of the 1951 Convention, such as rules about the acts of persecutions, the actors of protection, the definition of social group, etc. Even with some mistakes, ambiguity and lack of clarity, the Directive offers a better guidance to the decision -makers. These themes are extremely relevant and have to be defined, because they depend on the interpretations and so may assume a very restrictive approach, blocking the access to the

refugee status, or a more comprehensive and sensitive approach, which make the asylum seekers able to have their right granted fairly.

In summary, the weakness of the Brazilian Federal Law 9474/97 is to not address the important issues mentioned above. The issues not addressed in the law will rest upon the administrative measures and practices, which will be demonstrated further on this research by analysing cases-law and interviews with decision makers.

3.2.3 The roles of CONARE, UNHCR, and the Civil society

The Conare (National Committee for Refugee) was created by Law 9474/97. Under the Title II (About Conare) the Art. 11 established its creation.²⁹⁴ The Art. 12 set its jurisdiction²⁹⁵:

“It is due to CONARE, in line with the 1951 Convention about Refugee Status, with the Protocol relating to Refugee Status of 1951, with the Protocol relating to Refugee Status of 1967 and other sources of international refugee law”:

- I- analyse the application and state the recognition of the refugees’ condition, in the first instance;
- II- decide in the first instance the cessation of refugee status, ex officio or at the request of the competent;
- III- determine the loss of refugee status in the first instance;
- IV- guide and coordinate the actions needed for effective protection, assistance and legal aid to refugees;
- V- approve normative instructions clarifying the implementation of this Law.

The structure of the Brazilian system of refugee protection is based on the Government, the Civil society and UNHCR. This structure is part of the UNHCR strategy to create an

294 Art.11 of the law 9474/97. It was created the National Committee for Refugees –CONARE (Organ of collective deliberation, in the Ministry of Justice.

295 Art 12. Law 9474/97.

ideal model of refugee protection in the “Southern Cone” region. The Law 9474/97 established this ideal model as well as possible.²⁹⁶

This structure is set in the Chapter II Art. 14, when it is written that Conare will obey the following composition: I- one representative of the Ministry of Justice who will preside; II- one representative of the Ministry of Foreign Affairs; III- one representative of the Ministry of Labor; IV- one representative of the Ministry of Health. V- one representative of the Ministry of Education and Sports; VI; one representative of the Federal Police Department; one representative of a non-governmental organisation dedicated to activities of assistance and protection of refugees in the country.²⁹⁷ This place is occupied by Caritas International which has the right to vote. The representative of the UNHCR also has a place, but not the right to vote. The right to vote occurs for the analysis of individual cases of the refugee seeker, changes in resolutions and any theme that might be voted at Conare.²⁹⁸

Caritas International has a crucial role in Brazil regarding refugees. Caritas Archdiocese of São Paulo (Caritas SP) and Caritas Archdiocese of Rio de Janeiro (RJ Caritas) stand out for their attention and acceptance of refugees. Since the creation of Conare, the civil society is represented by Caritas of São Paulo and Rio de Janeiro (for historical reasons, because of the performance of organisations in protecting those who fled neighbouring countries under dictatorial governments and helping Brazilians who were persecuted by the military dictatorship in Brazil).²⁹⁹ Also, since the placement in Brazil, in 1977, UNHCR has always had the support of Caritas SP and RJ. The institution operates in three branches: supervision and guidance on seeking a safe refuge and provides immediate assistance to health, education, housing and feeding, besides providing assistance for local integration. Thus it has partnered with several non-governmental organizations such as the Institute of Migration and Human Rights (IMHR). This one

296 Leão, 2007, p.15.

297 Lei 9747&97 e Coletânea de Instrumentos de Proteção Internacional dos Refugiados, 2005, p.11.

298 viviancasp@gmail.com from Vivian Holzacker, lawyer, Caritas SP, 9 Jul 2013.

299 Idem.

focuses on legal assistance for interviews with Caritas RJ and SP as well as with the IMHR.

Yet in the Art.14 (1) it is stated that the UNHCR will always be a guest member to the Conare meetings, with right to speak but not to vote. Its assistance has been essential to the creation and support of refugee protection in Brazil. Furthermore, the political and financial support of UNHCR is essential for its successful work in Brazil.¹² The UNHCR in Brazil has also increased the partnership with the Civil Society and intensified its work on the political and diplomatic spheres¹³. Besides Conare, the UNHCR, also has a partnership with many other non-governmental organizations (NGOs) throughout the country, such as: Associação Antônio Vieira (ASAV) or Antônio Vieira Association, Cáritas Arquidiocesana de Manaus (Caritas Archdiocese of Manaus), the Caritas RJ, the Caritas SP, o Centro de Defesa dos Direitos Humanos (CDDH) or the Centre for Human Rights and the Institute Migrações e Direitos Humanos (IMDH) or Institute of Migration and Human Rights.³⁰⁰

Conare organisation consists of a heterogeneous basis, which includes the civil society and the participation of the most important International institution for refugee's protection: UNHCR. Even without the right to vote, its (UNHCR) presence is fundamental. The dialogue between important institutions, various ministries, the civil society and international organizations makes the nature of this Law to become much more humanitarian, ensuring that the point of view of the victims will be listened in a fairly way and thus granting the effectiveness of their. However, the ultimate test of Brazil's intended refugee policies as stated above is their application in practice. A review of statistical figures provides some indication and is provided below.

3.3 Sexual Orientation, Gender identity and the Refugee Status in Brazil

Brazil's Refugee Law does not explicitly mention the status of sexual orientation and gender identity. The Law does not estipulate rules for the Assessment of Facts and

300 O ACNUR no Brasil, available at: <http://www.acnur.org/t3/portugues/informacao-geral/o-acnur-no-brasil/> (consulted on 07 July 2013).

Circumstances, the Actors of Persecution, the Acts of Persecution, the Reasons of Persecutions, and other important issues to the analysis of an asylum claim.

Moreover, there is a lack of publication of refugee cases in Brazil, especially concerning the area of sexual orientation and gender identity. Therefore, to know how decision-makers have been interpreting and applying the refugee Law and the 1951 Convention, I interviewed professionals³⁰¹ who work in the field for the follow institutions: UNHCR (Brazil), Caritas Sao Paulo (Caritas SP), Caritas (RJ)³⁰², Institute of Human Rights and Migration (IDHM), Alliance for Refugees³⁰³. All these institutions play an important role in the protection of refugees in Brazil.

3.3.1 Sexual orientation, gender identity, social group, and the refugee status

Oliva explained that the last development regarding the recognition of sexual minorities in Brazil and also its position at the international level, in favour of sexual minorities protection, have encouraged the LGBT asylum seekers to apply their claims in Brazil.

Oliva also pointed out that in spite of the scarcity of studies about the concept of “social group”³⁰⁴ in Brazil, there is already a doctrine in the country, which stipulates the right of refugee protection to LGBT people based on their “membership of a particular social group” as a form of ensuring their minimum rights.³⁰⁵ Based on this, the research now takes a look at Brazil’s National Committee for Refugees (Conare) position.

301 Fictitious names are used to protect the identities of interviewees. These fictitious names are: Laura and Alice. The questionnaires with their information are retained.

302 It is also relevant to explain that the Caritas RJ is responsible to attend refugees in the North and Northeast regions of Brazil, besides Rio de Janeiro, and the Caritas SP is responsible to attend the South, Southeast and Centre-East regions. Between 2010 and 2012 66% asylum claims were processed in the Southeast regions, where are Sao Paulo and Rio de Janeiro federative states. ACNUR & CONARE, Novo perfil do Refugio no Brasil, p.7.

303 The name has been changed in order to protect the identity of the Institution. The information about the institution and the interviews with the professionals from this particular Institution is retained.

304 Oliva, 2012, p.19.

305 Idem.

Conare has a favourable position in terms of recognition of refugee rights for sexual minorities.³⁰⁶ The author Leão declared that Conare accepted asylum seekers who belong to the so called “vulnerable groups”, which are women, children, homosexuals, etc.³⁰⁷ Conare is treating homosexuals cases under Art.1- Clause I, considering homosexuals as “*membership of a particular social group*”.³⁰⁸ Indeed, all interviewees³⁰⁹ responded that Brazil has recognised refugee status to LGBT people considering their “*membership of a particular social group*”.

The UNHCR recently started to analyse data of individuals persecuted in their own country because of their sexual orientation, and with this background they were recognized as refugees in Brazil. Until now, the UNHCR has counted 15 individuals LGBT granted refugee status because of their membership of this particular social group. Among these 15 individuals, 3 were recognized as refugees in 2011, five in 2012 and 7 until June of 2013. According to UNHCR, 13 were man and 2 were women and the country of origin of these refugees are: 2 from Gana, 7 from Nigeria, 2 from Colombia, 1 from Iran, 1 from Guinea (Conakry), 1 from Senegal and 1 from Pakistan.³¹⁰ Gabriel Godoy³¹¹ also highlighted: “*this number is even higher, mainly because the years before 2011 have not been included, and also considering LGBT people, recognized because of other reasons and who did not declare their sexual orientation at any moment in the procedure*”.³¹²

3.3.1.1 “Case-law of Colombians”

In 2002, two Colombians, a homosexual couple, were recognized as refugees because of their sexual orientation. As Leão explained: both were from a region with strong presence of paramilitary forces with common practices of ‘social cleaning’, meaning

306 Idem,p.20.

307 Leão, 2007, p.34.

308Leao,2007, p.37.

309 Fabrício Toledo de Souza, Vivian Holzacker, Laura, Alice, Gabriel Gody, Rosita Miseli.

310 Interview with Gabriel Gualano de Godoy, UNHCR Protection Officer –Brazil and Raquel Trabazo, UNHCR Protection Assistant, UNHCR (BRAZIL), 20 July 2013.

311 The interviewees Gabriel Godoy and Raquel Trabazo counted on the contribution of the UNHCR Protection Unit (PU)-Brazilian Office.

312 Idem.

selective murders of people with specific backgrounds, which they considered corrupted in their understanding of society, such as prostitutes, drug addicts, robbers, abandoned minors.³¹³ The well-founded fear of persecution was considered credible for two principle reasons: First because the couple suffered aggression and was threatened by the paramilitary forces and second, because the region has already had cases of homophobic murders, in addition to the existence of groups practicing “social cleaning”.³¹⁴ It is interesting to notice Conare’s position in this case because, based on these situations, it took into consideration the perception of the actor of persecution and not only the homosexuality of the claimants, Leão highlighted.³¹⁵ The social perception was the key element of the analysis of the judges. They did not focus on analysing the veracity of the homosexuality of the claimants or the “cohesiveness” of the social group. But focus more on analysing the objective facts about the country of origin.

The relevance of this case relates to the fact that Conare recognized a non-State actor as an actor of persecution, in this case a paramilitary group. Moreover, as Oliva points out, Conare did not consider that Colombia officially states not to criminalise homosexuals and even more explicitly not to discriminate homosexuals.³¹⁶ Therefore, it can be concluded that in this case Conare’s interpretation is very positive for the protection of the victims, as it took into account the social and political situation of the country and not only the legal aspects, considering a more realistic picture of the risks the victims faced.

3.3.2 Actor of persecution or serious harm

In the Colombian case, CONARE analyzed the state capacity and its attempt to protect individuals. Although the Colombian state does not criminalize sexual relations between same-sex adults, there was a well-founded fear of persecution, justifying the claim for asylum. This fear was imposed by non-state actors, paramilitary forces and, also due to the inability of the Colombian state to establish the control and/or protect its victims.

³¹³ Leão, 2007, p.38.

³¹⁴ Idem.

³¹⁵ Idem.

³¹⁶ Oliva, 2012, p.21

The importance to recognize the non-State actor as a persecutor is very relevant to the acknowledgment of the refugee status, especially for LGBT people, who have been persecuted. The issue was discussed in the interviews. In the opinion of Fabrício Toledo de Souza³¹⁷ (Caritas RJ) non-State actors are a considerable factor. Souza demonstrated the importance of verifying the institutions mechanisms in order to protect the victims. It is not rare that a relative is denounced as an actor of persecution. In this case, Souza affirms that social and political context must be analysed.³¹⁸ This analysis is related with the UNHCR's guidelines and also with the Conare's approach as it was discussed before.

Vivian Holzacker³¹⁹ stated that in countries where same-sex relationship is considered a crime, the fear of a persecution or a persecution by private actors, make the well-founded fear very understandable. She added that in countries where there is no criminal law against same-sex relationship, the applicant, has to demonstrate that its home State could not offer protection and also, that this persecution is not a punctual fact. Additionally, Rosita Milesi³²⁰ from the IDHM added that the State deficiencies towards the individual protection are responsible for the well-founded fear regarding the private actors.

Alice³²¹ from Alliance for Refugee stated that if the asylum-seeker only attests persecution by its own relatives without facing problems with the society in general, this would represent just a family problem, resulting in the denial of its refugee status.

The approaches from the professionals interviewed about this theme were similar. It is important to analyse the whole context in which the applicant is inserted, considering

³¹⁷ Interview with Fabrício Toledo de Souza, lawyer, Caritas RJ, 10 Jun 2013.

³¹⁹ Interview with Vivian Vivian Holzacker, lawyer, Caritas SP, 9 Jul 2013.

³²⁰ Interview with Rosita Miseli, Director, the IMDH, 02 July 2013.

³²¹ Interview with Alice, lawyer, Alliance for Refugee, 16 Jun 2013. The name of person and Institution and all the information except to the date of the interview are fictional to protect their identity.

legal, political and social aspects from the country or region of its origin. The combination of these elements is essential to determine the refugee status.

Oliva mentioned that some refugees were accepted in Brazil, when the applicant conditions were similar to the Colombians whose regions were also controlled by force groups. In other situation, when the applicants alleged to be persecuted by its relatives, Conare has decided that the persecution must be well characterized and proved, since the family abandonment does not consist *per se* a persecution act.³²² In this sense, if the fear of persecution is just based on the family reluctance in accepting the applicant's sexual orientation, the allegation won't be sufficient to determine its refugee status.

3.3.3 Acts of persecution

The objective of this section is to analyse the interpretation and implementation of the “*Acts of Persecution*” in Brazil. Emphasis will consist in the discrimination issue, largely present in the LGBT asylum-seeker narratives.

Vivian explained that, in countries where same-sex relations are considered a “*social taboo*”, but are not prohibited by the law, some asylum seekers fear from social exclusion, family abandonment and discrimination leading to violent acts. She adds: “*Not all discrimination should be considered a persecution. However, when the asylum seeker cannot enjoy fully its fundamental rights, such as having access to minimum living standards or education, due to discrimination, this will consist as a persecution. The family reluctance in accepting same-sex relationship, when it doesn't violate the fundamental rights, will not be equal to persecution*”.³²³ In this case, as Gabriel Godoy and Raquel Trabazo pointed out, it is very important to analyse the situation of its country of origin in order to understand if the discrimination practices are strong enough to cause a considerable prejudice to the supposed victim.³²⁴

³²² Oliva, 2012, p.22.

³²³ Interview with Vivian Vivian Holzacker, lawyer, Caritas SP, 9 Jul 2013.

³²⁴ Interview with Gabriel Gualano de Godoy, UNHCR Protection Officer –Brazil & Raquel Trabazo, UNHCR Protection Assistant: Brazil, UNHCR (Brazil), 20 July 2013.

Additionally, Vivian explains that the recognition of refugee status in Brazil will depend on the analyses of the objective and the subjective well-founded fear of persecution. The first consists on gathering information about the country of origin, as mentioned previously. For the second point, the individual needs to demonstrate why she or he fears being persecuted. The plaintiffs need not to prove previous persecution, because they could suffer a future fear. Gabriel Godoy and Raquel Trabazo also explains that the applicants do not need to demonstrate that local authorities had knowledge about their sexual orientation and/or gender identity. If the State criminalizes same sex relations, it suffices that the individual's fear that the law would be applicable to them in the future.³²⁵

In Souza's opinion, it exist a difference between discrimination and persecution, but there is a crucial point where the discrimination becomes a persecution. However, knowing its difference or when they become one is not always clear and unequivocal. To him, the simply existence of a criminal or discriminative law *per se* is sufficient to recognize the refugee status.³²⁶

Milesi observed that sometimes the applicant, when attempting to write a narrative according to juridical terms, may commit mistakes by not knowing them. Therefore, to analyse the applicant's well-founded fear of persecution, it is very important to focus on its narratives. However, she believes that the applicants do not allege fearing from discrimination or persecution probably because they are unaware of such technical terms. Consequently the consideration has to be based on subjective and objective facts, being considered a persecution when, after the analyses, it's proven that their life and/or integrity are at risk.³²⁷

Alice states that usually the refugees allegation only refer to discriminative factors such as being rejected or being called by pejorative names. In her opinion, this is not a

³²⁵ Idem.

³²⁶ Interview with Fabrício Toledo de Souza, lawyer, Caritas RJ, 10 Jun 2013.

³²⁷ Interview with Rosita Miseli, Director, IMDH, 02 July 2013.

reason for a well-founded fear, however, according to the “*gay dictatorship*”,³²⁸ these events allow a reasonable factor for it. In contrast, for her, persecution means put at risk the life and/or liberty of the individual.

3.3.4 The question of “discretion”

Regarding to the discretion issue, all interviewees but one, responded that there is no reasonable justification to deny a refugee status based on the applicant discretion. The interviewee, that didn't agree, affirmed its lack of knowledge to answer to this question. Thereby, the opinion of the majority is in conformity with the UNHCR guidelines.

Vivian explained, with her own words, the reasons why it is not possible to use the discretion as a justification: “*with the concept of belonging to a social group, that can be defined according to the UNHCR Manual on Refugee Protection and the European Convention on Human Rights, as a group of people that have a common characteristic beyond the fact of persecution, makes them being known to the society as a group. This characteristic can be innate, immutable or fundamental to the identity, conscience and to the exercise the human right. While innate characteristic, immutable or fundamental to identity, one cannot require the applicant to be different*”.³²⁹

In contrast, Alice argued that the possibility to hide the sexual orientation or, to live a discreet life regarding it, could be a justification to the denial of the refugee status. The argument is defended with the presupposition that people, who live in a discreet way, don't have a well-founded fear of persecution. This view seems to be similar when compared to the United Kingdom, where the “*volunteer discreet*” can be the justification for denial a refugee status. But, as this research already debated, this is a problematic position.

3.3.5 Assessment of Fact and Evidences

³²⁸ According to the interviewee, the term “gay dictatorship” means that anything against homosexuals is considered prejudiced or homophobic.

³²⁹ Interview with Vivian Vivian Holzacker, lawyer, Caritas SP, 9 Jul 2013.

3.3.5.1 Credibility Assessment

Credibility assessment is based mostly on the asylum seeker narratives, especially for LGBT people, as explained in previous chapters. The main problem is that these narratives usually are not consistent. There are many reasons for this outcome: shame, “*internal homophobia*”, among others. How professionals are dealing with this issue in Brazil? This chapter will discuss this question in detail.

No different than other countries, Brazil has most of its credibility based on the analysis of the refugee narratives plausibility. According to Milesi, many elements must be observed in the moment of the interview. For example: applicant posture, its reaction to questions, coherence of the narrative, dominant language etc.³³⁰

Vivian points out that the assessment of credibility will depend on each case. She highlights that sometimes LGBT people may have particular problems, not accepting being homosexual or even being ashamed of it, leading this asylum-seekers to change their stories several times. In other cases, the interviewer is able to notice the claimant’s lies, for example, when they are clearly telling a “*story by heart*” made by them and also, when they are not able to answer a specific question.

Alice also emphasized that applicants create their own stories, indicating lack of credibility. She added that the claimants alleging to be homosexual do not transmit credibility. In her words: “*Many of them allege not to be homosexual anymore, they talk about family, wife and children from its country of origin. Also talk about their willing to adopt a children or having one*”.

Certainly, the applicants may sometimes lie about their homosexuality, but it is equivocated to assume that, just because they have a family, they are not homosexuals or bisexuals. The analysis is very complex and needs to cross cultural and social observations and personal sensibility. However, the implication of these assumptions could cost the life of a person or its harm, therefore the conclusion needs to be made with caution.

³³⁰ Interview with Rosita Miseli, Director, IMDH, 02 July 2013.

Milesi, Vivian and Souza described a good approach to deal with this kind of situation. Milesi also highlights that, in this case, it is important to have an intercultural knowledge, since the judgment cannot be grounded by the interviewer culture. This is established because people's way of expressing its homosexuality differs from country to country. Thus, in order to avoid mistakes, it is important to take into account the cultural variations.³³¹ As for Vivian and Souza, having a family is not sufficiently reasonable to deny a refugee status, meaning that the opinion should be constructed upon the facts mentioned by the claimant.

According to Alice, the current problem committing Brazil is related to how the declaration of homosexuality is analysed. She affirms that a simply claimants application counts as a homosexual recognition, even when there are proves that the applicant's story was not true.

For Alice, the acceptability of the LGBT as a refugee isn't based on the applicant's credibility, but on the idea that denying it would be politically incorrect. In her opinion the reason why this happens in Brazil nowadays, is related to the fact that actions against LGBT are easier to be considered "*homophobic*" or harmful. She also believes that, in some cases, the applicant declare itself to be homosexual only to gain legal field in the country, once it is common to see people affirming to be heterosexual after.

Souza's opinion is that, the claimant self-declaration towards its sexual orientation has to be analysed in conjunction to the coherences in its statements during the analysis. In his opinion, the credibility of the LGBT claimants should not be evaluated with cautious. In his words: "*Personally, I see with extreme caution the issue of credibility, since it implies always and necessarily a subjective judgment, subject to tastes, choices, impressions and individual prejudices. Not to mention that not always our communications between applicant and interviewer (and judgmental) give up under appropriate conditions (because of the language, the environment, emotional state,*

³³¹ Interview with Rosita Miseli, Director, IMDH, 02 July 2013.

etc.). *We consider the applicant's expression 'self-declaration' and the coherence between its manifestations during the process (...) we also believe that the responsibility for the onus of proof is shared between the interviewer and the applicant and that is why the credibility must be analysed with extreme caution.*"³³²

Oliva states that sometimes the asylum-seekers don't feel comfortable talking about their homosexuality, which assures its lack of credibility. There have been situations where Conare rejected solicitations due to the inconsistency of the information that it was given by the solicitors along the process. Nonetheless, Leão said that, in doubtful cases, Conare will investigate the veracity of the information before making any decision.³³³

3.3.6 Country of origin information

In Brazil there is no National System which has a compilation of the Country of Origin Information (COI), but as demonstrated in practice, the decision-makers are gathering not only legal, but also social and political information. Brazil also doesn't have a list of "Safe Country".

3.4 A political perspective on the refugee policy in Brazil

At the discourse of the Brazilian delegation, the "The High Level Dialogue of the United Nations on Migration and Development"³³⁴, Brazil defined a humanitarian policy linked to the immigration question as follows: *"The migration theme has to be treated in the context of the Human Rights. Our goal is to ensure that Civil Rights are applied to immigrants. We support policies to formalize immigration status. In addition, the dignity to be guaranteed as immigrants disallows any kind of xenophobia. Brazil states its support to an improved international protection for refugees. It is believed that human interactions should constitute the main objective of the foreign policy"*³³⁵ Brazil

³³² Interview with Fabrício Toledo de Souza, lawyer, Caritas RJ, 10 Jun 2013.

³³³ Oliva, 2012, p.25.

³³⁴ Nova Iorque, 14-15 de setembro de 2006. Barreto, Refugio, Migrações e Cidadania, 2007, p.29-33.

³³⁵ Idem, p.31.

also declared its support to a proposal presented by Kofi Annan, the UN General Secretary to create a Global Forum of Nations on Immigration and Development.³³⁶

In 2012, Brazil' government declared in the National Report presented at the The Universal Periodic Review (UPR), under the auspices of the Human Rights Council, its strong commitment with refugee and stateless protection.³³⁷ In 2010, the country hosted the meeting, which 18 Latin America countries adopted: the "Declaration of Brasilia on the Protection of Refugees and Stateless People in the Americas". In 2011, at the "Inter-Ministerial of the United Nations High Commissariat for Refugees (UNHCR)" the Government committed itself to adopt measures to improve the local refugees integration, consolidate and expand the program "*solidary resettlement* " and to adopt a legislation that creates a mechanism for the recognition of the stateless condition.³³⁸

The Report shows Brazil is seeking solutions for complementary protection to people moving to the country. To date the statistics show that about 1.300 humanitarian visas were provided by the "*National Council of Immigration*" to citizenships from Haiti who arrived in Brazil escaping from the effects of the 2010 earthquake in their country.³³⁹

3.4.1 Brazil's refugee statistics

According to an activity report of Conare, the number of refugees accepted after the implementation of the Federal Refugee Law increased significantly. Brazil accepted 1.991 refugees in 1998. By December 2002 the number had increased to 2.884. As of October 2006, Brazil had 3.271 recognized refugees, after adjusting for voluntary repatriation and refugees who lost their status. At the end of 2006, Brazil had 3.311 recognized refugees from 70 different nationalities.³⁴⁰ The initial number of nationalities

³³⁶Idem, p.33.

³³⁷"Segundo Relatório nacional do Estado brasileiro apresentado no mecanismo de revisão periódica Universal do Conselho de Direitos Humanos das Nações Unidas- 2012." Paraf. 43.

³³⁸Idem.

³³⁹Idem, Paraf. 44.

³⁴⁰Leão, 2007,p.18.

of asylum seekers requesting refugee status was 80 and it was reduced to 70 after adjusting for those refugees whose status was denied.³⁴¹

From 1998 to 2006, the total number of refugee requests amounted to 3.681. 1587 solicitations were deferred, and 2094 dismissed.³⁴² Among those whose application was dismissed 1024 appealed to the Minister of Justice. 10 of them had their application request granted subsequently.³⁴³ According to Leão, these data demonstrate the existence of a perception that the Brazilian society, generally pacifist in nature, rejects any obstacle to the integration and recognition of refugees.³⁴⁴ At the end of 2009 Brazil had 4,239 refugees from 75 different countries. 62% of the asylum seekers were qualified as recognized refugees.³⁴⁵

Between 2010 and 2012, ACNUR published figures demonstrating the strong protection of refugees in Brazil.³⁴⁶ The total number of applications more than tripled during these years, increasing from 566 in 2010 to 2.008 in 2012. The majority of asylum seekers came from Africa, South America and Asia. In 2012, the important humanitarian crises had a direct impact on the number of asylum seekers in Brazil, with many coming from Syria, Mali, Democratic Republic of Congo (DRC) and the Ivory Coast.³⁴⁷

At the end of 2012, Brazil spearheaded within Mercosul the adoption of the “*Mexico Declaration and Plan of Action*” como parte dos Princípios Internacionais de Proteção aos Refugiados. The document reaffirms the principle of *non-refoulement*, the importance of family union and non-discrimination in terms of age, gender and diversity. The Declaration also emphasizes the importance to avoid restrictive migration

³⁴¹ Idem, p.74.

³⁴² Idem, pp.74-75.

³⁴³ Idem, p.74

³⁴⁴ Idem, p.75

³⁴⁵ O ACNUR no Brasil, available at: <http://www.acnur.org/t3/portugues/informacao-geral/o-acnur-no-brasil> (consulted on 09 Jun 2013).

³⁴⁶ ACNUR, Refúgio no Brasil Uma Análise Estatística (2010-2012), p.1.

³⁴⁷ Idem.

policies, the need to establish additional mechanisms of cooperation and new complementary ways of humanitarian protection.³⁴⁸

Actual data of June 2013 reveal the existence of 4262 refugees³⁴⁹ in the country and CONARE is projecting another 2.580 applications until the end of the year.³⁵⁰ In 2013, until the end of June, 557 new cases were evaluated, of which 253 were accepted, representing an acceptance rate of 45,4%.³⁵¹ Historically the acceptance rate was 39%, 21% and 24% in 2010, 2011 and 2012 respectively.

A specialist stated that “the acceptance of refugee status varies between 35% and 55% in Brazil, which is a generous average, comparing to other countries, where the acceptance is about 30%”.³⁵² In fact, it seems Brazil is becoming a new route for refugees coming from Africa and other countries, since it is very hard to enter Europe.

Maria (fictitious name), an African 42 years old woman from Uganda who, through social assistance left the country to preserve her life. This woman declared choosing Brazil to ask refugee because she knew that it would be difficult for her to be accepted in Europe. In her words: *“I know I would have many difficulties to be accepted in Europe. Brazil, for me, was safer”*. She has been waiting for 7 months for the decision of her case in Brazil.³⁵³

A specialist affirms *“The European frontiers have closed. It is almost impossible for Africans disembarking there... And there are countries which have quotas for refugees as Italy. In Brazil we do not have this”*.³⁵⁴

³⁴⁸Idem, p.4.

³⁴⁹Acnur & Conare, Novo perfil do refugio no Brasil, 2013,p.3.

³⁵⁰Idem, p.4.

³⁵¹Idem, p.8.

³⁵²Nádia Pontes, Lei brasileira para refugiados é considerada exemplar, at: <http://www.dw.de/lei-brasileira-para-refugiados-%C3%A9-considerada-exemplar/a-5167314-1> (consulted on 03 July 2013).

³⁵³Idem.

³⁵⁴Idem.

In summary, it is growing the number of asylum seekers in Brazil. This fact demonstrates that Brazil is open to hearing these people and proves that there is facilitation, by means of the government or not, for the asylum seekers access to the refugee procedures. Regardless of the acceptance rate, statistics suggest that at least the refugee seekers are not been blocked for other meanings, such as restrictive measures on migration policies as it happens in EU and in the UK.

4 Conclusion

The recognition of the refugee status based on sexual orientation and/or gender identity faces many obstacles. The three main challenges are: first, the political consensus and legal developments on the sexual orientation and gender identity fundamental rights. Second, the lack of clarity in the 1951 Convention and the restrictive interpretation of the clause “*membership of a particular social group*”, putted together with a non-clear, national and regional, legislation on refugee’s that concern sexual orientation, gender identity and the few historical guidelines on the issue. Third, the country’s political position related to refugee and migration’s policies.

The problem with stereotypes, sociological and physiological aspects of the LGBT asylum seekers, makes it even harder to achieve the recognition of refugee status based on sexual orientation and/or gender identity. To better understand the vulnerability of the LGBT asylum seekers, in the process of recognizing the refugee status all challenges presented have to be read together.

The human rights norms, that prohibit discrimination, and the principle of equality before the law, influenced the judges from the Human Rights to defend LGBT people who were discriminated. The judgments of the cases, *Dudgeon v. the United Kingdom* (1981)³⁵⁵ and *Toonen v. Australia* (1994)³⁵⁶ were examples of ideas which supported that a person should be free from discrimination based on the sexual orientation.

³⁵⁵ *Dudgeon v. the United Kingdom* (ECtHR, 1981)

³⁵⁶ *Toonen v. Australia*, (UNHRC, 1994).

In parallel, in the nineties, the protection of LGBT people was also made by the International Refugee System, showed in the previous case *Matter of Toboso-Alfonso*³⁵⁷. In this decade LGBT people started to be recognized as “*membership of a particular social group*” and their refugee status was granted. However, achieving protection was never easy for an LGBT asylum seeker, since the Convention does not mention, explicitly, that sexual orientation and gender identity can be a ground of appeal. This gap opened room to divergent interpretations when applying the 1951 Convention and other legislations.

One of the reasons for the divergences between the Courts and the States happened, mostly, because of the long years without guidelines. The States had to deal with a new issue that didn't have a consensus in terms of human rights. This fact made the protection of this category very vulnerable, and the lack of equality concerning to the interpretation and application of the Convention, did not contribute.

It was recently published by UNHCR the first guidelines regarding the specific problems of LGBT asylum seekers. However, La Violette³⁵⁸ well observed that it is an incomplete document, with many gaps. In 2012, the UNHCR also published a guide note hoping to add more consistency to the protection. Unfortunately, it is too soon to see its impact on the LGBT refugee protection.

Some contradictions were observed when analysing the UK. On one hand, the Human Rights system in Europe is used as a foundation to develop the idea of, sexual orientation and gender identity as human right. Moreover, the principle of non-discrimination based on sexual orientation and/or gender identity was mentioned explicitly for the first time on the Charter of Fundamental Rights and Freedom in Europe. It became then legally bound after the Lisbon Treaty. However, it took more than twenty years after the first successful case of *Dudgeon*, to the sexual orientation and gender identity to be treaded and discussed in the Refugee European legal

³⁵⁷ *Matter of Toboso-Alfonso*. (United States Board of Immigration Appeals, 1990).

³⁵⁸ La Violette, 2010, pp.173-2008

framework. Fortunately, the 2004 Directive, explicitly mentioned the sexual orientation term, yet it was putted in a very limited way. In the 2011 Directive the gender identity was also included, but there was no progress relating to its lack of clarity and limitations towards the sexual orientation. The Directive deals with important issues that are relevant to the recognition of the refugee status, especially when regarding the LGBT people and sexual minorities. In general, its legal instrument, when compared to the 1951 convention, is much broader, but still presents some deficiencies and ambiguities that enable a variety of approaches by the MS.

In the UK, although LGBT rights are very developed, in the refugee context this is not the case. Many restrictive measures and practices relating to the method of application, such as the cumulative way explained previously, are blocking the LGBT applicants from granting the refugee status. This happens not only with the provisions regarding to sexual orientation and /or gender identity, but also with others concerning refugees.

As ILGA pointed out, almost a 100% of LGBT claims were denied in UK. The study of cases-law showed that UK has applied, until 2012, very restrictive measures in most of the cases. They have, for example, the list of “*safe countries*” which wrongly contains homophobic countries.³⁵⁹ The UK also considers that, even when it exist a criminal law against homosexuals, this won’t mean necessarily a persecution. They do not attempt on the fact that, when these laws exist, there is a future risk of persecution. Other example of restrictive application and interpretation of the law is the question of “*discretion*”, an excuse used by the UK to deny the refugee status. In 2012, it was decided that this type of justification cannot be valid anymore. However, UK Courts still consider the “*voluntary discreet*”, remaining a reasonable justification to denial the refugee status based on sexual orientation and /or gender identity.

As well as in the EU, where asylum policies are very restrictive, the efforts made by the UK to not accept refugees, were visibly observed and, are reflected on its restrictive measures regarding the migration policy or refugees legislation.

³⁵⁹ Jansen & Spikerboer, 2011,p.24

The idea is that the reluctance in recognising the refugee status based on sexual orientation, in the UK, is not just a problem with these specific categories, but with the general refugee and migration policies. Nevertheless, this research assumes that it is premature to conclude that the denials of the sexuality-based claims are totally linked with the political unwillingness of recognising the refugee in the UK. The protection of sexual orientation and gender identity are very weak in terms of law, historical guidelines, etc. Thus the political field will gain a greater proportion. In this sense the insight of this connection can certainly be an addition for understanding better the obstacles to the recognition of these categories.

In Brazil, even though there are some contradictions between high numbers of homophobic murder and developments on Human Rights concerning sexual orientation and gender identity, the LGBT refugees' protection is not affected. Further, Brazil is demonstrating a positive approach on the recognition of refugee status based on sexual orientation and gender identity.

Comparing the National Refugee Law to the 1951 Convention, the first even though covers a broader definition of refugee, does not cover important issues, such as the Acts of persecution, Actors of persecution, Credibility Assessments, among others.

Nonetheless, after an analysis of the experts opinions and practices it can be concluded that there is a political consensus about the issues mentioned above. Fortunately, most of them had a position very similar to the UNHCR guidelines. However, there were some opinions which were convergent to the justification of "*discretion*". Nevertheless, analysing deeper some cases mentioned, and also taking in consideration the Refugee administrative structure in Brazil, which considers vote being deliberated between different organizations, the restrictive interpretation such as the "*discretion*" seems hard to become alive.

The current research demonstrated that the discourses of human rights and refugees protection on Brazilian International Forums are also a reality. The number of asylum seekers has been increasing and the recognition of refugee's status is relatively satisfactory comparing to other countries. Furthermore, the refugee policy is not as restrictive as it is in the EU and UK. It even offers a guarantee for the people who enter illegally in the country. Thus Brazil, with fewer guidelines and less specific laws, is not applying restrictive interpretations, at least, not concerning the very important topics to the recognition of an LGBT person as a refugee.

Finally, standard among countries is still very difficult to find, especially in cases of sexual orientation and/or gender identity. The refugees in general depend much on the national refugee and migration policies and the LGBT asylum seeker might also encounter others barriers, such as stereotypes, not acceptance of sexual orientation and gender identity as human rights, lack of guidelines or lack of cross cultural knowledge by decision-makers.

In conclusion, the effectiveness of the 1951 Convention in protecting LGBT individuals, who have a well founded-fear of persecution, also includes questions that are not embraced by legal aspects. To find a fair judgment, it is necessary to acknowledge political, administrative and social-cultural aspects.

Appendix

Interview Questions

- In your opinion, are the Convention Relating to the Statute of Refugees (1951) and other Human Rights international instruments effective for the protection of refugees on the grounds of sexual orientation and gender identity? If not, mention the main difficulties.
- Does Brazil recognize the refugee status on the grounds of sexual orientation and gender identity, considering it a “membership of a particular social group”¹, according to clause I A (2) of 1951 Convention?
- In your opinion, are LGBTs themes still considered taboos in the Brazilian society? If so, do you believe that it may be an obstacle to the recognition of that class of refugees?
- Does your Institution foster specific actions that aim facilitating the access to asylum proceedings for those who are escaping from persecutions on the grounds of sexual orientation and/or gender identity? If so, what are they?
- Have you or the Institution you work for ever received or provided training about LGBTs themes in the context of refugees? If so, discourse about it and give your opinion about its quality and the obtained results. Do you know any other training programs in this field?
- In your opinion, do asylum seekers seem to have difficulty in assuming their sexual orientation and/or gender identity and talking about it? If so, is this a challenge in ensuring their protection?

- Do asylum seekers on the grounds of sexual orientation and/or gender identity allege serious and well-founded fear of persecution or discrimination? How do you distinguish discrimination from persecution? To what extent can discrimination be considered persecution?
- In Brazil, does an asylum seeker have to prove persecution to be considered a refugee, or the previous knowledge that there are laws against homosexuality and/or not prohibited discriminatory actions in the country or place of origin is enough to justify the fear of persecution?
- Do those who claim persecution on the grounds of their sexual orientation and/or gender identity convey credibility during the interview? If not, why? What to do when in doubt?
- What kind of criteria does your Institution use to confirm the sexual orientation and/or gender identity? For example, how can one analyze the situation of asylum seekers who have constituted families with persons of the other sex and even so claim to be homosexuals?
- Do those asylum seekers generally claim to have problems with their families or the society? Is the persecution by private agents such as the family accepted, or only the persecution by public agents is valid?
- In your opinion, some possible omission or the fact that someone is leading “a discreet life” on the issue of sexual orientation and/or gender identity in the country or place of origin could be a reason for denial the refugee status?
- Do you know if refugees on the grounds of sexual orientation and/or gender identity have been accepted in Brazil? If you do, would you be able to inform the percentage of recognition among those asylum seekers?

Bibliography

Books and Edited Books

Barbosa, Luciano. P & Hora, José S., *A Polícia Federal e a Proteção Internacional dos Refugiados*. Brasília: Servidéias Comunicação Ltda, 2007.

Demant, Eva; Barreto, Luis T.F.; Leal, Maria L. P.; Almeida, Paulo S.; Leão, Renato Z.R., *Refugio, Migrações e Cidadania*, UNHCR-ACNUR/IMDH, 2006

Ghandhi, S., *Blackstone's International Human Rights Documents*. Eighth Edition. United Kingdom: Oxford University Press, 2012.

Goodwin-Gill, Guy S. & McAdam, Jane, *The refugee in international law*. Third Edition. New York: Oxford University Press, 2007.

Guterres, A., 'A personal appeal from the United Nations High Commissioner for refugees, pp. 1-12 in *The 1951 Convention relating to the status of refugees and its 1967 protocol*. Geneva: UNHCR, 2011.

Kushner & Knox, *Refugee in an Age of Genocide*. London/New York: Routledge, 1999.

Oliva, Janet R., *Sexually Motivated Crimes: Understanding the Profile of the Sex Offender and Applying Theory to Practice*. United States: CRC Press, 2012.

Leão, Renato Z.R., 'O reconhecimento dos refugiados pelo Brasil: Decisões comentadas do CONARE, CONARE-ACNUR, 2007, available at <http://www.acnur.org/biblioteca/pdf/5780.pdf?view=1>

Sumner, I., 'The charter of Fundamental Rights of the European Union and Sexual Orientation', pp. 869-889 in *Family life and human rights*. Utrecht: Gyldendal, 2004.

Vitucci, Maria C., *La Tutela Internazionale Dell' Orientamento Sessuale*. Napoli: Jovene Editore, 2012.

Viviani, A. 'Immigrazione e diritto all'identità personale', pp. 229-270 in *Diritti umani degli immigrati / a cura*. Napoli: Editoriale Scientifica, 2010.

Wintemute, Robert, *Sexual orientation and human rights: The United States Constitution, the European Convention, and the Canadian Charter*. Oxford and New York: Clarendon Press, 1995

Articles and Reports

'We cannot claim any particular Knowledge of the ways of homosexuals, still less of Iranian Homosexuals. The particular problems face those who seek', 87-95 in *Feminist Legal Studies*, vol. 16, 2008.

Abrão, P. & Ramires André, 'Novo perfil do refúgio no Brasil', ACNUR – CONARE, 26 abril 2013.

ACNUR, 'Governo do Rio faz consulta pública sobre plano de atenção a refugiados' 25 abril 2013, available at: <http://www.acnur.org/t3/portugues/noticias/noticia/governo-do-rio-faz-consulta-publica-sobre-plano-de-atencao-a-refugiados/>(consulted on 01 May 2013).

ACNUR, 'Refúgio no Brasil: Uma Análise Estatística (2010-2012)' available at: http://www.geografia.seed.pr.gov.br/arquivos/File/noticias_2013/Refugio_no_Brasil_2010_2012.pdf (consulted on 15 May 2013).

Americas - Miscellaneous, Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama 22 November 1984, available at: <http://www.refworld.org/docid/3ae6b36ec.html> (consulted on 13 May 2013).

Carvalho, Henrique R., 'LGBTB refugees: the Brazilian case', p. 19 in Forced Migration review, no 42, 2013.

El-Enany, 'Who is the New European Refugee?'. p. 323 in LSE Legal Studies Working Paper no 19/2007 2008, December 2007 available at: SSRN: <http://ssrn.com/abstract=1033334>

European Legal Network on Asylum (ELENA) /European Council on Refugees and Exiles (ECRE), 'The Impact of the EU Qualification Directive on International Protection' October 2008.

Fleeing Homophobia, Jansen, Sabine & Spijkerboer Thomas, 'Asylum claims related to sexual orientation and gene Identity in Europe, September 2011.

George L., 'The ECHR as a Living Instrument: Its Meaning and Legitimacy', 14 March 2012 available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2021836 (consulted on 07 July 2013).

Heath, R. Jeffries and S. Pearce, 'Home Office Statistical Bulletin: Asylum Statistics 2005, 22 August 2006.

Human Rights Watch, 'Hated to Death: Homophobia, Violence, and Jamaica's HIV/AIDS Epidemic' 16 November 2004 available at <http://www.hrw.org/reports/2004/11/15/hated-death> (consulted on 02 July 2013).

ILGA- EUROPE., Schutzer , Mathew, 'Status of Asylum Law in EU Member States', 2010.

ILGA Report, Bruce-Jones, Eddie & Itaborahy, Lucas P., 'State-Sponsored Homophobia: A World Survey of Laws Criminalising Same-Sex Sexual Acts Between Consenting Adults', may 2011, available at: www.ilga.org. (consulted on 10 June 2013).

International Commission of Jurists (ICJ), 'Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity', March 2007, available at: <http://www.refworld.org/docid/48244e602.html> (consulted on 6 July 2013).

James C Hathaway & Michelle Foster 'Membership of a Particular Social Group (Discussion Paper No. 4 Advanced Refugee Law Workshop International Association of Refugee Law Judges Auckland, New Zealand, October 2002)', pp. 477-491 in *International Journal of Refugee Law*, vol. 15 no 3, 2003.

Johnson, Toni A. M., 'On Silence, Sexuality and Skeletons: Reconceptualizing Narrative in Asylum Hearings', pp. 57-78 in *Social & Legal Studies March*, vol. 20, 2010.

Jordan, S. Morrissey, C., "On what grounds?" LGBT asylum claims in Canada, p.13 in *Forced Migration review*, no 42, 2013.

LaViolette, Nicole, 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: a Critical Commentary', pp. 173-208 in *International Journal of Refugee Law*, vol. 22, no 2, 2010.

Mackenzie, Cailin C.E.; Paradis, Evelyne; Agius, Silvan; Lavrikovs, Juris, *ILGA-Europe: Annual Review of the Human Rights situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe*, 2012.

Millbank, J. & Berg, L., 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants', pp.195-223 in *Journal of Refugee Studies*, vol 22, no 2, 2009.

Millbank, J., 'The Ring of truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations', pp. 1-33 in *International Journal of Refugee Law*, vol. 21, no 1, 2009.

Nathanael Miles, 'No Going Back, Lesbian and Gay People and the Asylum System', Stonewall, May 2010, available at: www.stonewall.org.uk.

O ACNUR no Brasil, available at: <http://www.acnur.org/t3/portugues/informacao-geral/o-acnur-no-brasil/> (consulted on 01 July 2013).

O'Flaherty, Michael & Fisher, John, 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles', p. 230 in *Human Rights Law Review*, vol. 8, no 2, 2008.

OAS, 'IACHR Condemns Murder of Trans Women in Brazil', available at: http://www.oas.org/en/iachr/media_center/PReleases/2012/113.asp (consulted on 02 July 2013).

Pontes, Nádía 'Lei brasileira para refugiados é considerada exemplar' available at: <http://www.dw.de/lei-brasileira-para-refugiados-%C3%A9-considerada-exemplar/a-5167314-1>(consulted on 20 May 2013).

Refugee Studies Centre, Webels, J., 'Sexual orientation in Refugee Status Determination', April 2011, available at: http://reliefweb.int/sites/reliefweb.int/files/resources/Full_Report_258.pdf. (consulted on 10 June 2013).

Segundo relatório Nacional do Estado Brasileiro apresentado no mecanismo de revisão periódica universal do Conselho de Direitos Humanos das Nações Unidas, 2012 available at: http://www.sedh.gov.br/cooperacao/revisao-periodica-universal/Relatorio%20Nacional_RPU_Brasil_port_VERSaO_FINAL.pdf (consulted on 1 July 2013).

Stonewall, Nathanael Miles, 'No Going Back, Lesbian and Gay People and the Asylum System', May 2010, available at: www.stonewall.org.uk.

UNHCR - ACNUR/IMDH, Lei n° 9.474 e Coletânea de Instrumentos de Proteção Internacional dos Refugiados , abril 2012.

University of Minnesota, Human Rights Library, ‘ Study guide, Sexual Orientation and Human Rights’, 2003, available at: <http://www1.umn.edu/humanrts/edumat/studyguides/sexualorientation.html> (consulted on 14 June 2013).

Internet Websites

ECRE, ‘The Promise of Protection: Progress Towards a European Asylum Policy since the Tampere Summit 1999’, 2001.

European Court of Human Rights, ‘Factsheet - Sexual Orientation Issues’, May 2013 available at: http://www.echr.coe.int/Documents/FS_Sexual_orientation_ENG.pdf (consulted on 02 June 2013).

<http://www.bia.homeoffice.gov.uk/sitecontent/newsarticles/annualasylumapplications> (consulted on 01 June 2013).

ILGA, ‘ILGA applauds the first ever Report on Sexual Orientation and Gender Identity issued by the UN High Commissioner for Human Rights.’ Available at: <http://ilga.org/ilga/en/article/njkiWuq1C5>. (consulted on 15 June 2013).

ILGA, ‘May 17 th is the Intl Day against Homophobia’, 5 May 2005. Available at: <http://ilga.org/ilga/en/article/546> (consulted on 10 Jun 2013).

ILGA-Europe, ‘Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe’, 2011 available at: http://www.ilga-europe.org/home/news/for_media/media_releases/ilga_europe_launches_its_very_first_annual_review_of_human_rights_situation_lgbti_in_europe_and_updated_rainbow_map (consulted on 3 May 2013).

ILGA-EUROPE, 'UK Lesbian & Gay Immigration Group, failing the grade: Home Office initial decisions on lesbian and gay claims for asylum', 2010, available at: <http://uklgig.org.uk/docs/Failing%20the%20Grade%20UKLGIG%20April%202010.pdf> (consulted on 05 June 2013).

ILGA-Europe, ILGA-Europe welcomes the adoption of a groundbreaking EU asylum directive covering both sexual orientation and gender identity, 27 October 2011, http://ilga.org/ilga/en/article/ex_4807ffaa-0168-11e1-9eda-feff00005bea (Consulted on 03 Jun 2013).

Intergroup on LGBT Rights, 'European Parliament: World Health Organization must stop treating transgender people as mentally ill' Available at: <http://www.lgbt-ep.eu/press-releases/who-must-stop-treating-transgender-people-as-mentally-ill/> (consulted on 10 June 2013).

Promising protection, 2001, p.9, available at:

UK Government, 'New Vision for Refugees', 07 March 2003, available at: http://www.proasyl.de/texte/europe/union/2003/UK_NewVision.pdf (consulted on 7 July 2013).

UK Home Office, 'Operational Guidance Note: Jamaica', 03 May 2012, vol. 9.0, paragraph 3.7.7 available at: <http://www.refworld.org/docid/4dc141ff2.html> (consulted 02june 2013).

UK Lesbian & Gay Immigration Group, available at: <http://www.uklgig.org.uk/>.

Cases-law

Alekseyev v. Russia [2010] App no 4916/07, 25924/08 and 14599/09 (ECtHR).

Canada (Attorney General) v Ward [1993] 2 S. C. R. 689 (Canada: Supreme Court).

Dudgeon v United Kingdom [1981] Appl. 7525/76 (ECtHR).

DW (Jamaica) v. Secretary of State for the Home Department [2005] GG UKAIT 00168 (United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority).

Hernandez-Montiel v INS [2000] 225 F. 3d 1084 (United States Court of Appeals for the Ninth Circuit).

HJ (Iran) (FC) v. Secretary of State for the Home Department and HT (Cameroon) v. Secretary of State for the Home Department [2010] EWCA Civ 172 (United Kingdom: The Supreme Court).

HJ (Iran) and HT (Cameroon) v Secretary of State for the Home Department [2010]

EWCA Civ 172 (United Kingdom: The Supreme Court).

Islam (A.P.) v. Secretary of State for the Home Department

Matter of Acosta [1985] A-24159781 (United States Board of Immigration appeals).

Matter of Toboso-Alfonso [1990] A-23220644 (United States Board of Immigration Appeals)

Minister for Immigration and Ethnic Affairs v Guo Wei Rong and Anor [1997] S 151 1996 (Australia: High Court).

OO (Sudan) and JM (Uganda) v. Secretary of State for the Home Department [2009]

EWCA Civ 1432 (United Kingdom: Court of Appeal/ England and Wales).

Rees v UK [1985] App no 9532/81 (ECtHR).

Regina v. Immigration Appeal Tribunal and another Ex Parte Shah (A.P.) (Conjoined Appeals) [1999] Session 1998-1999 (United Kingdom: House of Lords).

Salkeld v. Gonzales [2005] 420 F. 3d 804 (United States Court of Appeals for the Eighth circuit).

SW (Jamaica) v. Secretary of State for the Home Department, [2011] CG UKUT 00251 (United Kingdom: Upper Tribunal /Immigration and Asylum Chamber).

Toonen v. Australia [1994] CCPR/C/50/D/488/1992 (UNHRC).

Van Kuck v. Germania [2003] App no 35968/97 (ECtHR).

X. v. Turkey [2012] App no 24626/09 (ECtHR).

National, Regional and International Documents

Comitê Estadual Intersetorial de Políticas de Atenção aos Refugiados do Rio de Janeiro, Plano Estadual de Políticas de Atenção aos(às) Refugiados(as), p.1, available at: http://download.rj.gov.br/documentos/10112/556509/DLFE47406.pdf/plano_estadual_politicas_atencao_refugiados_consulta_publica.pdf.pdf, (consulted on 02 July 2013).

Council Directive (EC) 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted [2004] OJ L304/12;L304/14;L304/16;L304/17.

Council Directive (EC) 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status [2005] OJ

Council Directive (EC) 2011/95/EU of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ

Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html> (consulted 02 June 2013).

ECRE, Comments from the European Council on refugees and exiles on the European Commission. Proposal to recast the Qualification Directive, March 2010.

ECRE, Position on the Interpretation of Article 1 of the Refugee Convention, 1 September 2000, available at:
<http://www.refworld.org/docid/3ae6b33c4.html> (consulted 03 June 2013).

European Commission, on the application of Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection, 2010.

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) available at: <http://www.refworld.org/docid/3ae6b3aa0.html> (consulted 9 July 2013).

L 326/13; L 326/34.

L 337/9, 337/10, 337/11, 337/16.

Presidência da República Casa Civil / Subchefia para Assuntos Jurídicos, Lei n° 9.474, 22 July 1997, available at: http://www.planalto.gov.br/ccivil_03/Leis/L9474.htm (consulted on 15 May 2013).

The Charter of Fundamental Rights of the European in Union Official Journal of the European Communities [2000] OJ C364/1 – C364/22.

UN General Assembly, '*International Covenant on Civil and Political Rights*', 16 December 1966, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> (consulted on 03 June 2013).

UNCHR, '*The State of the World's Refugees: In Search of Solidarity, 2012*', available at: <http://www.refworld.org/docid/5100fec32.html> (consulted 10 June 2013).

UNHCR, '*Guidelines on international protection no. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*', Un Doc HCR/GIP/12/09, 23 October 2012, available at: <http://www.refworld.org/pdfid/50348afc2.pdf>. (consulted on 02 July 2013).

UNHCR, '*Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*', Un Doc HCR/GIP/02/01, 07 May 2002, available at: <http://www.refworld.org/docid/3d36f1c64.html> (consulted on 6 July 2013).

UNHCR, '*UNHCR Manual on Refugee Protection and the European Convention on Human Rights (Abril 2003, updated august 2006)*', August 2006, available at: <http://www.refworld.org/docid/3f4cd5c74.html> (consulted on 10 June 2013).

UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees' UN Doc CR/IP/4/Eng/REV.1 , January 1992.

UNHCR, 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity', 21 November 2008, available at: http://www.justice.gov/eoir/vll/benchbook/resources/UNHCR_Guidelines_Sexual_Orientation.pdf (consulted on 02 July 2013).

UNHRC, 'Human rights, sexual orientation and gender identity: resolution / adopted by the Human Rights Council' UN Doc A/HRC/RES/17/19, 14 July 2011, available at: <http://www.refworld.org/docid/512f0bd22.html> (consulted on 02 July 2013).

UNHRC, 'Report of the United Nations High Commissioner for Human Rights on the Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity' UN Doc A/HRC/19/41, 17 November 2011, p. 3.

Interviews

Interview with Alice, lawyer, Alliance for Refugee, Paraíso, 16 Jun 2013.

Interview with Fabrício Toledo de Souza, lawyer, Caritas RJ, Rio de Janeiro, 10 Jun 2013.

Interview with Gabriel Gualano de Godoy, UNHCR Protection Officer –Brazil, UNHCR, Brasília & Raquel Trabazo, UNHCR Protection Assistant, UNHCR-Brazil, 20 Jun 2013.

Interview with Laura, lawyer, Proteção para Refugiados, Paraíso, 02 July 2013.

Interview with Rosita Miseli, Director, IMDH, Brasília, 02 July 2013.

Interview with Vivian Vivian Holzacker, lawyer, Caritas SP, Sao Paulo, 9 Jul 2013.

Email exchange

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