

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

Analysing Brazil and the United Kingdom

Fernanda Estevão Pollini

Abstract: In some countries, LGBT people suffer oppression. They are at risk of suffering 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 research has focused on a few countries. South American States, such as Brazil, have little information about it, even though recently the number of asylum seekers has increased.

The purpose of this thesis is to identify what the main obstacles for the recognition of a refugee status based on these grounds are and why there is no common standard among the States. Such an analysis is relevant to better acknowledge the vulnerability of LGBT asylum-seekers. The research focuses 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 countries' refugee policies are relevant to comprehend the denial or the recognition of the refugee status of LGBT people.

Keywords: LGBT, asylum-seekers, refugee status, Brazil, United Kingdom

I. 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 that 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 example would be the Sexual Offences Act of 1956, 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 (...)*".²

¹ International Commission of Jurists (ICJ), 'Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity' [2007].

² Sexual Offences Act 1956.

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, predominantly at the international level. Some regional systems and instruments have been protecting the right of freedom of sexual orientation and gender identity, such as 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.

There are three main points that will illustrate 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 countries. Second, is the reinforcement of the non-discrimination principle and equality before the law. Third, is to emphasize that the studies about the recognition of refugee status based on sexual orientation and gender identity is a relatively new area of research, especially in South American countries like Brazil, where there are few publications about this matter. Furthermore, Brazil is one of the 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 it will be illustrated and explained the unfortunate situation of the LGBT individuals in the world and how the perception of sexual orientation and gender identity has been developed, mostly in legal terms. In order to identify and study the primary obstacles in the recognition of a refugee status based on sexual orientation and/or gender identity it will be mainly discussed the 1951 Convention. Besides, relevant case-law, research from experts in the field and the United Nations High Commissioner for refugee (UNHCR) guidelines are also going to be analysed with the intention to find and understand other specific problems encountered by LGBT asylum seekers.

After identifying the core difficulties encountered by LGBT asylum seekers, the second chapter will focus on the analysis of the developments of the European System and the United Kingdom on the issue of sexual orientation and gender identity. Then, the attention will be focus on the refugee law in Europe and, on the position of the UK in legal and practical terms. It will be included, as well, a section with a political vision upon the refugee policy in the EU and the UK in order to add a new perspective to the issue and raise some important questions for deeper reflexion.

In the third chapter, Brazil will be analysed, beginning with an explanation of the developments on the right of freedom of sexual orientation and gender identity within the country. Secondly, it will be examined how the

³ *Matter of Toboso-Alfonso* [1990] A-23220644 United States Board of Immigration Appeals.

contents of the 1951 Convention was transferred into Brazil's national legislation. In Brazil, there is a lack of publication about this specific topic. Therefore, it was chosen 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 Caritas Rio de Janeiro, Institute of Migration and Human Rights (IMHR) and others institutions that did not allow to publish their names. 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 status based on sexual orientation and/or gender identity. Last but not least, it will be included a more political view on the refugee policies in Brazil.

In the last section, it will be presented the conclusions. In short, the outcome of the research is 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. The main objective and hope is that this research will add to a deeper understanding of the reasons for the differences among the countries.

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

A. A worldwide picture on the situation of individuals LGBT

In order to give proper attention to the alarming situation of the LGBT individuals in the world, it was opted to briefly show, in the first part of this 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 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) and some federative states of Brazil and the federal district.¹⁰ The prohibition of discrimi-

⁴ ILGA, 'ILGA applauds the first ever Report on Sexual Orientation and Gender Identity issued by the UN High Commissioner for Human Rights', 18 December 2011 <<http://ilga.org/ilga/en/article/njkiWuq1C5>> accessed 15 June 2013.

⁵ General Assembly - 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' [2011], UN Doc A/HRC/19/41, 3.

⁶ Ibid.

⁷ Bruce-Jones, Eddie and Itaborahy, Lucas P, 'State-Sponsored Homophobia: A World Survey of Laws Criminalising Same-Sex Sexual Acts between Consenting Adults' (ILGA Report may 2011) < www.ilga.org.> accessed 10 June 2013, 9-10.

⁸ Ibid 39.

⁹ Ibid 10.

¹⁰ 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). Ibid 12.

nation in employment based solely on gender identity exists in only 19 countries.¹¹ Constitutional prohibition on sexual orientation discrimination appears in only 7 countries, including some federal states of Brazil and the federal district.¹²

It is relevant to mention the conclusion of Wintemute about the importance of the political consensus around discrimination on the basis of sexual orientation and gender identity. 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"*.¹³

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.¹⁴

Quite frequently discrimination is present in family and community structures, which can represent an obstacle for LGBT persons enjoy fully their fundamental rights. 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 psychiatric institutions, forced to marry, forced to relinquish children, punished for activist work and subjected to attacks on personal reputation"*.¹⁵ Moreover, the laws which have criminalized the LGBT 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.¹⁶

Effectively, it can be observed that not many countries have taken adequate measures to ensure the protection of LGBT people. 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. In summary, some LGBT persons are unable to fully exercise and enjoy their human rights because of their sexual orientation and/or gender identity. 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.¹⁷

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"*.¹⁸ Next, it will be analyzed the extent in which the "condition" of sexual orientation and/or gender identity is recognized as a prohibited ground of discrimination in the international human rights law and how this recognition might influence the inclusion of this specific category in the refugee protection.

¹¹ Ibid 13.

¹² Alagoas (2001), Distrito Federal (1993), Mato Grosso (1989), Pará (2003), Santa Catarina (2002), Sergipe (1989). Ibid.

¹³ Robert Wintemute, *Sexual orientation and human rights: The United States constitution, the European Convention and the Canadian Charter* (Clarendon Press 1995) 251.

¹⁴ General Assembly - 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' [2011], UN Doc A/HRC/19/41, 16.

¹⁵ Ibid 3.

¹⁶ Ibid 16-21.

¹⁷ Ibid 8.

¹⁸ Maria Vitucci, *La tutela internazionale dell'orientamento sessuale*, (Jovene Editore 2012) 153.

B. 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.¹⁹

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.²⁰ The judgment of the well-known case *Dudgeon v. the United Kingdom* (1981)²¹ 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.²² The Court held that criminalization of homosexuality affects the private life of the claimant (art 8)²³.

Another well-known example, at the United Nations (UN) level, was the case of *Toonen v. Australia* in 1994.²⁴ Here, the United Nations Human Rights Committee (UNHRC) undoubtedly declared that the prohibition of discrimination, under art 2²⁵ and art 26²⁶ of the International Covenant on Civil and Political Rights (ICCPR) (1966) should be interpreted to include the sexual orientation ground.²⁷ 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.²⁸

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 Children's 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).²⁹

In 2003, the rights of transsexuals were affirmed in the case of *Van Kuck v. Germania* at the ECtHR. 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".³⁰

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 orien-

¹⁹ ILGA, 'May 17th is the Intl Day against Homophobia', 04 May 2005 <<http://ilga.org/ilga/en/article/546>> accessed on 10 June 2013.

²⁰ Ian Carry-Sumner, 'The Charter of Fundamental Rights of the European Union and Sexual Orientation' in Lodrup P and Modvar E (eds), *Family life and human rights* (Gyldendal 2004) 869-889.

²¹ [1981] Appl. No. 7525/76 ECtHR.

²² University of Minnesota, Human Rights Library, 'Study guide, Sexual Orientation and Human Rights' (Human Rights Education Associates -HREA,2003) <<http://www1.umn.edu/humanrts/edumat/studyguides/sexualorientation.html>> accessed 14 June 2013.

²³ European Convention of Human Rights and Fundamental Freedom, art 8.

²⁴ [1994] CCPR/C/50/D/488/1992 UNHRC.

²⁵ "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". International Covenant on Civil and Political Rights, art 2.

²⁶ "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". International Covenant on Civil and Political Rights, art 26.

²⁷ Maria Vitucci, *La tutela internazionale dell'orientamento sessuale*, (Jovene Editore 2012) 245.

²⁸ Ibid 11.

²⁹ Ibid 10.

³⁰ *Van Kuck v. Germania*, [1003] No. 35968/97 ECtHR 12.

tation.³¹ 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 on behalf of a cross-regional grouping of 32 States.³² In 2007, the "Yogyakarta Principle",³³ drafted by human rights experts, was published. This document, despite of being a soft law, helped to reinforce the application of the right of 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".³⁴ 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.³⁵ In 2008, the UNHCR finally published the first guidance note on "Refugee claims relating to Sexual Orientation and Gender Identity".³⁶ 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.³⁷ In that same year, the UNHCHR published their first report on this issue, as we have previously discussed. In 2012, another UNHCR guideline was added regarding the same issue which contained more recommendations.³⁸

These facts demonstrate how relatively "new" this issue is in terms of recognition of sexual orientation and gender identity as human rights and in terms of application of the international human rights law. In some countries or regions within the EU this notion has developed better. In contrast, Syria and others 59 States are against considering this topic as a human rights matter.³⁹ 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.⁴⁰ This demonstrates that the theme of universal rights is still not a consensus.

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.⁴¹ 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.⁴²

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

³¹ Maria Vitucci, *La tutela internazionale dell'orientamento sessuale*, (Jovene Editore 2012) 13.

³² Michael O'Flaherty and John Fisher, 'Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles' (2008) 8 [2] Human Rights Law Review 230.

³³ International Commission of Jurists (ICJ), 'Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity' [2007].

³⁴ Ibid 27.

³⁵ Ibid.

³⁶ UNHCR, 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity' (21 November 2008) <http://www.justice.gov/eoir/vll/benchbook/resources/UNHCR_Guidelines_Sexual_Orientation.pdf> accessed 02 July 2013.

³⁷ UNHRC, 'Human rights, sexual orientation and gender identity: resolution / adopted by the Human Rights Council' [2011], UN Doc A/HRC/RES/17/19.

³⁸ 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' [2012] Un Doc HCR/GIP/12/09.

³⁹ Maria Vitucci, *La tutela internazionale dell'orientamento sessuale*, (Jovene Editore 2012) 14.

⁴⁰ Intergroup on LGBT Rights, 'European Parliament: World Health Organization must stop treating transgender people as mentally ill', 29 September 2011 <<http://www.lgbt-ep.eu/press-releases/who-must-stop-treating-transgender-people-as-mentally-ill/>> accessed on 10 June 2013.

⁴¹ 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).

⁴² Maria Vitucci, *La tutela internazionale dell'orientamento sessuale*, (Jovene Editore 2012) 2-16.

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.

C. 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)⁴³ and the 1967 Protocol⁴⁴ 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.⁴⁵

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*".⁴⁶

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 to determine who should be included in this category and, therefore, be classified under a refugee status. The Convention does not include, explicitly, the grounds for sexual orientation and gender identity, so the question is: should LGBT individuals 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 noted, the international protection against discrimination based on sexual orientation and gender identity is still weak, as a result of an incomplete 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 ad-

⁴³ Sandy Ghandhi, *International Human Rights Documents* (8th edn, Oxford University Press 2012) 18-27.

⁴⁴ *Ibid* 28-29.

⁴⁵ António Guterres, *The 1951 Convention relating to the status of refugees and its 1967 protocol* (UNHCR 2011) 1-12.

⁴⁶ General Assembly, 'Convention Relating to the Status of Refugees' [1951] United Nations, Treaty Series 189/137.

⁴⁷ *Ibid*, art I A (2).

⁴⁸ James C Hathaway and 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) (2003) 15 [3] *International Journal of Refugee Law* 477.

⁴⁹ Thiago D Oliva, 'Minorias Sexuais Enquanto "Grupo Social" e o Reconhecimento do Status do Refugiado no Brasil', (2012)

<http://www.acnur.org/t3/fileadmin/Documentos/portugues/eventos/Minorias_Sexuais_enquanto_Grupo_Social.pdf?view=1 accessed 04 July 2013, 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". Janna Weibels, 'Sexual orientation in Refugee Status Determination', (2011) *Refugee Studies Centre, Oxford Department of International Development, University of Oxford* 73, 9.

vantageous 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. 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 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, it will be considered 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 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

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. Ibid.

⁵² Ibid 48.

⁵³ Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, (3rd edn, Oxford University Press 2007) 76.

⁵⁴ Ibid 74.

⁵⁵ Ibid 76.

⁵⁶ Ibid 74.

This opinion is supported by the development of the jurisprudence around the interpretation of 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 The 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", which required protection because gender discrimination 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?

The UNHCR upholds that 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.

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 four 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*

⁵⁷ Thiago D Oliva, 'Minorias Sexuais Enquanto "Grupo Social" e o Reconhecimento do Status do Refugiado no Brasil', (2012) <http://www.acnur.org/t3/fileadmin/Documentos/portugues/eventos/Minorias_Sexuais_enquanto_Grupo_Social.pdf?view=1 accessed 04 July 2013, 6.

⁵⁸ Ibid.

⁵⁹ Ibid 10.

⁶⁰ Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, (3rd edn, Oxford University Press 2007) 76.

⁶¹ Ibid.

⁶² 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' [2002], Un Doc HCR/GIP/02/01, 2.

⁶³ [1990] A-23220644 United States Board of Immigration Appeals.

⁶⁴ Ibid.

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 homosexual, the government had the perception that he was homosexual. Therefore, he would be persecuted.

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* (2005). 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 group⁷³: The Canadian case *Canada (Attorney General) v Ward* (1993), the Australian case *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) and the UK case *Islam (A.P.) v. Secretary of State for the Home Department Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.)* (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 terror-

⁶⁵ Ibid.

⁶⁶ Thiago D Oliva, 'Minorias Sexuais Enquanto "Grupo Social" e o Reconhecimento do Status do Refugiado no Brasil', (2012) <http://www.acnur.org/t3/fileadmin/Documentos/portugues/eventos/Minorias_Sexuais_enquanto_Grupo_Social.pdf?view=1 accessed 04 July 2013, 15.

⁶⁷ [2005] No 02-72651 United States Court of Appeals for the Ninth Circuit.

⁶⁸ [2000] A72-994-275 United States Court of Appeals for the Ninth Circuit.

⁶⁹ Thiago D Oliva, 'Minorias Sexuais Enquanto "Grupo Social" e o Reconhecimento do Status do Refugiado no Brasil', (2012) <http://www.acnur.org/t3/fileadmin/Documentos/portugues/eventos/Minorias_Sexuais_enquanto_Grupo_Social.pdf?view=1 accessed 04 July 2013, 716-17.

⁷⁰ Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law*, (3rd edn, Oxford University Press 2007) 77.

⁷¹ Millbank Jenni, 'The Ring of truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations' (2009) 21 [1] International Journal of Refugee Law 1-33.

⁷² Ibid.

⁷³ Janna Webels, 'Sexual orientation in Refugee Status Determination', (2011) Refugee Studies Centre, Oxford Department of International Development, University of Oxford 73, 9.

⁷⁴ *Canada (Attorney General) v. Ward* [1993] 2 SCR 689 SCC.

ist 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 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, the main arguments taken from the "Matters of Acosta" case, which illustrates the doctrine of the *ejusdem generis* approach (protected characteristics)⁷⁷ is very relevant because it was concluded 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.

2. The UNHCR's guidelines on social group

In order to create a standard for the interpretation of social group, the UNHCR published in 2002 the guidelines on the "membership of a particular social group" in context with the 1951 Convention and 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 art 1 A (2). (...) the term membership of a particular social group

⁷⁵ *Applicant A and Another v Minister for Immigration and Ethnic Affairs and Another* [1997] HCA.

⁷⁶ Janna Webels, 'Sexual orientation in Refugee Status Determination', (2011) Refugee Studies Centre, Oxford Department of International Development, University of Oxford 73, 9.

⁷⁷ James C Hathaway and 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) (2003) 15 [3] International Journal of Refugee Law 480.

⁷⁸ *Matter of Acosta* [1985] A-24159781 United States Board of Immigration Appeals.

⁷⁹ *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] Session 1998-99 UKHL-Judicial Committee (Lord Steyn).

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, the 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

The 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 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 pre-condition 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

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

⁸⁰ 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' [2002], Un Doc HCR/GIP/02/01, para 3.

⁸¹ Ibid para 6.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid para 7.

⁸⁵ Ibid para 8.

⁸⁶ Ibid para 11.

⁸⁷ Ibid para 13.

⁸⁸ Ibid para 15.

⁸⁹ James C Hathaway and 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) (2003) 15 [3] International Journal of Refugee Law 484.

⁹⁰ Ibid 487.

⁹¹ Ibid 485.

⁹² Ibid 490.

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.

The 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

D. 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.

The 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 Handbook,¹⁰³ they recommend applying the

⁹³ Nicole La Violette, 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: a Critical Commentary' (2010) 22 [2] International Journal of Refugee Law 189.

⁹⁴ Ibid 191.

⁹⁵ Ibid.

⁹⁶ Ibid 192-193.

⁹⁷ 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' [2012], Un Doc HCR/GIP/12/09, para 45.

⁹⁸ Ibid, para 1.

⁹⁹ UNHCR, 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity' (21 November 2008)

<http://www.justice.gov/eoir/vll/benchbook/resources/UNHCR_Guidelines_Sexual_Orientation.pdf> accessed 02 July 2013, para 7.

¹⁰⁰ Janna Webels, 'Sexual orientation in Refugee Status Determination', (2011) Refugee Studies Centre, Oxford Department of International Development, University of Oxford 73, 40.

¹⁰¹ Nicole La Violette, 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: a Critical Commentary' (2010) 22 [2] International Journal of Refugee Law 193.

¹⁰² Millbank Jenni and Berg Laurie 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants' (2009) 22 [2] Journal of Refugee Studies 196.

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' [1992] UN Doc CR/IP/4/Eng/REV.1.

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 highlighted the same point but also added that it is unsuitable to request a physical demonstration by photo, in order to prove the individual sexual orientation. In the follow words: "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

In regards to the development of these stereotypes, the 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

¹⁰⁴ UNHCR, 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity' (21 November 2008)

<http://www.justice.gov/eoir/vll/benchbook/resources/UNHCR_Guidelines_Sexual_Orientation.pdf> accessed 02 July 2013, para 35.

¹⁰⁵ 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' [2012] Un Doc HCR/GIP/12/09, para 64.

¹⁰⁶ Millbank Jenni, 'The Ring of truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations' (2009) 21 [1] International Journal of Refugee Law 2.

¹⁰⁷ Ibid 1-33; Millbank Jenni and Berg Laurie 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants' (2009) 22 [2] Journal of Refugee Studies 195-223.

¹⁰⁸ Millbank Jenni and Berg Laurie 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants' (2009) 22 [2] Journal of Refugee Studies 197.

¹⁰⁹ Millbank Jenni, 'The Ring of truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations' (2009) 21 [1] International Journal of Refugee Law 5.

¹¹⁰ Ibid.

¹¹¹ Barry O' Leary, 'We cannot claim any particular Knowledge of the ways of homosexuals, still less of Iranian Homosexuals. The particular problems face those who seek Asylum on the Basis of Their Sexual Identity', [2008] 16 Feminist Legal Studies 94.

¹¹² "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". Millbank Jenni and Berg Laurie 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants' (2009) 22 [2] Journal of Refugee Studies 200.

¹¹³ UNHCR, 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity' (21 November 2008)

<http://www.justice.gov/eoir/vll/benchbook/resources/UNHCR_Guidelines_Sexual_Orientation.pdf> accessed 02 July 2013, para 36.

¹¹⁴ Nicole La Violette, 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: a Critical Commentary' (2010) 22 [2] International Journal of Refugee Law 194.

¹¹⁵ UNHCR, 'Guidelines on international protection no. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of art 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees' [2012], Un Doc HCR/GIP/12/09, para 62.

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 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 Violette considers, with reason, that this omission is a failure of the guideline.

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, sexu-

¹¹⁶ Millbank Jenni, 'The Ring of truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations' (2009) 21 [1] International Journal of Refugee Law 3-4.

¹¹⁷ 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' [2012], Un Doc HCR/GIP/12/09, para 63.

¹¹⁸ Millbank Jenni and Berg Laurie 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants' (2009) 22 [2] Journal of Refugee Studies 196.

¹¹⁹ UNHCR, 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity' (21 November 2008)

<http://www.justice.gov/eoir/vll/benchbook/resources/UNHCR_Guidelines_Sexual_Orientation.pdf> accessed 02 July 2013, para 38.

¹²⁰ Nicole La Violette, 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: a Critical Commentary' (2010) 22 [2] International Journal of Refugee Law 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, 'Guidelines on international protection no. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of art 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees' [2012], Un Doc HCR/GIP/12/09, 4-5.

¹²² Ibid 2.

¹²³ UNHCR, 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity' (21 November 2008)

<http://www.justice.gov/eoir/vll/benchbook/resources/UNHCR_Guidelines_Sexual_Orientation.pdf> accessed 02 July 2013, para 13.

¹²⁴ UNHCR, 'Guidelines on international protection no. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of art 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees' [2012], Un Doc HCR/GIP/12/09, para 63 vi.

¹²⁵ Millbank Jenni, 'The Ring of truth': A Case Study of Credibility Assessment in Particular Social Group Refugee Determinations' (2009) 21 [1] International Journal of Refugee Law 1-3.

al 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

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, reinforces 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

¹²⁶ UNHCR, 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity' (21 November 2008) <http://www.justice.gov/eoir/vll/benchbook/resources/UNHCR_Guidelines_Sexual_Orientation.pdf> accessed 02 July 2013, para 10.

¹²⁷ Nicole La Violette, 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: a Critical Commentary' (2010) 22 [2] International Journal of Refugee Law 185.

¹²⁸ Ibid.

¹²⁹ Ibid.

¹³⁰ UNHCR, 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity' (21 November 2008) <http://www.justice.gov/eoir/vll/benchbook/resources/UNHCR_Guidelines_Sexual_Orientation.pdf> accessed 02 July 2013, para 11.

¹³¹ Nicole La Violette, 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: a Critical Commentary' (2010) 22 [2] International Journal of Refugee Law 185.

¹³² UNHCR, 'Guidelines on international protection no. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of art 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees' [2012], Un Doc HCR/GIP/12/09, para 21.

¹³³ UNHCR, 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity' (21 November 2008) <http://www.justice.gov/eoir/vll/benchbook/resources/UNHCR_Guidelines_Sexual_Orientation.pdf> accessed 02 July 2013, para 27.

¹³⁴ Ibid 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 level.¹³⁶ 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 experiences are often not well known or publicized.¹⁴¹ After this important acknowledgment, La Violette advises decision-makers to thoughtfully consider the reasons why reports on persecution are not available.¹⁴² In 2012, the 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 in which one person lives, can influence whether to hide or not, its 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

¹³⁵ Nicole La Violette, 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: a Critical Commentary' (2010) 22 [2] International Journal of Refugee Law 198.

¹³⁶ One example is Jamaica, where there are numerous violent and abusive incidents by the police authorities, information published by: Hated to Death: Homophobia, Violence, and Jamaica's HIV/AIDS Epidemic, (Human Rights Watch, 16 November 2004) < <http://www.hrw.org/reports/2004/11/15/hated-death> > accessed 02 July 2013.

¹³⁷ General Assembly - 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' [2011], UN Doc A/HRC/19/41, 9.

¹³⁸ Janna Webels, 'Sexual orientation in Refugee Status Determination', (2011) Refugee Studies Centre, Oxford Department of International Development, University of Oxford 73, 37.

¹³⁹ Ibid.

¹⁴⁰ Nicole La Violette, 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: a Critical Commentary' (2010) 22 [2] International Journal of Refugee Law 173.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ UNHCR, 'Guidelines on international protection no. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of art 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees' [2012], UN Doc HCR/GIP/12/09, para 66.

¹⁴⁴ Nicole La Violette, 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: a Critical Commentary' (2010) 22 [2] International Journal of Refugee Law 188.

¹⁴⁵ Ibid 188-189.

¹⁴⁶ Maria Vitucci, *La tutela internazionale dell'orientamento sessuale*, (Jovene Editore 2012) 160.

¹⁴⁷ Ibid 163.

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

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, the UNHCR expressed clearly 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 2008, 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. As many authors agree, the main reasons for the constantly denial of the refugee status based on sexual orientation and/or gender identity are based on the lack of information, guidelines, laws, stereotypes, and sadly, homophobia. Even that been true, why with all the new information and guidelines and the higher recognition of sexual orientation and gender identity as fundamental rights, some States and jurisdictions do not show a change of perspective and are still applying a very restrictive approach regarding the 1951 Convention and the refugees law protection? 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 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.

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

A. Overview on the Human Rights in the European System and the UK

¹⁴⁸ Nicole La Violette, 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: a Critical Commentary' (2010) 22 [2] International Journal of Refugee Law 187-188.

¹⁴⁹ Appellant S395/2002 above n.84 cited in Janna Webels, 'Sexual orientation in Refugee Status Determination', (2011) Refugee Studies Centre, Oxford Department of International Development, University of Oxford 73, 19.

¹⁵⁰ Ibid 19.

¹⁵¹ UNHCR, 'Guidelines on international protection no. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of art 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees' [2012], Un Doc HCR/GIP/12/09, para 31.

¹⁵² Janna Webels, 'Sexual orientation in Refugee Status Determination', (2011) Refugee Studies Centre, Oxford Department of International Development, University of Oxford 73, 21.

¹⁵³ UNHCR, 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity' (21 November 2008) <http://www.justice.gov/eoir/vll/benchbook/resources/UNHCR_Guidelines_Sexual_Orientation.pdf> accessed 02 July 2013, para 25.

¹⁵⁴ Maria Vitucci, *La tutela internazionale dell'orientamento sessuale*, (Jovene Editore 2012) 168.

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 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 applicant. 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 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 art14. The Court had a more positive approach comparing with the *Rees v. UK* case because it was considered that the right to marry had been infringed and stated that 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,

¹⁵⁵ Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 [1950] ETS 5.

¹⁵⁶ George Lestas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy', (2012) University College London - Faculty of Laws <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2021836> accessed 07 July 2013.

¹⁵⁷ [1981] Appl. No. 7525/76 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". Sandy Gandhi, International Human Rights Documents (8th edn, Oxford University Press 2012) 260.

¹⁵⁹ *Rees v UK* [1986] Appl. No. 9532/81 ECtHR.

declared a violation of art 8. This fact demonstrated a more positive approach relating to the rights of the transgenders.

The recent case *X. v. Turkey* in 2012¹⁶⁰ is about a homosexual prisoner who, after complaining about acts of intimidation and bullying by his fellow inmates, was left in solitary confinement for over eight 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 finds 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

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 art14 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 the protection against discrimination on the basis of sexual orientation very weak. In this context, the opinion of the Parliamentary Assembly of the Council of Europe is that should be included in art 14 the ground of sexual orientation.

Nonetheless, 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. 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 treaty is a development and it is quite possible that the protection of homosexuals in Europe undergoes positive changes.

¹⁶⁰ [2012] Appl. No. 24626/09 ECtHR.

¹⁶¹ European Court of Human Rights, 'Turkish authorities should not have placed a prisoner in solitary confinement because of his sexual orientation in conditions that did not respect human dignity', (ECtHR 370, 09 October 2012) < <http://hudoc.echr.coe.int/sites/eng-press/pages/search.aspx?i=003-4110556-4833050> > accessed 04 January 2014.

¹⁶² Ian Carry-Sishumner, 'The Charter of Fundamental Rights of the European Union and Sexual Orientation' in Lodrup P and Modvar E (eds), *Family life and human rights* (Gyldendal 2004) 878-879.

¹⁶³ Ibid.

¹⁶⁴ Ibid 883.

¹⁶⁵ Ibid.

3. Sexual orientation and gender identity in the UK

The ILGA Europe Annual 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 prohibit 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

Some examples 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 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

Until 2011 the only legal institutions available for homosexuals related to family was the cohabitation law and partnership registered. In 2013 the UK legalized same-sex marriage.

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

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 (MS) 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.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 to recognize applicants as refugees within the meaning of art 1 of the 1951 Convention¹⁷² and introducing a common concept of "*membership of a particular social group*" persecution ground.¹⁷³

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 orienta-

¹⁶⁶ Mackenzie Cailin C E, 'Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans and Intersex People in Europe', 2011 (ILGA-Europe 2012) <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> accessed 3 May 2013.

¹⁶⁷ Ibid 165.

¹⁶⁸ Ibid 171.

¹⁶⁹ Council Directive (EC) 2004/83/EC, para 2.

¹⁷⁰ Ibid para 6.

¹⁷¹ Ibid para 16.

¹⁷² Ibid para 17.

¹⁷³ Ibid para 21.

¹⁷⁴ Ibid para 15.

tion this Directive is more developed and broader, since had already included explicitly this group before the first UNHCR guideline had been published on the topic. Probably because the EU have already been developing the concept of sexual orientation as a human right and as a protection ground against discrimination by 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.

Some relevant aspects of arts. 4, 6, 9, 10, of the Directive¹⁷⁵ 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 the UK, it will base mostly on "*The Impact Assessment conducted for the purposes of the recast of the qualification Directive*" by ECRE¹⁷⁶, the European Commission Report 2010¹⁷⁷ and the studies of ECRE (2010).¹⁷⁸

a. Charter II: Assessment of Applications for International Protection

aa. 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, 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.¹⁷⁹

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)¹⁸⁰ 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.

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

¹⁷⁵ 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.

¹⁷⁶ European Council on Refugees and Exiles (ECRE) and European Legal Network on Asylum (ELENA), 'The Impact of the EU Qualification Directive on International Protection', (ECRE, 25 October 2008) < <http://ecre.org/topics/areas-of-work/protection-in-europe/150.html> > accessed 14 May 2013.

¹⁷⁷ This Report is part of the Commission's obligation under art 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 ECRE.

¹⁷⁸ ECRE, 'Comments from the European Council on refugees and exiles on the European Commission. Proposal to recast the Qualification Directive' (March 2010) < <http://ecre.org/topics/areas-of-work/protection-in-europe/148.html> > accessed 29 May 2013.

¹⁷⁹ Council Directive (EC) 2004/83/EC , art 4 (3) c, L 304/15.

¹⁸⁰ Ibid, art 5, L 304/16.

COI are provided by law and it is a very developed instrument.¹⁸¹ This is positive because it helps the decision-makers to assess information about the country of origin. 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)¹⁸² 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 art 4(5).¹⁸³ 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. 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.

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. In 2000, ECRE and UNHCR¹⁸⁴, when regarding this point, stressed the duty of the decision-makers to give the benefit of doubt to the refugee claimant, especially in view of the difficulty in obtaining corroboration of evidence.¹⁸⁵ However, this was not mentioned in any EU Directives. They stated: "*At the moment this is not the case in all Member States*".¹⁸⁶

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*"¹⁸⁷. 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*".¹⁸⁸ 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.¹⁸⁹

ba. Article 6 - Actors of persecution or serious harm¹⁹⁰

This article includes non-State actors as a possible persecutors when it can be demonstrated that the State 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 art 7.¹⁹¹

The UK literally transposed article 6.¹⁹² In most of the countries surveyed, groups such as families, clans, tribes, mafias, rebel groups, etc., are recognized as non-State actors.¹⁹³ This is positive for the claimant based

¹⁸¹ European Council on Refugees and Exiles (ECRE) and European Legal Network on Asylum (ELENA), 'The Impact of the EU Qualification Directive on International Protection', (ECRE, 25 October 2008) < <http://ecre.org/topics/areas-of-work/protection-in-europe/150.html>> accessed 14 May 2013, 12.

¹⁸² Ibid 10.

¹⁸³ European Commission, 'Report 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', COM (2010) 314 final, 4.

¹⁸⁴ UNHCR, 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity' (21 November 2008)

<http://www.justice.gov/eoir/vll/benchbook/resources/UNHCR_Guidelines_Sexual_Orientation.pdf> accessed 02 July 2013, para 35.

¹⁸⁵ ECRE, 'Position on the Interpretation of art 1 of the Refugee Convention' (2000) < <http://www.refworld.org/docid/3ae6b33c4.html>> accessed 03 June 2013, 3.

¹⁸⁶ ECRE, 'Comments from the European Council on refugees and exiles on the European Commission. Proposal to recast the Qualification Directive' (March 2010) < <http://ecre.org/topics/areas-of-work/protection-in-europe/148.html> > accessed 29 May 2013, 115-116.

¹⁸⁷ European Council on Refugees and Exiles (ECRE) and European Legal Network on Asylum (ELENA), 'The Impact of the EU Qualification Directive on International Protection', (ECRE, 25 October 2008) < <http://ecre.org/topics/areas-of-work/protection-in-europe/150.html>> accessed 14 May 2013, 11.

¹⁸⁸ Ibid 11.

¹⁸⁹ Ibid.

¹⁹⁰ Council Directive 2004/83/EC, art 6, L 304/16.

¹⁹¹ 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. Council Directive (EC) 2004/83/EC, art 7, L 304/16.

on sexual orientation and /or gender identity because most of them are persecuted by non-States actors, such as family and society in general without the State protection.

b. Chapter III: Qualification for being a Refugee

aa. 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 art 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).

Art 9 (2) 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 and gender identity, 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 UK¹⁹⁴, but only Germany, Hungary, Ireland, Italy, Luxemburg, Romania, Slovakia and Slovenia have transposed the non-exhaustive list of acts of persecution. Other countries have not implemented them or have done their own list.¹⁹⁵

ba. 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"¹⁹⁶ and the "Social perception", without explicitly mentioning these approaches, but using their content. However, it 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".¹⁹⁷

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

¹⁹² European Council on Refugees and Exiles (ECRE) and European Legal Network on Asylum (ELENA), 'The Impact of the EU Qualification Directive on International Protection', (ECRE, 25 October 2008) < <http://ecre.org/topics/areas-of-work/protection-in-europe/150.html>> accessed 14 May 2013, 15.

¹⁹³ Ibid.

¹⁹⁴ Ibid 19.

¹⁹⁵ Ibid 20.

¹⁹⁶ "Article (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." Council Directive (EC) 2004/83/EC, art (10) 1(d), L 304/17

¹⁹⁷ European Council on Refugees and Exiles (ECRE) and European Legal Network on Asylum (ELENA), 'The Impact of the EU Qualification Directive on International Protection', (ECRE, 25 October 2008) < <http://ecre.org/topics/areas-of-work/protection-in-europe/150.html>> accessed 14 May 2013, 20.

origin, a particular social group might include a group based on a common characteristic of sexual orientation (...).¹⁹⁸

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*".¹⁹⁹

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 orientation represents the 'limits of the harmonization exercise'*"²⁰⁰. 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*".²⁰¹

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*"²⁰². 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 ECRE²⁰³ 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 aspects of an asylum claim should be duly considered in terms of establishing membership of a particular social group²⁰⁴.

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.²⁰⁵ 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.²⁰⁶ A few MS such as

¹⁹⁸ Council Directive (EC) 2004/83/EC, art 10 (1) d, L 304/17

¹⁹⁹ Ibid.

²⁰⁰ El-Enany, 'Who is the New European Refugee?' [2008] LSE Legal Studies 323.

²⁰¹ Ibid.

²⁰² Council Directive (EC) 2004/83/EC, art (10) 2, L 304/17.

²⁰³ ECRE, 'Position on the Interpretation of Article 1 of the Refugee Convention' (2000) < <http://www.refworld.org/docid/3ae6b33c4.html> > accessed 03 June 2013, 9.

²⁰⁴ ECRE, 'Comments from the European Council on refugees and exiles on the European Commission. Proposal to recast the Qualification Directive' (March 2010) < <http://ecre.org/topics/areas-of-work/protection-in-europe/148.html> > accessed 29 May 2013, 11.

²⁰⁵ Ibid 12.

²⁰⁶ European Council on Refugees and Exiles (ECRE) and European Legal Network on Asylum (ELENA), 'The Impact of the EU Qualification Directive on International Protection', (ECRE, 25 October 2008) < <http://ecre.org/topics/areas-of-work/protection-in-europe/150.html> > accessed 14 May 2013, 20.

the UK did not transpose the last clause of article 10(1) (d) regarding the relevance of gender-related aspects.²⁰⁷

2. 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 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 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 the 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. They should 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 Council²⁰⁸ fairly argues that both directives are still very vague and unclear about sexual orientation as membership of a social group, thus makes the protection of homosexual asylum seekers weak. It also says that the notion of particular social groups that remains unchanged in the 2011 Directive favours the restrictive interpretation of art 10 (1) (d).²⁰⁹ ILGA-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.²¹⁰

²⁰⁷ European Commission, 'Report 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', COM (2010) 314 final,8.

²⁰⁸ ECRE, 'Comments from the European Council on refugees and exiles on the European Commission. Proposal to recast the Qualification Directive' (March 2010) < <http://ecre.org/topics/areas-of-work/protection-in-europe/148.html> > accessed 29 May 2013.

²⁰⁹ Ibid 6.

²¹⁰ 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> accessed on 03 June 2013.

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*".²¹¹

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. Nonetheless, in general, the research about the European Countries shows that there are much incomplete and incorrect transportation by the Member States national legislations. Some of them offer lower standards of protection.²¹²

The problem is not only the incorrect transposition of the Directive. Some States transport 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 transported 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 transported 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 family be considered? It will be looked through this information further in the analysis of some UK cases-law.

The UK has also recognised NGOs 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 to give the refugee status is justifiable.

The UK has partially transported by the national legislation 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. 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. 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 Directive²¹³ has not changed some important issues. Political reasons might be behind the fact that both Directives (2004 and 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 to the refugee status based on sexual orientation and gender identity be recognized.

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

a. Sexual orientation, gender identity and the "membership of a particular social group"

The possibility to recognize LGBT people as "*membership of a particular 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

²¹¹ European Commission, 'Report 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', COM (2010) 314 final, 15.

²¹² Ibid 15.

²¹³ Council Directive (EC) 2011/95/EU, L 337/9.

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 UK. However, there is no enforcement for that so 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 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, 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 cases-law. Furthermore, it will be added some political perceptions concerning the refugee and immigration policy in the EU and the UK.

b. Persecution and discrimination

The UK considers discrimination on “cumulative” grounds enough to someone apply for a refugee protection by fear of persecution? 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.²¹⁹

The UK is even more restrictive in the interpretation of acts of persecution, since criminal laws need to be enforced to constitute persecution. 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*”.²²⁰

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 UK has a list of “safe countries”, which wrongly contains homophobic countries.²²¹ Moreover, having the knowledge that in countries that criminalize sexual orientation or gender identity, there is always the risk of the criminal law to

²¹⁴ Sabine Jansen and Thomas Spijkerboer, ‘Fleeing Homophobia: Asylum claims related to sexual orientation and gender identity in Europe’ (Vrije Universiteit Amsterdam, September 2011) <<http://www.refworld.org/docid/4ebba7852.html>> accessed 10 June 2013, 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 *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] Session 1998-99 UKHL-Judicial Committee.

²¹⁶ Johnson Toni A M ‘On Silence, Sexuality and Skeletons: Reconceptualizing Narrative in Asylum Hearings’ (2010) 20 Social & Legal Studies March 60.

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

²¹⁸ ILGA-Europe, ‘UK Lesbian & Gay Immigration Group, failing the grade: Home Office initial decisions on lesbian and gay claims for asylum’, April 2010 <<http://www.asylumlaw.org/docs/sexualminorities/Failing%20the%20Grade%20UKLIG%20April%202010.pdf>> accessed June 2013.

²¹⁹ [2009] EWCA Civ 1432.

²²⁰ Sabine Jansen and Thomas Spijkerboer, ‘Fleeing Homophobia: Asylum claims related to sexual orientation and gender identity in Europe’ (Vrije Universiteit Amsterdam, September 2011) <<http://www.refworld.org/docid/4ebba7852.html>> accessed 10 June 2013, 22.

²²¹ Ibid 24

be enforced and also the possibility of the government not to offer protection to LGBT people. For these reasons it is recommended that these countries of origin cannot be considered as 'safe countries of origin', when analyzing LGBT claimants.²²² The idea is that these measures and interpretations such as to not consider the non-enforced criminal laws are just means applied by asylum authorities to reject LGBT application".²²³

c. 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 Country of Origin Information (COI) Reports of the UK has a specific section concerning the risk LGBTs run. The document titled Operational Guidance is used as a source of documents on the UK Home Office's policy.²²⁴ The positive thing is that this COI have been made in collaboration with NGOs, for example the UK Lesbian & Gay Immigration Group (UKLGIG).²²⁵

However, many mistakes have been 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 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.*"²²⁶ 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*".²²⁷ 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.²²⁸

It was also found a particular problem on searching 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.²²⁹ 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.²³⁰

d. 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

²²² Ibid 25-26.

²²³ Ibid 26.

²²⁴ Ibid 73.

²²⁵ UK Lesbian & Gay Immigration Group, <<http://www.uklgig.org.uk/>> accessed on 02 June 2013.

²²⁶ Ibid.

²²⁷ Ibid.

²²⁸ Ibid.

²²⁹ Barry O' Leary, 'We cannot claim any particular Knowledge of the ways of homosexuals, still less of Iranian Homosexuals. The particular problems face those who seek Asylum on the Basis of Their Sexual Identity', [2008] 16 Feminist Legal Studies 6.

²³⁰ Ibid.

seems that the UK is applying this provision well.²³¹ 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.²³²

e. 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.²³³ In the UK historical jurisdiction it was common the use of the idea of concealing identity to deny a refugee status.²³⁴ It was found that the UK applied a test as to whether discretion was ‘reasonably tolerable’ until 2006.²³⁵

The UK position partially changed in 2010 after the case *HJ (Iran) (FC) v. Secretary of State for the Home Department and HT (Cameroon) v. Secretary of State for the Home Department*,²³⁶ 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 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*”.²³⁷

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*”.²³⁸

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.²³⁹ In other words, when the applicant has been voluntarily discreet it is not considered a form of persecution. 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 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*”.²⁴⁰ The authors have the opinion that a more complex approach is needed, taking into account the complexity of the psycho-dynamics of the client.²⁴¹

²³¹ Jansen Sabine and Spijkerboer Thomas, ‘Fleeing Homophobia: Asylum claims related to sexual orientation and gene Identity in Europe’ (Vrije Universiteit Amsterdam, September 2011) <<http://www.refworld.org/docid/4ebba7852.html>> accessed 10 June 2013, 28.

²³² *DW (Jamaica) v. Secretary of State for the Home Department* [2005] UKAIT 00168; *SW (Jamaica) v. Secretary of State for the Home Department* [2011] UKUT 00251 (IAC).

²³³ Johnson, Toni A M, ‘On Silence, Sexuality and Skeletons: Reconceptualizing Narrative in Asylum Hearings’ (2010) 20 Social & Legal Studies March 58.

²³⁴ Millbank Jenni and Berg Laurie ‘Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants’ (2009) 22 [2] Journal of Refugee Studies 196.

²³⁵ Jansen Sabine and Spijkerboer Thomas, ‘Fleeing Homophobia: Asylum claims related to sexual orientation and gene Identity in Europe’ (Vrije Universiteit Amsterdam, September 2011) <<http://www.refworld.org/docid/4ebba7852.html>> accessed 10 June 2013, 34-38.

²³⁶ [2010] UKSC 31.

²³⁷ Jansen Sabine and Spijkerboer Thomas, ‘Fleeing Homophobia: Asylum claims related to sexual orientation and gene Identity in Europe’ (Vrije Universiteit Amsterdam, September 2011) <<http://www.refworld.org/docid/4ebba7852.html>> accessed 10 June 2013, 13.

²³⁸ Schutzer Mathew, ‘Status of Asylum Law in EU Member States’ (ILGA-EUROPE, 2010) <<http://www.ilga-europe.org/content/download/17877/114543/version/1/file/EU+Member+Law+PUBLICATION.pdf>> accessed 04 July 2013, 16.

²³⁹ Jansen Sabine and Spijkerboer Thomas, ‘Fleeing Homophobia: Asylum claims related to sexual orientation and gene Identity in Europe’ (Vrije Universiteit Amsterdam, September 2011) <<http://www.refworld.org/docid/4ebba7852.html>> accessed 10 June 2013, 34.

²⁴⁰ Millbank Jenni and Berg Laurie ‘Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants’ (2009) 22 [2] Journal of Refugee Studies 216.

²⁴¹ *Ibid* 217.

The article *Fleeing Homophobia* says the approach developed in HJ-HT, represent a good direction, which has to be followed by other countries and 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".*²⁴²

f. 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 discretion requirement rejection. After the abandonment of the discretion requirement, it was observed a wave of disbelief on the applicant's credibility assessment in the UK.²⁴³ 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.²⁴⁴ One example is when the First-Tier Tribunal could not accept that a Ugandan lesbian woman was not familiar with lesbian books and magazines.²⁴⁵ In other case, a gay man was expected to know about the works of Oscar Wilde.²⁴⁶

The recent United Kingdom Asylum Instruction is more sensitive about the specific problems of the claimants based on sexuality when it declared: *"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".*²⁴⁷ 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".*²⁴⁸

In contrast to the sensitive approach just mentioned above, it was found in 2011 a case in the UK that inappropriate questions were made, such as asking sexually explicit questions to a lesbian woman and asking a gay man about the first time he had committed buggery with his boyfriend. These questions were clearly embarrassing for them to answer and interfered in the applicants' private life.²⁴⁹

²⁴² Jansen Sabine and Spijkerboer Thomas, 'Fleeing Homophobia: Asylum claims related to sexual orientation and gene Identity in Europe' (Vrije Universiteit Amsterdam, September 2011) <<http://www.refworld.org/docid/4ebba7852.html>> accessed 10 June 2013, 38.

²⁴³ Ibid 47

²⁴⁴ Ibid 6.

²⁴⁵ Immigration and Asylum Chamber, 30 January 2011, BN (Uganda), reported on LGBT Asylum News website.

²⁴⁶ Nathanael Miles, 'No Going Back, Lesbian and Gay People and the Asylum System', (Stonewall) <www.stonewall.org.uk> accessed 4 July 2013.

²⁴⁷ Jansen Sabine and Spijkerboer Thomas, 'Fleeing Homophobia: Asylum claims related to sexual orientation and gene Identity in Europe' (Vrije Universiteit Amsterdam, September 2011) <<http://www.refworld.org/docid/4ebba7852.html>> accessed 10 June 2013, 60.

²⁴⁸ Ibid 56.

²⁴⁹ Ibid 55.

Berg and Millbank (2007) explained that this kind of practice is the result of a western perception of homosexuality, which may not be applicable to other cultural contexts.²⁵⁰ Therefore, the decision-makers should understand the cross-cultural perception of sexuality. Johnson adds: *"An inability to disclose using specifically Western 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"*.²⁵¹

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.²⁵² Certainly, it is. Some authors believe that using the discretion as a solution to send people back, represents *"the macroscopic presence of homophobia in the UK asylum law"*.²⁵³ Indeed, most of the conclusions about the recognition of sexual orientation and/or gender identity are surrounded by homophobia, ignorance about this subject, etc. Undoubtedly, this may happen frequently, but the question which remains is the contradiction between the development of the rights to freedom of sexual orientation and/or gender identity considering it 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.

4. 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, it will be dedicate a brief section to the discussion of a more political view about the issue. The purpose of this section is to reflect on how this topic can also dialogue with the recognition of the refugee status based on sexual orientation and gender identity, so becoming an addition in the way of thinking the reasons for the massive denial of refugee's status for LGBT claimants.

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 the EU because of the European Union's restrictive migration policy makes the Refugee status a privilege for few people²⁵⁴. 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 that: *"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"*.²⁵⁵

The host States suffer pressure because the number of refugee claims has grown in the last decades, and the Members States 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 Members States need to determine each application individually²⁵⁶. In the UK for instance, there were 4000 applications in 1986

²⁵⁰ Millbank Jenni and Berg Laurie 'Constructing the Personal Narratives of Lesbian, Gay and Bisexual Asylum Claimants' (2009) 22 [2] Journal of Refugee Studies 207.

²⁵¹ Johnson, Toni A M, 'On Silence, Sexuality and Skeletons: Reconceptualizing Narrative in Asylum Hearings' (2010) 20 Social & Legal Studies March 70-71.

²⁵² Ibid 58.

²⁵³ Ibid.

²⁵⁴ El-Enany, 'Who is the New European Refugee?' [2008] LSE Legal Studies 327.

²⁵⁵ Ibid 316.

²⁵⁶ Ibid 319.

and a decade later, the number had risen to 27.000.²⁵⁷ In this context, El-Enany highlights that 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 undermine the right to seek asylum.²⁵⁸ The restrictive measures go far away from only restrictive 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,²⁵⁹ however the decrease of application number does not necessarily mean the number of individuals in need of protection has decreased²⁶⁰. In the view of El-Enany, the decrease in the refugee applications has a strong connection with the restrictive migrant ion policy, which makes 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 the Directive 2005/85.²⁶¹ 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.²⁶²

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 countries, in violation of the 'right to seek and enjoy asylum' as prescribed in Article 14 of the Universal Declaration of Human Rights."*²⁶³

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 regions²⁶⁴. 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"*.²⁶⁵

Other emblematic example of the restrictive control measures *"designed to deflect asylum seekers"*²⁶⁶ in the UK is the Home Office Asylum Statistical Bulletin of 2006, which included a section, entitled *"Key changes to reduce the number of asylum applications"*²⁶⁷. For instance, the so called *"safe countries"* are included in this section.

²⁵⁷ Toni Kushner and Katharine Knox, *Refugee in an Age of Genocide* (Routledge 1999) 335-336.

²⁵⁸ ECRE, 'The Promise of Protection: Progress towards a European Asylum Policy since the Tampere Summit 1999, november 2001 <<http://ecre.org/component/downloads/downloads/101.html>> accessed 18 December 2013, 9.

²⁵⁹ El-Enany, 'Who is the New European Refugee?' [2008] LSE Legal Studies 324.

²⁶⁰ Ibid 325.

²⁶¹ Ibid 320.

²⁶² Ibid 318.

²⁶³ ECRE, 'The Promise of Protection: Progress towards a European Asylum Policy since the Tampere Summit 1999, november 2001 <<http://ecre.org/component/downloads/downloads/101.html>> accessed 18 december 2013, 9.

²⁶⁴ UK Government, 'New Vision for Refugees', 07 March 2003 <http://www.proasyl.de/texte/europe/union/2003/UK_NewVision.pdf> accessed 7 July 2013.

²⁶⁵ El-Enany, 'Who is the New European Refugee?' [2008] LSE Legal Studies 314.

²⁶⁶ Ibid 325.

²⁶⁷ Heath T, Jeffries R. and Pearce S, 'Asylum Statistics United Kingdom 2005' (London: Home Office, 22 August 2006) <<http://www.homeoffice.gov.uk/rds/pdfs06/hosb1406.pdf>> accessed 10 May 2013, 8.

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 the development in the rights of freedom of sexual orientation and gender identity in the EU and 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, yet they are very slow and present many limitations. The UK practices in this issue are not linear. Sometimes there are very restrictive interpretations, 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.

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

A. Sexual Orientation and Gender Identity in Brazil

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 freedom of expression granted and hosts the largest Pride Parade in the world.²⁶⁸

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

In the interview with Rosita Milesi, from the Institute of Human Rights and Migration (IMDH), 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".²⁶⁹

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.²⁷⁰ The Supreme Court of Brazil recognized same-sex union in May 2011.²⁷¹ The Supreme Court of Justice recognized the possibility of same-sex marriage in October 2011.²⁷²

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 move-*

²⁶⁸ Jordan Sharalyn and Morrissey Chris, 'On what grounds?' LGBT asylum claims in Canada' (2013) 42 Forced Migration review 13.

²⁶⁹ Interview with Rosita Miseli, Director, IMDH (Brasília, 02 July 2013). Natalia Medina, lawyer and consultant of the IMDH collaborated with this interview.

²⁷⁰ Henrique R Carvalho, 'LGBT refugees: the Brazilian case', (2013) 42 Forced Migration review 19.

²⁷¹ Thiago D Oliva, 'Minorias Sexuais Enquanto "Grupo Social" e o Reconhecimento do Status do Refugiado no Brasil', (2012)

<http://www.acnur.org/t3/fileadmin/Documentos/portugues/eventos/Minorias_Sexuais_enquanto_Grupo_Social.pdf?view=1 accessed 04 July 2013, 6.

²⁷² Ibid.

ment was 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".²⁷³

However, 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*".²⁷⁴

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*".²⁷⁵ 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 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 LGBT 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) confirmed the acceptance of homosexuals as a social group in the refugee law context, in her words: "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 relative new "democracy". Even being able to develop the protection of the right of freedom of 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.

B. 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 1972.²⁷⁶ However, until 1997 the application of these instruments was precarious²⁷⁷, since Brazil did not have a national refugee law.²⁷⁸ In 1997, this scenario changed with the creation of the Federal Law 9474/97. 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.²⁷⁹

²⁷³ 'Segundo relatório Nacional do Estado Brasileiro apresentado no mecanismo de revisão periódica universal do Conselho de Direitos Humanos das Nações Unidas' (2012) <http://www.sdh.gov.br/assuntos/atuacaointernacional/programas/pdf/mecanismo-de-revisao-universal-das-nacoes-unidas-rpu_1 > accessed 11 December 2014, para 36.

²⁷⁴ Organization of American States (OAS), 'IACHR Condemns Murder of Trans Women in Brazil' <http://www.oas.org/en/iachr/media_center/PReleases/2012/113.asp> accessed 02 July 2013.

²⁷⁵ Carvalho Henrique R, 'LGBTTT refugees: the Brazilian case', (2013) 42 Forced Migration Review 19.

²⁷⁶ Comitê Estadual Intersetorial de Políticas de Atenção aos Refugiados do Rio de Janeiro, 'Plano Estadual de Políticas de Atenção aos(as) Refugiados(as)' [2012].

²⁷⁷ Ibid.

²⁷⁸ Ibid.

²⁷⁹ Ibid.

The Law became an example to the region.²⁸⁰ Its purpose was the harmonization of the political and legal instruments for the American Latin Refugees and refugees from other continents, such as Africa. The Law became an example mainly because of its broad approach towards the refugee definition. The approach is even more extensive than the 1951 Convention because it also includes the Cartagena Declaration (1984)²⁸¹, 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.

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 law and the Brazilians "*progress in the deep policy of human rights*"²⁸² very well. The illustration of this activism is the implementation of an important program called "*National Program of Human Rights*"²⁸³, 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 and the themes such as democracy, development and human rights were at the top of the Brazilian foreign policy. 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.²⁸⁴

It was exactly in this context of a positive approach regarding the human rights instruments that Brazil created the Federal Refugee Law which is one of the most modern legislation in the world according to Barbosa and Hora.²⁸⁵ The Law establishes the rights and duties of the refugees in Brazil.

a. Chapter I of the Federal Law n° 9474/97: concept, extension and exclusion

aa. Section I: the concept

Art1- 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;

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

²⁸⁰ Ibid.

²⁸¹ 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". Ibid.

²⁸² Luciano P Barbosa and José R S Hora, A Polícia Federal e a Proteção Internacional dos Refugiados (ACNUR Brasil 2007) 12.

²⁸³ Ibid.

²⁸⁴ Luciano P Barbosa and José R S Hora, A Polícia Federal e a Proteção Internacional dos Refugiados (ACNUR Brasil 2007) 42.

²⁸⁵ Ibid.

human beings: the humanitarian law, the human rights and the refugee law.²⁸⁶ This combination is called "*Cartagena Spirit*"²⁸⁷, 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*".²⁸⁸

ba. Section II: the 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.

ca. Section III: the exclusion

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

b. Chapter II- The Juridical Condition of Refugees: 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.

c. 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 1951 Convention important areas, such as the broad definition of refugee and access to the refugee system. It is important to notice that this 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 Council Directive 2004/83/EC offers a more variety and a complex set 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.

²⁸⁶ Renato Z. R. Leão, *O reconhecimento dos refugiados pelo Brasil: comentários sobre decisões do CONARE* (CONARE and ACNUR 2007)78.

²⁸⁷ Ibid.

²⁸⁸ Ibid 78-79.

C. The roles of CONARE, UNHCR, and the Civil Society

The Conare (National Committee for Refugee) was created by the Law 9474/97, under the Title III (About Conare) - art 11.²⁸⁹

The art 12 establishes the Conare competencies: "*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 the UNHCR. This structure is part of the UNHCR strategy to create an ideal model of refugee protection in the "Southern Cone" region. The Law 9474/97 established this ideal model as well as possible.²⁹⁰

This structure is set in the Chapter II - art 14, where it is established the Conare 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 do Federal Police Department; one representative of a non-governmental organisation dedicated to activities of assistance and protection of refugees in the country.²⁹¹ This place is occupied by Caritas International,²⁹² 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 refuge seekers, changes in resolutions and any other theme that needed to be voted at Conare.²⁹²

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).²⁹³ Also, since the placement in Brazil, in 1977, UNHCR has always had the support of Caritas SP and Caritas 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).

Besides, 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. The UNHCR in Brazil has also increased the partnership with the Civil Society and intensified its work on the political and diplomatic spheres. Besides Conare, the UNHCR, also has a partnership with many other non-governmental organizations (NGOs) throughout the country, such as: "Associação Antônio Vieira" (Antônio Vieira Association), "Cáritas Arquidiocesana de Manaus" (Caritas Archdiocese of Manaus), the Caritas

²⁸⁹ Presidência da República Casa Civil / Subchefia para Assuntos Jurídicos, Lei nº 9.474 [1997], art 11.

²⁹⁰ Renato Z R Leão, *O reconhecimento dos refugiados pelo Brasil: comentários sobre decisões do CONARE* (CONARE and ACNUR 2007) 15.

²⁹¹ UNHCR – ACNUR, IMDH, ' Lei nº 9.474/97 e Coletânea de Instrumentos de Proteção Internacional dos Refugiados' (2005) < <http://www.acnur.org/biblioteca/pdf/3390.pdf?view=1> > accessed 15 June 2013, 11.

²⁹² Email from viviancasp@gmail.com to author (9 July 2013).

²⁹³ Ibid.

RJ, the Caritas SP, “Centro de Defesa dos Direitos Humanos” (the Defense Centre for Human Rights) and the “Instituto Migrações e Direitos Humanos –IMDH” (Institute of Migration and Human Rights- IMHR).²⁹⁴

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 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 the Law. 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 as shown below.

D. 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 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, interviews with professionals were made.²⁹⁵ The interviewers work in the follow institutions: UNHCR (Brazil), Caritas SP, Caritas RJ²⁹⁶, Institute of Human Rights and Migration (IMDH), Alliance for Refugees²⁹⁷. All these institutions play an important role in the protection of refugees in Brazil.

1. Sexual orientation, gender identity, social group, and the refugee status

Oliva explained that the latest 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”²⁹⁸ 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.²⁹⁹ Based on this, the research now takes a look at Conare position.

Conare has a favourable position in terms of recognition of refugee rights for sexual minorities.³⁰⁰ The author Leão declared that Conare accepted asylum seekers who belong to the so called “vulnerable groups”, which are women, children, homosexuals, etc.³⁰¹ Conare is treating homosexuals’ cases under art 1- Clause I,

²⁹⁴ ACNUR, ‘O ACNUR no Brasil’ < <http://www.acnur.org/t3/portugues/informacao-geral/o-acnur-no-brasil>> accessed 01 July 2013.

²⁹⁵ Fictitious names are used to protect the identities of interviewees. These fictitious names are: Laura and Alice. The questionnaires with their information are retained.

²⁹⁶ 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. Paulo Abrão and André Ramires, ‘Novo perfil do refúgio no Brasil’, (ACNUR Brasil, 26 abril 2013)

<http://www.acnur.org/t3/fileadmin/Documentos/portugues/Estatisticas/Novo_perfil_do_Refugio_no_Brasil_Abril_2013.pdf?view=1> accessed 10 June 2013.

²⁹⁷ 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.

²⁹⁸ Thiago D Oliva, ‘Minorias Sexuais Enquanto “Grupo Social” e o Reconhecimento do Status do Refugiado no Brasil’, (2012)

<http://www.acnur.org/t3/fileadmin/Documentos/portugues/eventos/Minorias_Sexuais_enquanto_Grupo_Social.pdf?view=1> accessed 04 July 2013, 19.

²⁹⁹ Ibid.

³⁰⁰ Ibid 20.

³⁰¹ Renato Z R Leão, *O reconhecimento dos refugiados pelo Brasil: comentários sobre decisões do CONARE* (CONARE and ACNUR 2007) 34.

considering homosexuals as "*membership of a particular social group*".³⁰² Indeed, all interviewees³⁰³ 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.³⁰⁴ Gabriel Godoy³⁰⁵ 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*".³⁰⁶

a. "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 selective murders of people with specific backgrounds, which they considered corrupted in their understanding of society, such as prostitutes, drug addicts, robbers, abandoned minors.³⁰⁷ 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. Second, because the region has already had cases of homophobic murders, in addition to the existence of groups practicing "*social cleaning*".³⁰⁸ 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.³⁰⁹ 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. Instead the focus was 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 State do not criminalise homosexuals and even protect homosexuals from discrimination by law.³¹⁰ 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.

b. Actor of persecution or serious harm

In the Colombian case, CONARE analysed 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

³⁰² Ibid 37.

³⁰³ Fabrício Toledo de Souza, Vivian Holzhacker, Laura, Alice, Gabriel Gody, Rosita Miseli.

³⁰⁴ Interview with Gabriel Gualano de Godoy, UNHCR Protection Officer – Brazil, UNHCR Brazil (Brasília, 20 June 2013); Raquel Trabazo, UNHCR Protection Assistant, UNHCR Brazil (Brasília, 20 June 2013).

³⁰⁵ The interviewees Gabriel Godoy and Raquel Trabazo counted on the contribution of the UNHCR Protection Unit (PU)-Brazilian Office.

³⁰⁶ Ibid.

³⁰⁷ Renato Z R Leão, *O reconhecimento dos refugiados pelo Brasil: comentários sobre decisões do CONARE* (CONARE and ACNUR 2007) 38.

³⁰⁸ Ibid.

³⁰⁹ Ibid.

³¹⁰ Thiago D Oliva, 'Minorias Sexuais Enquanto "Grupo Social" e o Reconhecimento do Status do Refugiado no Brasil', (2012) <http://www.acnur.org/t3/fileadmin/Documentos/portugues/eventos/Minorias_Sexuais_enquanto_Grupo_Social.pdf?view=1 accessed 04 July 2013, 21.

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.

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 Souza³¹¹ from 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. This analysis is related with the UNHCR's guidelines and also with the Conare's approach as it was discussed before.

Vivian Holzacker³¹² 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 Milesi³¹³ from the IMDH added that the State deficiencies towards the individual protection are responsible for the well-founded fear regarding the private actors.

Alice³¹⁴ 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 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 military 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.³¹⁵ In this sense, if the fear of persecution is just based on the family reluctance in accepting the applicant's sexual orientation, the allegation will not be sufficient to determine its refugee status.

c. Acts of persecution

The objective of this section is to analyse the interpretation and implementation of the "Acts of Persecution" in Brazil. One issue that is going to be discussed is the differences between discrimination and persecution.

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*".³¹⁶ In this case, as Gabriel Godoy and Raquel Trabazo pointed out, it is very important to analyse the situation of its coun-

³¹¹ Interview with Fabrício Toledo de Souza, lawyer, Cáritas Rio de Janeiro (Rio de Janeiro, 10 June 2013).

³¹² Interview with Vivian Holzacker, lawyer, Cáritas São Paulo (São Paulo, 9 July 2013).

³¹³ Interview with Rosita Miseli, Director, IMDH (Brasília, 02 July 2013).

³¹⁴ Interview with Alice, lawyer, Alliance for Refugee (Paraíso, 16 June 2013). The name of person and Institution and all the information except to the date of the interview are fictional to protect their identity.

³¹⁵ Thiago D Oliva, 'Minorias Sexuais Enquanto "Grupo Social" e o Reconhecimento do Status do Refugiado no Brasil', (2012)

<http://www.acnur.org/t3/fileadmin/Documentos/portugues/eventos/Minorias_Sexuais_enquanto_Grupo_Social.pdf?view=1 accessed 04 July 2013, 22.

³¹⁶ Interview with Vivian Holzacker, lawyer, Cáritas São Paulo (São Paulo, 9 July 2013).

try of origin in order to understand if the discrimination practices are strong enough to cause a considerable prejudice to the victim.³¹⁷

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 explained 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.³¹⁸

In Souza's opinion, 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.³¹⁹

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 is proven that their life and/or integrity are at risk.³²⁰

Alice stated that, usually, the refugees allegation only refer to discriminatory factors, such as being rejected or being called by pejorative names. In her opinion, this is not a reason for a well-founded fear. However, Alice said that according to the "*gay dictatorship*"³²¹, these events have been interpreted as reasonable to be considered a well-founded fear of the applicants. In contrast, for her, persecution means put at risk the life and/or liberty of the individual.

d. The question of "discretion"

Regarding the discretion issue, all interviewers but two, responded that there is no reasonable justification to deny a refugee status based on the applicant discretion. One of the two 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 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*".³²²

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, do not 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. However, as this research already debated, this is a problematic position.

³¹⁷ Interview with Gabriel Gualano de Godoy, UNHCR Protection Officer – Brazil, UNHCR Brazil (Brasília, 20 June 2013); Raquel Trabazo, UNHCR Protection Assistant, UNHCR Brazil (Brasília, 20 June 2013).

³¹⁸ Ibid.

³¹⁹ Interview with Fabrício Toledo de Souza, lawyer, Cáritas Rio de Janeiro (Rio de Janeiro, 10 June 2013).

³²⁰ Interview with Rosita Miseli, Director, IMDH (Brasília, 02 July 2013).

³²¹ According to the interviewee, the term "gay dictatorship" means that anything against homosexuals is considered prejudiced or homophobic. Interview with Alice, lawyer, Alliance for Refugee (Paraíso, 16 June 2013).

³²² Interview with Vivian Holzacker, lawyer, Cáritas São Paulo (São Paulo, 9 July 2013).

e. Assessment of Fact and Evidences

aa. *Credibility Assessment*

Credibility assessment is mostly based 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 professional 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.³²³

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 up 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, social observations and personal sensibility. The implication of these assumptions could cost the life of a person or its harm, therefore the conclusion needs to be made with caution.

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.³²⁴ 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 is not 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 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, 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*

³²³ Interview with Rosita Miseli, Director, IMDH (Brasília, 02 July 2013).

³²⁴ Ibid.

*between the interviewer and the applicant and that is why the credibility must be analysed with extreme caution.”*³²⁵

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.³²⁶

f. 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 does not have a list of “Safe Country”.

E. 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*”³²⁷, 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*”³²⁸. Brazil 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.³²⁹

In 2012, Brazil’ government declared in the National Report presented at the Universal Periodic Review (UPR), under the auspices of the Human Rights Council, its strong commitment with refugee and stateless protection.³³⁰ 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*”, 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.³³¹

The Report shows that 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.³³²

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

³²⁵ Interview with Fabrício Toledo de Souza, lawyer, Cáritas Rio de Janeiro (Rio de Janeiro, 10 June 2013).

³²⁶ Thiago D Oliva, ‘*Minorias Sexuais Enquanto “Grupo Social” e o Reconhecimento do Status do Refugiado no Brasil*’, (2012) <http://www.acnur.org/t3/fileadmin/Documentos/portugues/eventos/Minorias_Sexuais_enquanto_Grupo_Social.pdf?view=1 accessed 04 July 2013, 25.

³²⁷ Ferreira L P T Barreto, ‘*Discurso da delegação brasileira no diálogo de alto nível das Nações Unidas sobre migração e desenvolvimento*’ in Instituto Migrações e Direitos Humanos (ed), *Refúgio, Migrações e Cidadania* (ACNUR and IMDH 2007).

³²⁸ Ibid 31.

³²⁹ Ibid 33.

³³⁰ ‘*Segundo relatório Nacional do Estado Brasileiro apresentado no mecanismo de revisão periódica universal do Conselho de Direitos Humanos das Nações Unidas*’ (2012) <<http://www.sdh.gov.br/assuntos/atuacaointernacional/programas/pdf/mecanismo-de-revisao-universal-das-nacoes-unidas-rpu-1> > accessed 11 December 2014, para 43.

³³¹ Ibid.

³³² Ibid para 44.

voluntary repatriation and refugees who lost their status. At the end of 2006, Brazil had 3.311 recognized refugees from 70 different nationalities.³³³ The initial number of nationalities of asylum seekers requesting refugee status was 80 and it was reduced to 70 after adjusting for those refugees whose status was denied.³³⁴

From 1998 to 2006, the total number of refugee requests amounted to 3.681. 1587 solicitations were deferred, and 2094 dismissed.³³⁵ Among those whose application was dismissed 1024 appealed to the Minister of Justice. 10 of them had their application request granted subsequently.³³⁶ 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.³³⁷ At the end of 2009 Brazil had 4,239 refugees from 75 different countries. 62% of the asylum seekers were qualified as recognized refugees.³³⁸

Between 2010 and 2012, ACNUR published figures demonstrating the strong protection of refugees in Brazil.³³⁹ 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.³⁴⁰

At the end of 2012, Brazil spearheaded within Mercosul the adoption of the "*Mexico Declaration and Plan of Action*", as part of the International Principles of the Refugee Protection. 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 policies, the need to establish additional mechanisms of cooperation and new complementary ways of humanitarian protection.³⁴¹

Actual data of June 2013 reveal the existence of 4262 refugees³⁴² in the country and Conare is projecting another 2.580 applications until the end of the year.³⁴³ In 2013, until the end of June, 557 new cases were evaluated, of which 253 were accepted, representing an acceptance rate of 45,4%.³⁴⁴ 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%*".³⁴⁵ 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, an African woman 42 years old from Uganda who, through social assistance left the country to preserve her life and went to Brazil. She 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.³⁴⁶

³³³ Renato Z. R. Leão, *O reconhecimento dos refugiados pelo Brasil: comentários sobre decisões do CONARE* (CONARE and ACNUR 2007)18.

³³⁴ Ibid 74.

³³⁵ Ibid 74-75.

³³⁶ Ibid 74

³³⁷ Ibid 75

³³⁸ ACNUR, 'O ACNUR no Brasil' < <http://www.acnur.org/t3/portugues/informacao-geral/o-acnur-no-brasil>> accessed 01 July 2013.

³³⁹ ACNUR, 'Refúgio no Brasil: Uma Análise Estatística 2010-2012' <http://www.geografia.seed.pr.gov.br/arquivos/File/noticias_2013/Refugio_no_Brasil_2010_2012.pdf> accessed 15 June 2013.

³⁴⁰ Ibid.

³⁴¹ Ibid 4.

³⁴² Paulo Abrão and André Ramires, 'Novo perfil do refúgio no Brasil', (ACNUR Brasil, 26 abril 2013) < http://www.acnur.org/t3/fileadmin/Documentos/portugues/Estatisticas/Novo_perfil_do_Refugio_no_Brasil_Abril_2013.pdf?view=1> accessed 10 June 2013.

³⁴³ Ibid 4.

³⁴⁴ Ibid 8.

³⁴⁵ Nádía Pontes, 'Lei brasileira para refugiados é considerada exemplar', (DW, 25 January 2010)<<http://www.dw.de/lei-brasileira-para-refugiados-%C3%A9-considerada-exemplar/a-5167314-1>> accessed 20 May 2013.

³⁴⁶ Ibid.

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*".³⁴⁷

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 the EU and in the UK.

V. 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 rights to freedom of sexual orientation and gender identity as 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 and 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)³⁴⁸ and *Toonen v. Australia* (1994)³⁴⁹ were examples of ideas which supported that a person should be free from discrimination based on the sexual orientation.

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*³⁵⁰. 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 refugee 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 did not have a consensus in terms of human rights. This fact made the protection of this category very vulnerable.

It was recently published by UNHCR the first guidelines regarding the specific problems of LGBT asylum seekers. However, La Violette³⁵¹ 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 that sexual orientation and gender identity are human rights. 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

³⁴⁷ Ibid.

³⁴⁸ [1981] *Appl. No. 7525/76 ECtHR*.

³⁴⁹ [1994] CCPR/C/50/D/488/1992 UNHRC.

³⁵⁰ [1990] A-23220644 *United States Board of Immigration Appeals*.

³⁵¹ Nicole La Violette, 'UNHCR Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity: a Critical Commentary' (2010) 22 [2] *International Journal of Refugee Law* 173-208.

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.³⁵² The UK also considers that, even when it exist a criminal law against homosexuals, this will not 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.

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 specifics 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 refugees 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 covers 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 coun-

³⁵² Sabine Jansen and Thomas Spijkerboer, 'Fleeing Homophobia: Asylum claims related to sexual orientation and gene Identity in Europe' (Vrije Universiteit Amsterdam, September 2011). <<http://www.refworld.org/docid/4ebba7852.html>> accessed 10 June 2013, 24.

try. 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 from the 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.

Fernanda Estevão Pollini: Rua Quinze de Novembro, 1740, Apto.152, Centro, São Carlos/SP-Brasil, CEP:13.560-240, fe_pollini@hotmail.com

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Email from viviancasp@gmail.com to author (9 July 2013).