

CHARLES UNIVERSITY
FACULTY OF SOCIAL SCIENCES

Institute of political sciences

**LGBTQ issues of the right to asylum and
the refugee status**

Master thesis



2019

Jon Landaluze Aurre

Author: Jon Landaluze Aurre

Supervisor: JUDr. Milan Lipovsky, Ph.D.

Study programme: MAIN

Academic Year: 2018/2019

Bibliographic note

LANDALUZE, Jon. (2019) LGBTQ issues of the right to asylum and the refugee status. Master thesis. Charles University, Faculty of Social Sciences. Institute of Political Science. Supervisor: JUDr. Milan Lipovsky, Ph.D.

Abstract

Here we find a thesis on the topic of refugee protection and the specific area of LGBTQ applicants. This is a topic that still nowadays is important to analyze, since the acceptance and evolution of these specific cases is something that evolves throughout the present times. The objective of it is to first define the refugee definition and to see if the definition that is given is actually interpreted in the way that it protects this group of people worldwide. It then goes to analyze the European interpretation of the topic and the issues that usually arise when making decisions about international protection of the applicants, concluding with the problems that actually happen and the possible solutions to avoid them.

Keywords

Refugees, Asylum, LGBTQ, Persecution, International Protection

Declaration of Authorship

1. The author hereby declares that he compiled this thesis independently, using only the listed resources and literature.
2. The author hereby declares that all the sources and literature used have been properly cited.
3. The author hereby declares that the thesis has not been used to obtain a different or the same degree.

Prague 31 of July of 2019

Jon Landaluze Aurre

Diploma thesis project

1. Introduction to the topic

In the present times, and with the actual worldwide situation, the terms ‘asylum’ and ‘refugee’ appear more and more often in our everyday lives. These situations arise and become more common due to the increase of international or non-international conflicts, since people tend to start leaving their own countries because of different reasons, quite often based on being persecuted. Being persecuted in one’s country of origin is the main base for the right to seek for protection, as I will explain later. It is important to make the differentiation of the concepts of ‘asylum’ and ‘refugee’ that are going to be used through this thesis from the very beginning, since even if in the public this distinction is not very commonly done, it is one of the most important differentiations when talking about these issues. These two concepts are very commonly mistaken, and the consequence of using one of them at the time of using the other one can have very different results.

The definition of a refugee is one of the most important legal tools to deal with. It means that a person has achieved to gain a status after a specific procedure. As the 1951 UN Convention relating to the status of refugees defines in its first article, a refugee is any person who “*owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside 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*”. So on the universal level, a refugee is any person that fits in these categories and achieves to get that status through one process.

We then find the national asylum systems, processes that the asylum seekers have to go through in order to get protection, they seek domestic protection in another

country. When a person flees its country and arrives to another one, it becomes an asylum seeker when asking for the right to stay in that country that is not of one's origin. Through that process, the seeker is asking for the protection of that country and the state can then grant that right and recognize that person with the refugee status if his/her situation falls into the universal definition stated above. The difference roots in the fact that the refugees are regulated or defined by international law (since we are talking about a Convention between states), and the asylum is an issue of domestic law, that each state can regulate in its own way. And through the national asylum processes, the refugee status can be granted if the person's situation fits in the definition agreed between the states.

These are people that cannot return to their countries of origin because of some reason stated in the 1951 UN Convention, previously mentioned. Regarding that situation, there is another obligation for the states specified at the article 33, the prohibition of expulsion or return, the so-called 'non-refoulement' clause. This states that *"no contracting state shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion"*. There are of course some exceptions such as having been convicted of a serious crime or being a danger for the security of the country, but the previous statement is the general rule.

Every person asking for asylum has to be eligible to enter in some of the categories mentioned in the definition of refugees given by the 1951 UN Convention. And the LGBTQ people usually ask for the international protection including themselves in the 'membership of a particular social group' category, since there is not a more specific definition that include this situation of persecution. LGBTQ stands for Lesbian-Bisexual-Gay-Trans-Queer, and as everyone knows this set of initials' objective is to make people feel that they belong to a certain group that stands and fights for everyone's rights.

In the 'state sponsored homophobia' survey made by the ILGA (International Lesbian, Gay, Bisexual, Trans and Intersex Association) in 2017, it is proved that still in 2017 same-sex acts are illegal in 71 states, the 37% of UN states. And in 7 of those

states, or in parts of them, these acts are punished with death penalty (Iran, Saudi Arabia, Yemen, Sudan, Somalia, Nigeria and Iraq). This clearly shows that citizens of some countries are willing to leave their place or origin in order to look for a safer location.

The problems that may arise when going through the asylum procedure are going to be another focus point in this thesis. As an example, the recent event that occurred in Austria, when an Afghanistan man was denied of the refugee status because he did not fit the stereotype. The country argued that he did not walk, dress or act like a gay person, so they denied the international protection, among other surreal reasons.

2. Research target

The thesis will describe the legal tools on international, regional and domestic level that are used to protect individuals and groups fleeing persecution in their countries. Consequently, it will describe the basic issues of LGBTQ community related to the legal problems and will address the question of whether the LGBTQ people fit into the protected groups under various above-mentioned systems of protection granted abroad.

As such, the research question will be: do the LGBTQ people fit into the protected categories under the asylum and refugee protection? What can be done in order to avoid the problems that may arise?

The objective of the thesis is concluding if the LGBTQ people are protected enough through the actual ways of achieving protection by the tools that are going to be analyzed in this thesis, and if their situations fit into the categories that the 1951 UN Convention state in the definition of a refugee. In my opinion, and after reading nowadays' situations such as the one mentioned about the Afghan man whose protection was denied, I think that the protection is obviously not enough, of course depending on the country also. Assuring or doubting this statement will be one of the main objectives, since after researching the main laws, data and case-law it will be easier to make a clear conclusion. And on the other hand, seeing if the LGBTQ reasons

fit into the 1951 Convention definition of a refugee will be the other main objective too. Since even if plenty of the scholars say so, it can really vary from one country to another, and the objective is to see if with the international and regional regulations it is sufficiently specified so that it can be applicable in any country that the person asks for protection.

3. Literature review

For this specific thesis, being a mixture of international law and international relations, I will be using both international conventions and different sources of law and academic literature. For this particular theme, the most used international and regional laws and conventions will be the following ones:

- 1951 Convention by the UNHCR relating the status of refugees.
- 1967 Protocol by the UNHCR connected to the 1951 Convention about the status of refugees.
- 1966 International Covenant on Civil and Political Rights.
- 1979 Convention on the Elimination of All Forms of Discrimination against Women.
- 1989 Convention of the Rights of the Child.
- Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.
- Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.

Apart from the international regulations and conventions previously stated, I will be using academic literature as well, centred on the topic of asylum and the issues that can appear in specific LGTBQ case-law:

- UNHCR. (2017). *A guide to international refugee protection and building state asylum systems*.
- Bieksa, L. (2011). The Refugee Qualification Problems in LGTB Asylum Cases. *Jurisprudence*, 18(4), 1555–1565
- Jansen, S. & Spijkerboer, T. (2013). Fleeing homophobia: Sexual orientation, gender identity and asylum. *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum*, 1–239.
- Carroll, A. & Mendos, L. R. (2017). State sponsored homophobia. A world survey of sexual orientation laws: criminalisation, protection and recognition. *Ilga.org*
- Kotzeva, A., Murray L., Tam, I. & Burnett, I. (2008). Asylum and Human Rights Appeals Handbook. *Oxford University Press*. (8-19)
- Goodwin-Gill, G. & McAdam, J. (2007). The refugee in International Law. *Oxford University Press*. (15-86).
- Fobear, K. (2015). “I thought we had no rights”- Challenges in listening, storytelling, and representation of LGBT refugees’. *Studies in Social Justice*, 9(1), 102–117.
- Topel, K. D. (2017). “So, what should I ask him to prove that he’s gay?”: How sincerity, and not stereotype, should dictate the outcome of an LGB asylum claim in the United States. *Iowa Law Review*, 102(5), 2357–2384.
- França, I. L. (2017). “LGBTI Refugees”: Rights and Narratives Interlinking Gender, Sexuality and Violence. *Cadernos Pagu*, (50).
- Carlier, J. Y., Vanheule, D., Hullmann, K. & Galiano, C. P. (1997). Who is a Refugee? A Comparative Case Law Study. *Kluwer Law International*. (685-717).
- Hopkinson, R. A., Keatley, E., Glaeser, E., Erickson-Schroth, L., Fattal, O., & Nicholson Sullivan, M. (2017). Persecution Experiences and Mental Health of LGBT Asylum Seekers. *Journal of Homosexuality*, 64(12), 1650–1666.
- Hathaway, J. C. (2005). The Rights of Refugees under International Law. *Cambridge University Press*. (91-95)

4. Conceptual and theoretical framework

As expressed before, the topic of this thesis will be mainly researching and analyzing the asylum phenomena and the definition of a refugee. For this, international, regional and domestic regulation is going to be used, as well as scholarly literature. I will now shortly explain some differences and details about the future thesis content.

A refugee is, then, a person that complies all the requirements of the previously mentioned 1951 UN Convention and then earns that status, and that status is recognized by all the signing states. It is an issue regulated by international law and a well-founded fear of persecution is needed in order to fit in the description and definition that the Convention states. It is a person that fits in the definition and has the right of international protection achieving that special legal status defined in the 1951 UN Convention about the status of refugees. This convention has been the main base for this international protection tool, and it states the definition of a refugee, it establishes that no seeker can be returned to his/her country of origin forcibly if the person is threatened and if his/her life or rights are in danger, and other specific rights and obligations for states that will be explained during the thesis. An asylum seeker then, is a person who claims to be persecuted and asks for protection through the national asylum systems.

There are various reasons stated in the international, regional and national regulations that are valid and applicable when planning on asking for this type of international protection, such as persecution because of race, religion, nationality, membership of a particular social group or political opinion. When talking about the different levels of regulation, it is important to make a difference:

- International Protection regulation: in the international level, the regulation comes from the agreements between states, specifically the conventions achieved through the UN. In this area, the mainly used regulation (among others that will be mentioned after) is the 1951 UN Refugee Convention.
- Regional regulation: in this thesis, the used regional regulations will be mainly the European Directives and laws about this topic, such as the Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

- Domestic regulation: these are the laws that regulate the asylum processes in each state, which I will briefly use to compare some European countries in the thesis.

The most frequently used tools will be the international and regional regulations of asylum and refugee protection mentioned previously. These treaties and laws will be the base of the theoretical research done when wanting to clarify the processes used for the international protection and the issues that may appear that cause the problems. When focusing on the LGBTQ issues, apart from the regulation for asylum, other regulations are going to be used regarding the non-discrimination guarantee. All these regulations mentioned here are the ones listed when talking about the literature review, among others.

Regarding the methodology mainly descriptive and analytical methods are going to be used. When wanting to understand issues that may appear in the process of seeking asylum, the first method used is going to have the objective of describing and trying to understand the different definitions regarding the refugee definition and the asylum process. I will then analyze who fits and who does not fit into the definitions of the different protected groups that are listed in the definition of ‘refugee’.

Apart from describing and analyzing the issues that will appear, I will be using the comparative method too, being this an important tool to realize the differences between the different groups described previously in order to find where the LGBTQ people fit. When analyzing the different groups of people that the definition states in the 1951 UN Convention, the objective will be to see who can use each specification, what situation is needed in order to argue each of the reasons. The fact of describing each of the reasons is to find what can the LGBTQ people argue in order to defend that they deserve the status of refugees because they are persecuted in their country of origin.

5. Empirical data and analytical technique

As stated before, for this thesis different materials are going to be used, from legal documents, to scholar articles and to surveys. The treaties and the different sources

of law used are going to be basically the ones stated above, and so will the literature. Those will be two important sources of international law and international relations at the time of working on this thesis

When talking about data, it has to be said that the one used is in general going to be about the casuistic of accepting and denying the refugee status to LGBTQ seekers. There are plenty of surveys about this topic, but specially the one named 'Fleeing Homophobia – Asylum claims related to sexual orientation gender identity in Europe' done by Sabine Jensen and Thomas Spijkerboer is going to have a lot of importance, since its main objective is to describe the casuistic relating the topic of this thesis in Europe.

The survey done by the ILGA (State Sponsored Homophobia) is going to be taken into account to when talking about empirical data, and of course the one made by the European Union Agency for Fundamental Rights called 'current migration situation in the EU: Lesbian, gay, bisexual, transgender and intersex asylum seekers'. There are plenty of surveys that explore this topic, and all of them will be taken into account when working on the thesis to try to prove the irregularities that happen every day in the asylum processes.

6. Planned thesis outline

- Introduction
- Terminology
- Current legal framework
 - o Description of the situation as it is
 - o Analysis of data
 - o Own findings
- Cases
- Conclusion

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European states
5. Conclusion

1.- Introduction

The aim of my thesis is to shed some light into the nowadays' very discussed topic of the refugees and the asylum systems. This is something that has always been an important topic and a source of many discussions. Wars, different types of discriminations, ghettos, persecution and violence are unfortunately part of our everyday life, and this can be applied through different actions or lack of actions, having a big impact on certain people.

When persecution and violence happen in the specific case, some people decide that they cannot live with that situation anymore, since the fact that because of being a certain kind of way means that one may suffer persecution, violence or even death is not something acceptable. This applies to many different situations in many different places, since the reasons for persecution or violence vary depending on where on Earth we are focusing on. There can be hundreds of reasons behind some kind of discrimination or persecution, such as race, religion, nationality, being a member of a particular social group... and each case is specific and unique in its own way. The people that after suffering these kinds of situations decide to flee their country of origin, when arriving to a third country, will ask for international protection, basing their inquiry in arguments and facts that do not allow them to stay, since this would make the persecution continue.

So, what happens when a person decides to leave the country of his/her origin and go to ask for international protection to a third country? This is going to be the base of this thesis, to analyze the concepts of asylum and refugee, the main concepts regarding the international protection of people. These are two concepts that are usually mixed and not clearly differentiated in the everyday life and in the media, but they should be differentiated since they do not talk exactly about the same thing. This and other issues such as the reasons of persecution that can appear are going to be talked about during this thesis.

Once the definitions of important concepts are clear, the next step will be to analyze the current legal framework of the mentioned international protection. There are

different levels of regulation to take into account, such as the universal ones (e.g. UN Conventions), regional ones (e.g. EU legislation) and several national ones (laws created and applicable in individual states). For this work, I will mainly focus on the international rules and I will analyze different scenarios in which the international protection has been granted or denied in LGBTQ persecution cases.

After analyzing the rules that apply to this specific process of asking for international protection, a more specified approach will be taken, focusing on the people that ask for international protection because they are persecuted for their sexual orientation or gender identity. The fact of belonging to a persecuted social group is one of the reasons to ask for international protection as it will be explained further, and the LGBTQ group is considered as belonging to a specific social group (which is a hypothesis to be confirmed by this thesis). The LGBTQ community is unfortunately persecuted in many countries still today, and even if these countries are in general decreasing, some new cases appear as new too, as we have seen in the news recently with Brunei's case.

That is one of the reasons why this specific area (LGTBQ case-law) has been selected for this thesis, the fact that the situation is in a way stuck in time. One would say that the discrimination has gone down with the years, and even though this has happened in several places, is increasing or maintaining the same in others, making this problem maintain through time.

So, after selecting this topic and presenting it in certain cases, the research question of this thesis will be the following: *Do the LGBTQ people fit into the protected categories under refugee protection? What can be done in order to avoid the problems that may arise?*

This topic has been chosen to analyze if this group of people or social group is protected enough with the regulations and laws that we nowadays have in the international arena, and to shed some light into what could be done in case that this protection would not be enough or effective with the real cases. Making sure that this statement is correct or false is the main objective of the thesis. In order to do it, the legal

framework and some case research will be analyzed, to make a conclusion at the end with possible solutions or ideas in order to improve it.

Regarding the methodology that will be used throughout the thesis, it has to be said that it will mainly be an analytical and descriptive approach to the legal tools that the countries and the international society have to offer the individuals that are suffering or fearing persecution. This will be the main or most important part of the thesis, since the international regulations of the United Nations for example are the base for the refugee status and the protection given with it. In order to understand the situation nowadays we firstly have to clarify and explain the legal definitions of the concepts and situations that we then want to analyze. That is why a deep and specific interpretation and analysis will be done specially at the beginning to then be able to conclude if the situation is at the moment fair or if there are areas which need more work.

And apart from the analytical approach, the comparative method will be used also. This will be done in order to differentiate the categories that we nowadays have in the international regulation when wanting to ask for protection, in order to see where the LGBTQ community that we will be focusing on fit between all. And apart from that, some cases or analysis from different European countries will be done in order to see if the international regulation is applied in all of them the same way regarding the international protection of refugees and the right for asylum.

2.- Terminology

First of all, in order to proceed with the research, some differentiations and definitions have to be done to be on the same page when talking and explaining nowadays' situation. The main and most important differentiation to do is the one between a "refugee" and "asylum" or an "asylum seeker". The terms asylum and refugee are very commonly misused or not clearly defined in our everyday life and in the media. People that flee their country to get to another place to ask for international protection are commonly defined as refugees in the media, on a daily basis. It has to be said that this is one of the most common mistakes, since the status of being a refugee is gained once the specific person fulfills the refugee definition that the 1951 UN Convention gives, that will be analyzed below. We can call these people that flee their country and go to a third one asking for help refugee-seekers or asylum-seekers, but not refugees, since that is a status that is gained after fulfilling some specific characteristics or requirements. The signing states of the Refugee Convention have that minimum that they have to offer, but the asylum systems can widen the reasons for protection through their internal national system.

The easiest way to make a difference between a refugee and an asylum seeker in general is to base it on the process itself of asking for international protection. A refugee is the person that achieved to obtain the so-called international protection, and an asylum seeker is the person that is in the process of asking for asylum, but has not yet achieved that status. And at the same time we can call an asylum seeker to the person asking for asylum through the national or domestic process of the country that he or she has arrived to ask for protection. The domestic law of a particular country can grant a person running away from persecution asylum, since this can be a territorial permit that is given to the person in case that the state considers that his or her rights are not being protected. We can differentiate this by calling it the territorial asylum. To be more specific, the definition of a refugee is one of the most important legal tools when talking about this topic. A refugee is a person that has fulfilled the conditions of the UN

Refugee Convention. As it will be stated after in this work, the 1951 UN Convention¹ defines a refugee as any person who *“owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside 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”*.

We can view the word “refugee” as a status that is achieved if the person fulfills the definition given in the Refugee Convention. Then, after going through the domestic system of asylum, this is confirmed by the grant of the protection that the country offers. Not everyone that flees the country of origin because of any of the reasons mentioned is a refugee automatically, only the ones that are able to demonstrate that and achieve it after going through a process are refugees, even if the definition gives them the status. A refugee is, then, a person that complies all the requirements of the previously mentioned 1951 UN Convention and thus earned that status, and that status is recognized by all the signing states. The “well-founded fear of persecution” is important and needed to get the refugee status. The fact that the differentiation between the asylum seekers and the refugees is not done frequently creates a misunderstanding, since when talking about something related with people fleeing their countries and asking for international protection, these people are referred to as refugees. In other words, only the lucky ones finally end up having the status of refugees, since this can be understood as a name that the people that achieve to get this specific international protection have.

After clarifying the definition of a refugee, the terms “asylum” and “asylum seeker” have to be explained. The term asylum simply refers to the tool that the countries have in order to protect people that are not their citizens, when they are in need of aid from other countries than their own. The term “asylum” is what the countries can offer to the asylum seekers, being this protection so that they do not have to come back to their countries, where they suffer some kind of persecution. The asylum systems can vary from one country to another, since each country can choose how to

¹ 1951 UN Convention, relating to the status of Refugees. Date of conclusion 28 of July of 1951. Date of entry into force 22 of April of 1954. UNTS vol 189. Article 1

handle the requests of international protection (different than the refugee ones) and decide which rules to apply to their specific cases. The countries have some limits and guidelines such as the international and regional rules that they have signed regarding the right for asylum, as it will be explained after.

We have to connect the word “asylum” with the fact that these are the processes that states have for the seekers to go through when asking for international protection. One of the core differentiations between the term refugee and the asylum seekers is where they lay legally speaking. Meaning that the refugees are defined and regulated by international law, being this an agreement between states about a common status to give to unprotected people; and asylum systems are regulated by domestic law, since each state can organize the system in its own way. The fact of basing each of them in a different legal area is one of the clearest differentiations between these two concepts. And they are connected in the way that people go through the domestic process of asking for asylum in order to confirm that they fulfil the conditions of international protection agreed between the countries, hoping to fit in the definition given by the previously mentioned 1951 UN convention. Another result might be that they will be granted domestic asylum status, e.g. when the country offers wider reasons of protection than the UN Convention.

As the UNCHR guide states², the “asylum seeker” can be described as a “general designation for someone who is seeking international protection [...] and has not yet received a final decision on his or her claim”. One very important detail is that an asylum seeker cannot be sent back to his/her country of origin until the asylum claim has been examined and during the length of time of the process. Connected to that we have to state the so-called “non-refoulement” clause, regulated in the article 33 of the 1951 UN convention³. After achieving the refugee status, no country can send that person back to his/her country of origin, because of the danger that it may cause.

² UNHCR Agency, *A guide to international refugee protection and building state asylum systems*. Handbook for Parliamentarians n° 27, 2017.

³ Article 33 1951 UN conv: “no contracting state shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”.

Regarding the terminology, we cannot omit the selected group that will be analyzed after explaining the different issues with the general refugee and asylum regulation. This is the LGBTQ community, a community that is considered as a “social group” when wanting to make them fit into the refugee definition when they are being persecuted in certain states. This is something that will be worked on during this analysis, explaining how was considered a social group in order to fit one of the reasons to become a refugee. It has to be said that the LGBTQ stands for Lesbian-Gay-Bisexual-Trans-Queer, and the objective of this group is to make people feel part of a group that can understand and help in case of need, fighting for each other’s rights. It can be understood as an understanding and sharing group, even if we cannot consider it an organized group in general.

I will now briefly explain the differentiations between the groups represented in the LGBTQ letters. First of all we can find the first three, which are connected: gay, lesbian, bisexual. We can connect these three words with “sexual orientation”, which “refers to a person’s capacity for emotional, affectional or sexual attraction to, and intimate relations with, individuals of a different gender (heterosexual), of the same gender (lesbian or gay) or more than one gender (bisexual)”⁴. We then find the T from Transsexual, being this connected to gender identity, referring to “a person’s experience of gender, which may or may not correspond with the assigned at birth. It includes the personal sense of the body, and other expressions of gender, including dress, speech and mannerisms”⁵. And we then find the letter Q, which stands for Queer, meaning all the other people that do not feel included in the first categories, people that go beyond the explained LGBT due to their sexual orientation or gender identity.

The fact of being persecuted or harassed because of loving someone of the same sex or because he/she does not identify as his/her ‘biological gender’ for example, is unfortunately a reality in some parts of the world nowadays. This is why it is considered as a membership to a particular persecuted social group, as will be explained after.

⁴ Jensen, S & Spijkerboer, T. (2011) “Fleeing Homophobia. Asylum Claims Related to Sexual Orientation and Gender Identity in Europe”. COC Nederland. Funded by the European Refugee Fund & others. P. 17

⁵ Ibid.

3. Current legal framework

In order to have a clear picture of what asylum and a refugee is, the most important tools to check are the sources of international law that regulate them. These are the tools that are used to first of all define what these are, and second of all to regulate and arrange how they work in the everyday life. In order to know what we are facing, it is important to know how did we get here and how it works in the practical aspect.

As mentioned previously, we can find different levels of regulation when talking about this topic, from the more general to the more specific; from international to national. We can differentiate three big groups: **the universal protection regulation, the regional regulation and the domestic regulation**. As the names make easy to guess, each of the categories are usually regulated by a different actor or actors, and affects people in different ways. The first big group, the universal regulation, is the one represented by an international agreement between states, decisions and rules made by the United Nations and based on their sources. When focusing on the second group, we are still talking about agreements between states, but in a more specific area. A clear and near example for this could be the European Union, since we are still talking about agreements and regulations between states but we are only taking into account the states that are part of this specific regional area or institution. There are other regional regulations such as the Convention on refugee issues in Africa⁶, the Cartagena Declaration⁷ and others⁸, which will not be analyzed in this work, since those are out of the scope of this topic. And last but not least, we find the domestic or the in-state regulations (often based on the international sources). This is the regulation done by each state regarding the asylum procedures. This last level is definitely conditioned by all that the state has agreed to respect and follow in the previous two upper levels. If a state has committed by signing to any agreement in the international or regional

⁶ Convention Governing the Specific Aspects of Refugee Problems in Africa. Concluded the 10th of September of 1969. Entered into force the 20th of June of 1974.

⁷ Cartagena Declaration on Refugees. Concluded the 22nd of November of 1984.

⁸ Kampala Convention or the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa. Concluded in October 2009. Entered into force the 6th of December of 2012

regulation, then the domestic regulation has to be conditioned by all that was signed previously. At the same time it has to be stated that the national or domestic asylum systems can be wider when granting the protection that the state offers to another country's nationals, that is not limited by the mentioned upper levels, since those just establish some minimum issues that have to be assured.

After differentiating the regulation levels, I will now focus on the international regulation that we find when talking about the refugee status. After that, mentions will be done about the regional and domestic regulations, when comparing the situation in some countries and explaining why can this be avoided or improved.

3.1. Universal regulation

First of all, we find the so-called universal regulation regarding the refugee protection, which has to be understood as the rules created in the international arena and that influences and binds all the countries. As Guy Goodwin and Jane McAdam state⁹, the term refugee is a term “*verifiable according to principles of general international law*”, meaning that in order to find a definition of who is a refugee, we have to head to the international agreements and the definitions that these give for this term, together with the interpretation that is given by academics. They understand that the fact of deserving the status of refugee implies that the individual is “worthy of being” assisted or protected from the reasons or circumstances why they fled their own country. In order to analyze the international agreements, we will go from the broadest one to the most specific, focusing through each step in our topic.

3.1.1. Universal Declaration of Human Rights

As we all know, and even the United Nations itself say, the Universal Declaration of Human Rights was and still is the most important step in history regarding human rights and their protection. This declaration was passed the 10th of

⁹ Goodwin-Gill, Guy & McAdam, Jane (2007). *The refugee in International Law*. Oxford University Press. 3rd edition. P. 15.

December of 1948 in Paris¹⁰, and it was portrayed as the ideal for all countries around the world, with specific rights that have to be protected. It englobes different rights that are given the status of human rights, and I will now portray the most connected ones to our topic, the asylum systems and refugees.

When reaching article 7, it states that “*All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this declaration [...]*”. This article gives everyone the right of making their freedoms effective, by establishing that the protection of these articles has to be real and protected by the law. These rights have to be implementable by legal procedures in case that those have been broken by any party. Because of this, the citizens can access the different courts in order to make their freedoms applicable in case that those have been broken.

Once we move to article 13 and 14 we are approaching the right for asylum and the right to be a refugee. Specially in article 13.2 it is said that “*everyone has the right to leave any country, including his own, and to return to his country*”. This is a general freedom that this declaration states, but we have to connect it to the next article, which talks directly about the topic of this thesis:

Article 14 of the Declaration of Human Rights

1. *Everyone has the right to seek and to enjoy in other countries asylum from persecution.*
2. *This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.*

It has to be stated that this is the most important article from the Universal Declaration of Human Rights regarding the topic of asylum and the rights of refugees. It actually states it as a universal right applicable to everyone in any country, being this one of the most important and widespread tools. After the constitution of the right or freedom of asylum, different international regulations have been done in order to

¹⁰ UN webpage, Universal Declaration of Human Rights: <https://www.un.org/es/universal-declaration-human-rights/>

arrange it, and the final step in order to establish the procedure to ask for asylum is up to the countries. All the rights and freedoms stated in the Universal Declaration of Human Rights are basic in order to start regulating and creating international agreements, and the right of asylum is not an exception, having plenty of regulation that will be explained throughout this thesis.

Regarding the protection of the LGBTQ community, we cannot find a specific article mentioning it, since at the time of creation of this Declaration the situation of this community was not comparable to the one that it has nowadays. But when reading between lines, we can actually find an article where we could base the right of freedom of expression of love or gender identity. We are talking about article 29, since this states that *“everyone has duties to the community in which alone the free and full development of his personality is possible. [...] In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society”*.

Even if this is not a direct mention for the protection of the LGBTQ community, we could use this article as the origin of the regulations that came after that englobed this community. It is clear that this interpretation of the article is not something that will be used in all the countries worldwide, since some of the countries do not protect this community in general terms. The interpretation of these rules depends on states only, and that is why this will not be applied this way in all cases, but this is stated to show that an open interpretation can be done if interested by states. The fact that it states that the self-expression and the development of the personality is empowered in a community, and that this can only be limited by law on the grounds of morality and public order is in itself a step forward. The public order is a really broad concept that can really be used to argue many different points of view, but it can be definitely used to ask for the protection of a community that fights for self-expression. This concept has really been discussed when talking about gay rights for example, when they stated that this behavior was going against the public order.

It has to be said that these articles are the ones that have the biggest applicability for the topics of the right for asylum and the status of a refugee. These can be taken as the base for the rest of regulation that came after. Regarding the protection of LGBTQ, even if there is not direct mention, we could base the protection of those rights in other regulations, but basing them partly in article 29.

After analyzing the Universal Declaration of Human Rights, we will now head to other international regulations applicable for our topic, being these more specific ones for the right for the ask for the refugee status.

3.1.2. 1951 UN Convention relating to the Status of Refugees

This is the main legal tool that we can find in the international arena regarding the regulation and protection of refugees, since it actually is the tool that defines what a refugee is and why and when can a person seek for the status. There have been other previous international agreements regarding refugees, such as for example the Conventions of 1933 or 1938 of the International Refugee Organization¹¹, but the 1951 UN Convention is the one still applicable nowadays and the one to refer to when talking about the right of being a refugee. In the first article it is stated that who was considered a refugee under the previous International Refugee Organization will still be considered a refugee with this new regulation also, giving them a continuous protection. The mentioned International Refugee Organization (IRO) was later substituted by the nowadays UNHCR (United Nations High Commissioner for Refugees), which is the principal UN agency working with refugees¹².

This High Commissioner was established by the General Assembly in order to specialize and give expertise on the topic, so that the international protection is guaranteed to everyone after they work on permanent solutions for the problem of refugees through for example the assistance to governments¹³. This commissioner was

¹¹ Article 1. A. I of the 1951 UN Convention of the status of refugees.

¹² UNHCR webpage: <https://www.unhcr.org/history-of-unhcr.html>

¹³ UNCHR statute, article 1. <https://www.unhcr.org/4d944e589.pdf>

created with the explicit mention of being a non-political institution, only with humanitarian and social purposes to groups of refugees, as the statute mentions.

When talking about the people that were protected under the mentioned IRO (article 1.A I. 1951 UN Convention), it has to be said that this prolongation of the protection is done so that the people that may not be covered with the new regulation are still safe after the change. This was done to ensure that the people that already went through the process to become a refugee do not have to do it again, and so that they maintain the status under the new regulation. Throughout the literature, these people are referred us “statutory refugees”, being this a historical category for the people that asked for international protection before the 1951 UN Convention¹⁴. As the UNHCR handbook states, this is done to create a link with the past in order to make sure that the people that became part of the international protection before the mentioned UN Convention are still protected¹⁵. So, it was added in order to create a continuity for the international protection of these people.

Being the UNHCR the main institution regarding the protection of refugees in the international arena, we can now focus on the previously mentioned 1951 UN Convention regarding the status of refugees. Being this the main legal tool internationally, we can base here the definition of what a refugee is and how can we define it.

As the convention defines in its first article, a refugee “*is someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion*”. This is the main definition that the world has in its international regulation for the term ‘refugee’. As we can see in this definition, there are two clear situations that have to happen at first to be eligible as a refugee.

¹⁴ Kotzeva, A; Murray, L. & Tam, R. (2008). Asylum and Human Rights Appeals Handbook. Oxford University Press.

¹⁵ UNHCR. (1992). Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees. Par. 33.

Well-founded fear of persecution

Regarding the well-founded fear of persecution, we are facing one of the most important issues to take into account when talking about the status of refugees, the central element of the definition of what a refugee is. The fear of persecution listed in the first article of the Convention has to be active throughout the process, and it has to be the reason why the person decided to leave and flee its country of origin. In asylum processes, the asylum seeker has the “burden of proof”, since he or she has to prove that they are suffering some kind of persecution, or to establish an assessment to make their case¹⁶.

Before going into the well-founded part of the fear, we first have to define what persecution means and how we can establish it. It has to be said that there is not a universally accepted definition of persecution, but focusing on the Convention, it can be understood as a threat to life or freedom in one of the reasons that are after described¹⁷. The persecution itself has a subjective part that has to be taken into consideration as it will be explained after. In order to find a current definition that has achieved quite an amount of approval throughout the scholars, we can talk about the view of Professor Hames Hathaway, who states that persecution is “*the sustained or systemic failure of State protection in relation to one of the core entitlements which has been recognized by the international community*”¹⁸. This is a clear definition of what persecution can mean for the international refugee rights perspective, that is accurate in the way that it portrays the lack of protection that the country of origin is supposed to give to the applicant for refugee status or asylum. When that person is not getting that help, he or she suffers persecution when facing some kind of threat or limitation of rights, and we can consider that persecution for our purposes.

As the first article itself states, this fear of persecution has to be well founded. It can be said that the fear is well founded when there is a very high likelihood that the person will be persecuted if the applicant would go back to the country of origin. Some scholars argue that there is an objective and subjective part to the fear of persecution,

¹⁶ Kotzeva, A; Murray, L. & Tam, R. (2008). Asylum and Human Rights Appeals Handbook. Oxford University Press.

¹⁷ UNHCR handbook. Par. 51.

¹⁸ Hathaway, J. (1991). The Law of Refugee Status. P. 112.

being the subjective part way easier to explain than the objective proof part. The subjective part can be the simple ‘fear’ that the person suffers because of the situation that he or she is living in. But it has to be said that this subjective part, the mindset of the person, has to be supported with an objective situation. Both the subjective and the objective parts have to meet¹⁹ in order to succeed in the ‘well-founded fear of persecution’²⁰.

The mentioned subjective part of the fear has to be linked directly to the personality of the asylum seeker. Every situation is different depending on who it affects, every person reacts differently to a similar situation. When analyzing a specific case when having to make a decision, all the background of the person has to be taken into consideration in order to prove that the reaction of leaving and the decision not to go back to the country of origin is based on fear. In order to do so, the membership of a particular social or political group, the own interpretation of the situation and the personal experience of the protection seeker among all the factors that influence the person have to be analyzed and explored²¹.

Regarding the objective part of the ‘well-founded fear of persecution’, the context has to be analyzed, the background where the seeker feels this subjective fear previously mentioned, the character, the influence of the background and personality and many others. And even if each case has to be considered on its own, the similarities to other people’s processes can be taken into consideration also, meaning that what happened previously to members of his or her family or to some members of the same group can show that the seeker could eventually be a victim of the same persecution. Even the laws and the general situation of the country of origin has to be taken into consideration at the time of making a decision about a specific case, since this can influence the fact of having a well-founded fear of persecution²².

As Carlier, Vanheule, Hullmann and Peña state, we can ask ourselves three different questions in order to know how to decide when there is a fear of persecution,

¹⁹ European Commission: Well-founded fear of persecution. https://ec.europa.eu/home-affairs/what-we-do/networks/european_migration_network/glossary_search/well-founded-fear-persecution_en

²⁰ UNHCR. (1992) Handbook. Par. 38.

²¹ Ibid. Par. 41.

²² UNHCR. (1992) Handbook. Par. 43.

being this called the “theory of the three scales”²³. First of all, we have to ask at what point we consider that there is a well-founded fear. This is what they call the level of risk²⁴. The authors state different terminology used by different countries, such as “considerable likelihood”, “reasonable likelihood”, “not without foundation” or “when the risk of persecution cannot be excluded with certainty” when talking about the level of risk ‘needed’ when facing persecution. Stating where the well-founded fear starts is definitely a very difficult and subjective mission, and statements such as “when a reasonable person would find it credible” or “with common sense” come into play at this time. If we want to focus more on the objective parts of the level of risk, as the authors say, we have to analyze the moment and the place of such a risk. First we have to check when they are feeling threatened in their country. It has to be analyzed when this fear of persecution is active and when it influences the asylum seeker. As Carlier and the co-authors state²⁵, the risk has to be applicable when the decision is made and not only when the application is created. But at the same time, the longevity of the process to achieve the status of refugee cannot be attributable to the applicant, so this has to be taken into account too. And regarding the place, which we can consider a second objective point to check the level of risk, first of all, the fact that the applicant already suffered persecution in his/her country of origin can be considered as an important detail to take into account when evaluating future persecution and the fear of going back to its home country because of it. Even if the fact of having suffered persecution before the application is not a requirement, it can definitely influence the decision when deciding about the future persecution that has to be avoided through the asylum system and the refugee status. It can be concluded that in order to have the ‘sufficient’ level of risk to have the application approved, we would have to focus more on internal than external reasons, but the moment and place should definitely be taken into consideration as external factors. And the fact of having a reasonable risk of persecution should be enough for the specific case: “a reasonable risk of persecution, even if minimal, will suffice”²⁶.

²³ Carlier, J. Y.; Vanheule, D.; Hullmann, K & Peña Galiano, C. (1997) Who is a refugee? A Comparative Case Law Study. Kluwer Law International.

²⁴ Carlier, J. Y.; Vanheule, D.; Hullmann, K & Peña Galiano, C. (1997) Who is a refugee? A Comparative Case Law Study. P. 696.

²⁵ Ibid, 696.

²⁶ Ibid, 701.

Secondly, we have to ask when or because of what do we consider that there is persecution, at what point. They call this the level of violation of human rights. After checking that the level of risk has to be acceptable, even if minimal, we have to check whether the violation of human rights is sufficient or strong enough to grant the status of a refugee. In order to find the level of violation, we have to take into consideration the qualitative and quantitative parts of it. In order to know if the persecution or the violation is applicable in the specific case, the mentioned authors state that the qualitative part (being unjust or cruel) and the quantitative part (the continuousness) have to be noticeable and real. One important tool to analyze this is the disproportionality when talking about the violation of human rights in case law, meaning that “when the different treatment inflicted upon these categories of persons is disproportionate and without objective justification, it constitutes discrimination”²⁷. The conclusion is then that there will be a ‘sufficient’ level of violation of human rights when the treatment given to the asylum seeker “disproportionately violates a basic human right”. This violation has to be serious and disproportionate in order to achieve this level.

And lastly, we have to ask at what point we consider that there is enough proof of the well-founded fear of persecution, the so-called level of proof. When can we say that we can prove this discrimination and persecution? As known, the proving of the persecution is one of the most difficult actions to do, and it then has to be said that the persecution has to be reasonable and that it basically has to make or create the benefit of the doubt when talking about it. When talking about this three scale theory, and in general about the 1951 UN Convention that we are analyzing, we have to take into account the protective way of writing and stating that the agreement has, with the objective of protecting the people and always giving the benefit of the doubt and believing in a way to the asylum seekers. That is why when the doubt comes into place it should be taken into consideration in order to make the decision about the specific case.

²⁷ Carlier, J. Y.; Vanheule, D.; Hullmann, K & Peña Galiano, C. (1997) Who is a refugee? A Comparative Case Law Study. P. 702.

Reasons for persecution of the 1951 UN Convention

After analyzing the well-founded fear and the risk of persecution, we will now focus on the **list of reasons for persecution** that the article 1 of the 1951 UN Convention states, and we will analyze some details of them, focusing then on the membership of a particular social group that applies the most to our topic. As mentioned before, we can find 5 reasons listed that can be the reason of the suffered persecution, being those these ones: race, religion, nationality, membership of a particular social group and political opinion. In order for the status of refugee to be granted, the seeker has to comply with a well-founded fear of persecution for one of these reasons.

Race

First of all, we find the reason of discrimination due to race. Race has been an important topic throughout history when talking about discriminations or differences of treatment, and even if there are regulations against this, it unfortunately still is something to take into account when talking about the right for asylum and the refugee status. We first of all have to define what “racial discrimination” is, and we can say that it means *“any distinction, exclusion, restriction or preference based on race, color, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life”*²⁸. The 1966 Convention on the Elimination of Racial Discrimination defines and regulates the situation regarding these types of discrimination. This definition we can still see it applicable when wanting to analyze the specific case of race discrimination, and this reason still is a very frequent background to refugee movements nowadays. As Verdirame states, it is important to take into account that the tribunals are starting to accept the fact that collective ethnicity groups can be considered as social constructs, being these based on actual perceptions of people, not having to prove objectively at all times. When the persecution is ‘only’ based on the color of the skin, it may be proven in a more efficient way in front of a tribunal, but for example in case of

²⁸ 1966 UN International Convention on the Elimination of All Forms of Racial Discrimination. Article 1. Vol 660. Pag. 195 <https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx>

ethnic groups, the perception or the social construct is being accepted more and more often²⁹.

In order for this reason to be applicable under the 1951 UN Convention, the UNHCR handbook states that the racial discrimination has to achieve that the human dignity of the person is affected to the point that it is not compatible to most human rights, having this important consequences in the daily life³⁰.

Religion

The second reason for persecution mentioned in the first article of the 1951 UN Convention is the religion. As Goodwin-Gill says, “*religion has long been the basis upon which governments and people have singled out others for persecution*”³¹. Freedom of choosing and practicing a religion has and still is one of the main human rights for everyone, being this stated in the Universal Declaration of Human Rights³² or the 1966 Covenant on Civil and Political Rights³³. Since the right of freedom of belief and religion is covered by several international agreements, it is part of the reasons for the persecution regarding refugees, and it has to be taken into consideration as such, being a very argued reason when asking for the international protection in a third country. One of the most important texts supporting this argument is the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. This states and indicates all the interests that have to be protected when talking about religion, and the breaking or violating of those can be considered as persecution³⁴, which then is applicable to ask for the international protection of the status of refugees.

²⁹ Verdirame, G. (2000) The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals. *The international and Comparative Law Quarterly*. Cambridge University Press. Vol. 49.

³⁰ UNHCR. (1992) Handbook. Par. 69.

³¹ Goodwin-Gill, G. & McAdam, J. (2007) The refugee in International Law. 71

³² Article 18 Universal Declaration of Human Rights: “*Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance*”.

³³ Article 18 of the 1966 International Covenant on Civil and Political Rights. <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

³⁴ United Nations General Assembly A/RES/36/55. (1981).

This persecution can be shown in very different ways, some of them being the prohibition of membership of a religious community, of worship in private or in public, of religious instruction, or serious measures of discrimination imposed on persons because they practise their religion or belong to a particular religious community³⁵.

Nationality

We then find the third reason of persecution stated in the Convention, being this the nationality. This may be the oddest reason when talking about being persecuted and having this well-founded fear, since it can at first sight look not really possible that some people from a country will be persecuted because of being of that country in the same state of origin. It can be seen as absurd the fact that a state will persecute its own nationals because of simply being from there. That is why this reason is usually connected to others, such as the membership of a particular ethnic, social, cultural or other community³⁶. Nationality can be interpreted in order to work as a base to argue other persecutions connected to being a member of a specific community, in order to explain the situation of the country and what it implies being a national of there and being part of the persecuted community.

Nationality is used to empower the persecution suffered for being a member of a particular social group that will be explained later, in order to clarify what being a national of the specific country adds to that. Sometimes that fact that two or more national or ethnic groups co-exist in the same country can create conflicts and situations of persecution that have to be covered by this international protection³⁷.

Political opinion

We then find the reason of persecution of having a different political opinion, meaning that the fact that a person thinks differently and does not agree with certain politics of a country or a majority, means that he or she will be persecuted and will have to leave the country to protect his or her security and physical integrity. As Carlier,

³⁵ UNHCR. (1992) Handbook. Par.72.

³⁶ Goodwin-Gill, G. & McAdam, J. (2007) The refugee in International Law. 73

³⁷ UNHCR. (1992) Handbook. Par. 75.

Vanheule, Hullmann and Galiano state, the political opinion can either be active or passive, and can be expressed as a word, act or omission; even the fact of the flight to stay abroad³⁸. The right of freedom of opinion and expression is established in the Universal Declaration of Human Rights, in its article 19³⁹. Everyone is entitled to its own opinions, political or non-political, and if the person suffers persecution because of it, they should be eligible to ask for the international protection that the asylum systems and the status of the refugees offer.

In order to argue the persecution because of a political opinion, it has to be clear that the government of the state of origin knows about his or her opinions before the flight of the country. It can even happen that he or she has not yet suffered any kind of persecution before leaving the country, but the simple act of leaving the country fearing the consequences that it may create can be considered as a reason for fearing persecution and moving elsewhere⁴⁰.

Membership of a particular social group

And lastly, we find the last category or reason that the 1951 UN Convention lists as a persecution reason, the membership of a particular social group. This in particular is the most important for the purpose of this thesis, since, as we will explain now, the LGBTQ community is englobed after a long process in this category. This reason can be quite wide when wanting to select it to prove our specific case when asking for the international protection. This membership requires that the concrete person has some characteristics that are unchangeable and fundamental, and because of that it cannot be possible to ask for a change⁴¹. A lot of factors can come into place in this category, such as gender, age, sexual orientation and others for example. When this international agreement was approved, this reason was not specified in depth, so even if it was directed to protect known categories of people, the development of the future problems have taken place and owned this ‘open category’ for its protection. The society does not

³⁸ Carlier, J. Y.; Vanheule, D.; Hullmann, K & Peña Galiano, C. (1997) Who is a refugee? A Comparative Case Law Study. Kluwer Law International. P. 714.

³⁹ Article 19 Universal Declaration of Human Rights: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers”.

⁴⁰ UNHCR. (1992) Handbook. Par. 83.

⁴¹ Carlier, J. Y.; Vanheule, D.; Hullmann, K & Peña Galiano, C. (1997) Who is a refugee? A Comparative Case Law Study. Kluwer Law International.

stop changing and evolving throughout time, and new forms of persecution arise from time to time because of it. Authors state that “there is no reason in principle why this ground, like every other, should not be progressively developed”⁴².

With the passing of time, different candidate groups have appeared and will still appear, such as women, LGBTQ people, people affected by HIV/AIDS and others. This is due to the lack of specification of the definition of “membership of a particular social group”, it can englobe all kind of associations of people or communities, which can evolve throughout the future times. The fact that a group of people will become a “social group” in order to be able to ask for the international protection is a complicated subject, since there have to be some characteristics, values, aspirations or others that have to unify this group and make it be the objective of the persecution.

Various organizations or institutions have discussed about what a particular social group is and what can be understood as a social group for international protection purposes. The Council of Europe Committee of Ministers have discussed this issue in order to understand the way the 1951 UN Convention is written so that the application and interpretation is following its purpose. This is what they had to say about the issue: “*a particular social group is a group of persons who have, or are attributed with, a common characteristic other than the risk of being persecuted and who are perceived as a group by society or identified as such by the state or the persecutors. Persecutory action towards a group may however be a relevant factor in determining the visibility of a group in a particular society*”⁴³. It can be said that the interpretation taken by this institution is the same or similar to the one expressed by the expert roundtable of the UNHCR and the guidelines that will now be explained.

Describing the characteristics to become a so-called group for the international protection is very hard if not impossible, since we are facing a very subjective area of the word itself. As mentioned, some characteristics have to be common between the people in order to be a group, but it is true that this notion of being a social group for the Refugee Convention is in part very connected to the point of view of others. Meaning

⁴² Goodwin-Gill, G. & McAdam, J. (2007) *The refugee in International Law*. 74

⁴³ Council of Europe Committee of Ministers Recommendation Rec(2004)9 on the concept of “membership of a particular social group” in the context of the 1951 Convention relating to the status of refugees, 30 Jun 2004.

that the fact of being a social group can be seen through how this group is taken by others, by third people, especially at the official or state level. This is a key point in order to be a social group for this objective, since the group itself is not something that the people sign into, it is something subjective that can be created because of the view that third parties have of them. As the UNHCR expert roundtable states, a particular social group is “*a group of persons who share a common characteristics other than their risk of being persecuted, and which sets them apart. The characteristic will ordinarily be one which is innate, unchangeable, or which is otherwise fundamental to human dignity*”⁴⁴.

Regarding this specification given by the experts, it can be said that this can be interpreted as something positive for the LGBTQ community to be part of the refugee convention definition as a specific social group. It is clear that for example gay or lesbian people that are persecuted in their country of origin, even if each case will have its own characteristics and specific situations, they all have some in common that can qualify as a social group, in this case the fact of feeling attracted to and loving same sex people. This is a clear characteristic that they have in common that, as the experts say, is “*innate, unchangeable or fundamental*” to their dignity. The fact of having a common characteristic that is unchangeable and the reason why they are persecuted has to be taken into consideration when deciding if the LGBTQ community fit into the social group category of the refugee definition.

The fact that the state authorities see and act a certain kind of way when facing a group of people when making decisions, can be decisive to consider this group as a social group for the understanding of the international protection that the Refugee Convention offers everyone. As stated, the description of this part of the definition is not something closed or really detailed, which comes with some uncertainty and possibilities to evolve throughout time. Any way, we can find some tools that help define what this definition means and how we can clarify what we can call a social group regarding the definition of the Refugee Convention.

⁴⁴ Expert Roundtable organized by the United Nations High Commissioner for Refugees and the International Institute of Humanitarian Law, San Remo, Italy. (6-8 Sep 2001). *Summary Conclusions: membership of a particular social group*.

First of all, we find the previously mentioned UNHCR handbook, which states that “a particular social group normally comprises persons of similar background, habits or social status” and that “membership of such a particular social group may be at the root of persecution because there is no confidence in the group’s loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government’s policies”⁴⁵.

Once after reading these two specifications, we have to focus on two of the parts mentioned in the handbook, being the first one the “similar background or habits”. If we focus on the topic of refugees and the LGBTQ community, it has to be said that this specification can be connected in a way to specific cases. For example, even if every case is different in its own way, it can be said that the background of transgender people for example can be similar when talking about discovering him or herself, or same applies to lesbian or gay people. Obviously everyone has its own story and the situation of each person is different in its own family or background, but some details or experiences are shared between people, such as coming out for example. It is clear that it is not easy to just qualify as a social group for some situations or experiences in common, but all kind of interpretations can be done in order to qualify as a refugee in the international protection arena.

As a second tool we find the UNHCR Guidelines on International Protection about the membership of a particular social group⁴⁶. These guidelines, as the documents itself says, complement the previously mentioned handbook, and it is directed to governments, the judiciary and legal practitioners, to shed some light to the important definition of refugees. In paragraph 3 it is stated that there is not a “closed list” with the social groups that can apply and be interpreted as part of the protected area of this international protection, and that this term of membership of a specific social group has to be “*read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms*”.

⁴⁵ UNHCR handbook, 77 & 78.

⁴⁶ UNHCR: Guidelines on International Protection (2002): “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the status of refugees.

Regarding the interpretation of the so-called social group, the guidelines explain in paragraphs 6 and 7 that there are two main interpretations that have dominated the spectrum to decide whether a group of people qualify as a protected group under the Refugee Convention⁴⁷. First of all, we find the “protected characteristics” approach, which means that the characteristic to look for and protect is an “*immutable one [...] that is so fundamental to human dignity that a person should not be compelled to forsake it*”. We have to connect this to the interpretation that the expert roundtable gave above regarding this topic, since it definitely is connected and refers to the same approach. This feature of a person’s composition has to be so fundamental that living without that cannot be expected from the person, since it will not grant the human dignity that everyone should have. This UNHCR guidelines document actually states that applying this approach mentioned, “*courts and administrative bodies in many jurisdictions have concluded that women, homosexuals and families, for example, can constitute a particular social group within the meaning of Article 1A(2)*”⁴⁸.

As a second approach, the guidelines state that this is the characteristic that makes this group recognizable or noticeable from the society in general. We can summarize this one saying that this is the “social perception” at large that the group has when focusing and talking about the people that compose it. Referring to a group is always something that can be shared between the society in general, and the fact that they are seen as a social group is one of the approaches in order to know if this group can be applicable to the Refugee Convention protection. This second approach, as mentioned previously, is something to take into consideration when interpreting the Refugee Convention, and the guidelines that are being analyzed now actually state that, as within the first approach, “*women, families and homosexuals have been recognized under this analysis as particular social groups, depending on the circumstances of the society in which they exist*”⁴⁹.

After analyzing both approaches given by the UNHCR, the guidelines state that it is important to use an approach that incorporates both ways of interpreting it to the definition, so that it is applicable to the most people possible, so that the protection is as

⁴⁷ Querton, C. (2012). The Interpretation of the Convention Ground of ‘Membership of a Particular Social Group’ in the Context of Gender-related Claims for Asylum. P. 6.

⁴⁸ UNHCR: Guidelines on International Protection (2002). Par. 6

⁴⁹ UNHCR: Guidelines on International Protection (2002). Par. 7

wide as possible⁵⁰. That is why it is stated in paragraph 11 that a common definition has to be used, being this the one:

“A particular social group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights”.

This is the definition that the UNHCR guidelines provide to interpret what a social group is for Refugee Convention purposes. It is clear that it incorporates both approaches when describing it and trying to define what a group should be for governments and states to apply. They first introduce the approach of the image that the society has of the group, being this the fact that they are portrayed as a group by the society in general, that they are considered as a social group that has similar or the same interests among its members. And secondly, they add the approach that explains that they have characteristics which are innate or unchangeable, fundamental to their identities. So, the conclusion of the guidelines is that in order to interpret what a social group is, the two approaches have to be taken into consideration, both the view of the group by society and its historical background; and the innate characteristic approach, which analyzes the common features that the group members have and that cannot be expected to change, since these are connected to the dignity of the person and his or her human rights.

Another important feature that the UNHCR guidelines state⁵¹ is the fact that not all the members of the social group have to face persecution in order for one of them to ask for the international protection that the refugee convention grants. This means that when stating that one person is a member of a particular social group and that he or she is suffering persecution because of it, it is not a requirement to that person to prove that everyone in that specific social group faces the same persecution or the same effects that

⁵⁰ Querton, C. (2012). The Interpretation of the Convention Ground of ‘Membership of a Particular Social Group’ in the Context of Gender-related Claims for Asylum. P. 8.

⁵¹ UNHCR: Guidelines on International Protection (2002). Par. 17

he or she is suffering. In other words, not everyone from the same social group as the refugee-seeker has to face persecution in order for one specific person that is suffering it to ask for the international protection and get it, and the refugee seeker has to prove only his or her well-founded fear of persecution.

Even if this can sound strange at first glance, it is important to state that in order to ask and get the international protection, each case is unique and personal in its own way, and that is what a person that is asking for help has to prove in each case, there is not a general rule applicable to everyone. So, based on this uniqueness of the cases, that is why we cannot say that just because of being a member of a particular social group the refugee status will come automatically. An example can help explain this situation: going to our specific topic, let's focus on an out lesbian woman (a person that shows it in an open way, publicly). It has been stated and it can be interpreted through the Refugee Convention that the LGBTQ community can be considered as a social group when asking for international protection. The members of this community have to prove that in their country of origin they face persecution because of being members of the LGBTQ community, and that is why they have the need to flee their country and go to a third one. In this specific case, it can be that she is facing persecution because she is a lesbian in her country of origin, and that is why she decides to leave and ask for protection in another country. After proving that she faces persecution, she then gets the refugee status. Let's focus now on the same situation but in a 'closeted' (not publicly and outspokenly expressed) lesbian woman that is not planning on changing that part of her life by coming out as lesbian, by hiding that part of her and living another life. Since she is hiding part of her way of being, the common characteristic that links her to the community is at the moment not displayed, and she then does not suffer from persecution at the time. This is not to say that she may not be persecuted if she was public with her feelings, since this will unfortunately most probably happen, but the persecution is not happening at this stage of her life. Since she is not known to be a lesbian for the persecutors, she is not facing the persecution in order to qualify as a refugee. It has to be said anyway that this lack of showing her true self can happen due to the survival instinct, since the persecution will sure happen if she would display her true self. In case she would finally decide to change that and live her true self, she would be then eligible for international protection since the persecution or the well-

founded fear of suffering it would start when expressing her truth publicly, and the persecutors would know about her.

The fact that the guidelines say that “not all the members of the group must be at risk of being persecuted” (paragraph 17) has to be interpreted in a favorable way using an anti-discrimination way⁵², meaning that it has to be interpreted in an affirmative or confirming way to the people that are actually being persecuted or fearing persecution, so that they can claim that they are in order to get the refugee status. As said, some people may not suffer this persecution because they may be hiding their shared characteristic (being a lesbian in the previous example) or for any other reason, and in that moment they would not be then suffering the consequences, but this does not mean that they would eventually suffer them in case the situation in their country of origin for the LGBTQ community is not a good one and they would decide to live publicly. Even if they do not show the shared characteristic in their own country, if they then move to a third country and do it, expressing that they were not showing their affection for example due to fear of the consequences, the international protection will be applicable, since the fear of persecution is part of the definition itself. In other words, and not to mix and misunderstood what paragraph 17 means, we can summarize it by saying that each refugee seeker has to prove only his or her own case, without having to try to prove if the whole social group is facing persecution or not. Each person’s situation or background is different and that is why this paragraph specifies that the seeker only has to prove the persecution or the fear of persecution that he or she is suffering. It can be concluded that this specification has to be interpreted in a positive or helpful way for the seekers,.

And last but not least regarding the guidelines, it has to be said that as paragraphs 18 and 19 explain, the size of the social group is not relevant when having to decide if a group of people qualify as a social group for refugee convention purposes. It is not something to take into consideration the fact that for example a lot of people are members of a particular social group, so that it is decided that there are too many in order to grant the international protection⁵³. The number of people that are part of a

⁵² Aleinikoff, T. A. Protected characteristics and social perceptions: an analysis of the meaning of ‘membership of a particular social group’. P. 290-291.

⁵³ UNHCR: Guidelines on International Protection (2002). Par. 18

persecuted social group should not matter at the time of making a decision, and if each of them can prove that they are part of it and that they are persecuted because of it, everyone should be entitled to the protection after going through the process⁵⁴.

After analyzing this and other approaches to the membership of a particular social group from the Refugee Convention, it can be said that all the approaches and interpretations checked have an open door to include the LGBTQ community as a social group that have to be protected by the Convention, and after arguing the specific case, to grant the refugee status to the affected people. It is clear that accepting a specific community or social group as one for international protection does not mean that all the petitions of international protection will now be accepted when they argue that they belong to this group that can be persecuted in certain countries, but it definitely is a step forward to be able to argue and win cases through different processes and to protect people from persecution.

We now have a good first step into a fair direction when talking about the refugee status and the international protection arena when focusing on the LGBTQ community, since the interpretations regarding the acceptance of this group into the refugee definition of the 1951 UN Convention are favorable and positive.

On the other hand, we have to emphasize that this interpretations of the convention are just that, interpretations. The convention is the base document for the international protection and the refugee status, but this does not mean that all the signing countries will interpret it as it was just explained here. Each country has its own right to create and organize their own asylum system protecting the people that they consider are unprotected and in need of help. And at the same time, the countries that are actually the persecutors for some of the LGBTQ cases can be asylum granting countries for other cases, but definitely not for the issues that we are focusing on throughout this thesis. The Refugee Convention is the base document when talking about refugee protection, and all State Parties to it should follow what this says at the time of granting protection to unprotected people, but since they are the ones deciding

⁵⁴ Immigration and Refugee Board of Canada (1991). Membership in a Particular Social Group as a Basis for a Well-Founded Fear of Persecution - Framework of Analysis: *“Group size is irrelevant; the characteristic defining the group may be shared by many or a few”*.

about how to construct their own asylum systems, they decide how far they go when protecting different cases of different persecuted people, and how to interpret the Convention itself, always remaining among the limits stated there.

As stated, these are interpretations of the refugee convention regarding who can be included into it, so that then they go through the process of asking for international protection. One more efficient and direct way to protect the LGBTQ community and other social groups would be to directly mention those in the definition itself of the convention, so that the State Parties would have the obligation of protecting these people. On the other hand, if this was the actual situation, there would not be as much space as there actually is for interpretation, and the social groups that would be eligible for the international protection would be listed in a more objective way. This has its perks but it has its own disadvantages too, since if there was a closed list for social groups this would not leave as much space for growth and evolution of the society as the actual regulation does nowadays. The possible or recommended ways of improving will be analyzed and talked about at the conclusion, after going through a selected comparative approach to see how this convention applies to specific countries.

And another downside of the closed list of social groups or aiming for a more specific definition of the Refugee Convention is that, if this would be the case, most likely several countries would not sign or accept it as their own. It is well known that some countries are not on the same page in a lot of issues, such as for example the protection of the LGBTQ community. If all the countries worldwide would be positive and accepting with this community, the international protection would not be needed, since everyone could live without the fear of persecution in their own country. But as this is not the case, accepting a refugee convention that would eventually protect the LGBTQ community with a direct mention would mean that these countries would not accept and sign it. That can be one of the reasons why the Refugee Convention definition of a refugee is as subjective and general as it is, so that both interpretations can be implemented basing it on that. The guidelines and the expert roundtables specifying the definition are some useful tools for all countries for the time of interpreting the convention when creating or changing their own asylum system, but these will most likely only be used by those that have a more open minded or modern point of view, since the approach taken by the guidelines is an including an open one.

Non-refoulement clause

The non-refoulement clause is a part of the Convention that we cannot not explain when talking about the right for international protection of people. After analyzing the refugee definition, we have to analyze this clause, since it still is one of the most important tools in the 1951 UN Convention. In order to apply this, first of all, the person has to be out of his or her country of origin. The situation has to be such that the person decides to flee own country to ask for protection in another one. This has to be based on one reason of persecution that will be explained later, and it is forbidden for the rest of the states to send the person back to its country of origin, the so-called ‘non refoulement’ clause. This is stated in article 33, and it states the following: “*No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion*”. It is clearly stated that the reasons of persecution are so important that it is not possible for a third country to send the person back to that country. It has some exceptions such as to be a danger for the security of the country where he or she is on, stated on article 32, but the ‘non refoulement’ clause is one of the main rules to follow in this process.

This clause from international law “*prohibits States from transferring or removing individuals from their jurisdiction or effective control when there are substantial grounds for believing that the person would be at risk of irreparable harm upon return, including persecution, torture, ill-treatment or other serious human rights violations*”⁵⁵. This prohibition is also directly included under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment⁵⁶, among others. It is not exactly the same type of instrument, since it englobes more cases regarding human rights, but it is mentioned here to emphasize that this is a powerful tool used and applied worldwide. In that case, it is not only applied to the asylum

⁵⁵ UNHCR: The principle of non-refoulement under international human rights law. <https://www.ohchr.org/Documents/Issues/Migration/GlobalCompactMigration/ThePrincipleNon-RefoulementUnderInternationalHumanRightsLaw.pdf>

⁵⁶ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 3: <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx> Vol. 1465, P. 85.

seekers, it has to be said that this clause is applied to any form of process being made by states where there is sufficient evidence to support that the person being returned would be at risk of harm or torture. It is not limited to the people asking for international protection through the asylum systems to gain the status of refugee, it is a general clause applicable to any situation where the return of the person will be dangerous for his or her well-being, “irrespective of their citizenship, nationality, statelessness, or migration status, and it implies wherever a State exercises jurisdiction or effective control, even when outside of that State’s territory”⁵⁷.

⁵⁷ UNHCR: The principle of non-refoulement under international human rights law.

4. Interpretation overview and Cases

After analyzing the current international legal framework, it is important to see how this is interpreted and applied in practice throughout some of our nearest countries and administrations, since the international protection explained above is the base for the asylum systems that the countries have. It is important to note that the asylum systems of each country can be wider or narrower than the international protection learned, but they have to protect and agree on the general definition that the Refugee Convention gives if they were parties to it at the relevant time.

The previously explained Refugee Convention is the minimum that the state has to grant or protect the third country nationals, since this is an universal agreement that the State Parties have to follow. The asylum system that each country has depends on the laws of that specific country, and the decision of in which situations the country should grant asylum is always up to the country itself. The only limit is that the Refugee Convention State Parties have to follow this definition of refugee given by it, as a bare minimum. From that point on, the countries can decide whether they widen their asylum reasons, or if they will only apply the 1951 UN Convention definition at the time of granting asylum.

It has to be clarified that as the asylum systems depend on countries only, with the only limit of protecting and following the Refugee Convention, if the country decides to protect a specific situation or type of persecution that is not englobed in the mentioned international treaty, the person protected by that decision of the state cannot be considered a refugee, he or she will be an asylee only, protected by the specific country that has decided to grant the protection to that type of persecution.

We now will be focusing on the protection of the LGBTQ community that is the topic of this specific research, being this part of the Refugee Convention and definition granted above, as we have already discussed.

The protection of this community or group of people, that we can call social group for Refugee Convention purposes, can and should be included in the universal

protection listed by the agreement, and so, connected with that, it can be said that if a person achieves the international protection because of suffering the fear of persecution for being part of the LGBTQ community, he or she will have the status of a refugee. That is something that we can say after analyzing the convention as we have, and the interpretations that the United Nations High Commissioner of Refugees (UNHCR) grants for the states to apply. The previously analyzed expert roundtables⁵⁸ organized and guidelines⁵⁹ stated by this institution clearly say that this community can be considered as a social group and that it is and should be consequently protected by the international protection that the 1951 Convention grants through the refugee definition of article 1.

That is something that can be confirmed from the theoretical point of view, since the suggested interpretations of the Refugee Convention clearly states so. But in the practical and everyday decision making, can we say that this is followed by all the signing states and administrations? This is the question that we will try to answer in this chapter, checking if this supposed protection that the universal regulation offers is followed by specific countries at the time of granting asylum and protection to persecuted citizens, or people fearing persecution. The main focus will be on European states, since this is where we are actually located and since the European Union has done in fact some more specific regulations regarding the asylum systems and specifically the refugee convention interpretation. I will now briefly talk about specific European regulations about this issue, only focusing on the areas that are interesting and applicable for this specific thesis and topic.

4.1 European interpretation

The European Union has in fact regulated the area of the protection of Refugees and the asylum systems of its member states through some specific directives. There are two main ones regarding the refugee protection, the so-called Qualification directive and the one about common procedures for granting international protection. It first have to be said that the directives of the EU “*set out a goal that all EU countries must*

⁵⁸ Expert Roundtable organized by the United Nations High Commissioner for Refugees and the International Institute of Humanitarian Law, San Remo, Italy. (6-8 Sep 2001). *Summary Conclusions: membership of a particular social group*.

⁵⁹ UNHCR: Guidelines on International Protection (2002).

achieve. However, it is up to the individual countries to devise their own laws on how to reach these goals”⁶⁰. This means that the goals and definitions that appear in these Directives that will be analyzed are mandatory to all EU countries, even though the implementation of this is up to the countries themselves at the end of the day. But the important point to take from this statement is that the definitions and decisions that will be analyzed now are mandatory for the European states to follow. This will be important at the time of analyzing the actual situation of LGBTQ asylum seekers throughout Europe.

I will not analyze the Directives in full, since we only need to focus on whether the European Union makes a more specific mention for the protection of the LGBTQ community, which is the core of this work specifically after focusing on the international protection of people. The Qualification directive was adopted “*as part of the EU’s harmonization drive and efforts to reach a common asylum policy*”⁶¹. It is thought about in order to establish a minimum standard for the member states, but it is always a possibility for the states to create a wider provision in their individual asylum systems, the directive is just the bare minimum.

After analyzing them, we first of all have to say that the definition of a refugee used in this Directive is the one that is given in the Refugee Convention, they take the definition of a refugee from there directly as a base. Then, it has to be said that a specific mention to this community is actually a reality in the Qualification directive, specifically in article 10.1.d), when this two important parts are mentioned: First of all, when talking about the membership of a particular social group when interpreting the Refugee Convention, it is said the same or a very similar approach when interpreting what a social group means, meaning that the “*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*”⁶². This can be understood as the same interpretation previously analyzed that the UNHCR makes about the membership of a particular social

⁶⁰ European Union definition of a Directive: https://europa.eu/european-union/eu-law/legal-acts_en

⁶¹ Goodwin-Gill, Guy & McAdam, Jane (2007). The refugee in International Law. P. 60

⁶² Directive 2011/95/EU Of The European Parliament And Of The Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted. Article 10.1. d) I.

group, meaning that the common characteristic is innate and unchangeable and that this is the main point about the social group.

But the important mention that makes a difference when talking about the topic of the thesis is a paragraph that actually is stated just below the previous mention, in the last text of article 10.1.d). This is what the European Qualification Directive says, that is so important to our topic:

“Depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation. Sexual orientation cannot be understood to include acts considered to be criminal in accordance with national law of the Member States. Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group”.

This has the most importance when talking about the protection of the LGBTQ community regarding the international protection, since it is the first time that we can find a direct mention to this community in law when talking about the refugee protection. Since this is displayed in a European directive, this means that, as explained before, all the member countries should implement this in their domestic asylum systems, since it is a mandatory rule that binds all of them. The Directive then explains many more concepts and introduces the so-called Subsidiary Protection⁶³, which is not going to be explained in this work, but it is good to know regarding a protection that can be achieved if the refugee protection is denied when going through the process.

The second mentioned Directive⁶⁴ about the common procedures regarding the granting of international protection regulates the process and the steps and requirements to follow for the states to apply in their asylum systems. This is to make sure that the decisions taken in international protection matters follow a certain procedure and at the same time make sure to protect the rights of the asylum- and refugee-seekers.

⁶³ Directive 2011/95/EU. Chapter V.

⁶⁴ Directive 2013/32/EU Of The European Parliament And Of The Council of 26 June 2013 on common procedures for granting and withdrawing international protection.

4.2 Problems that arise when analyzing LGBTQ refugee and asylum cases in the European states

As mentioned before, the thesis will now be focusing on the practical or every-day part of the international protection system, which is a question of whether the theoretical part analyzed until now actually is applied as it is supposed to be in the real world and to real people. This is something that will be done by researching the problems that the LGBTQ asylum cases face in the European Union in selected countries. By researching the problems that arise and are argued by scholars, we can then find some solutions or recommendations in order to improve the actual system and make it a better or a more efficient one at the same time.

This will be done this way since some scholars argue that European countries usually act and make decisions below the required standards that are state in universal and European refugee law, and that this carries with it the fact that many asylum seekers are denied the protection and returned to their country of origin where they will face persecution or even worse scenarios⁶⁵. The research will be focused on eight issues or scenarios to take into consideration, which are some of the most common problems when facing this kind of international protection cases. In their research, Sabine Jansen and Thomas Spijkerboer identified 8 relevant issues⁶⁶, when analyzing asylum claims about sexual orientation and gender related issues in Europe, and after gathering data from all the member states.

The eight issues that the research analyzes that bring difficulties within asylum cases, and that will be checked now are the following ones: criminalization, state protection against non-state persecution, concealment of sexual orientation or gender identity, internal protection, credibility assessment, late disclosure, country of origin information and reception. These are the eight issues that create the most problems for

⁶⁵ Biekša, L. (2011). The Refugee Qualification Problems in LGBT Asylum Cases. Mykolas Romeris University. JURISPRUDENCE 2011, 18(4), p. 1555–1565. P.2

⁶⁶ Jansen, S. & Spijkerboer, T. (2011). Fleeing Homophobia. Asylum claims related to sexual orientation and gender identity in Europe. COC Netherlands and VU University Amsterdam.

states when making decisions about LGBTQ asylum cases in Europe. These issues will be taken as the base to check the problems that arise in these cases in Europe, in order to make the comparison and to see if the theory analyzed until now is interpreted the same way or if there is still work to do in order to ensure protection to LGBTQ asylum and refugee seekers. In each one of them, specific EU countries with cases will be mentioned regarding the concrete issue and how they face it.

These 8 issues or problems have been taken as the base of the thesis since those are commonly used and accepted in the literature nowadays⁶⁷. The research done by Jansen and Spijkerboer is a very complete and detailed one that is taken as a source by many authors⁶⁸ when researching the problems that usually arise when making decisions about LGBTQ asylum cases in the European states, and that is why those are going to be analyzed individually in this thesis.

Criminalization

This is the first issue or problem that the LGBTQ asylum seekers may face when asking for international protection, the fact that the same-sex relations or not identifying with the sex assigned at birth is criminalized in their country of origin, and what this can effect on the decision of the country that is analyzing his or her specific case after asking for international protection. Before going forward and seeing the effect that the fact of this relations being criminalized can have in the asylum seeking process, it is important to see the worldwide situation nowadays regarding the laws about sexual orientation:

⁶⁷ Jakulevičienė, L., Biekša, L. & Samuchovaitė, E. (2012). Procedural problems in LGBT asylum cases. Mykolas Romeris University, Faculty of Law. Jurisprudence 2012, 19(1), P. 195–207.

⁶⁸ Den Heijer, M. (2014). Persecution for reason of sexual orientation: X, Y and Z. Kluwer Law International. Common Market Law Review. P. 1218- 1224.

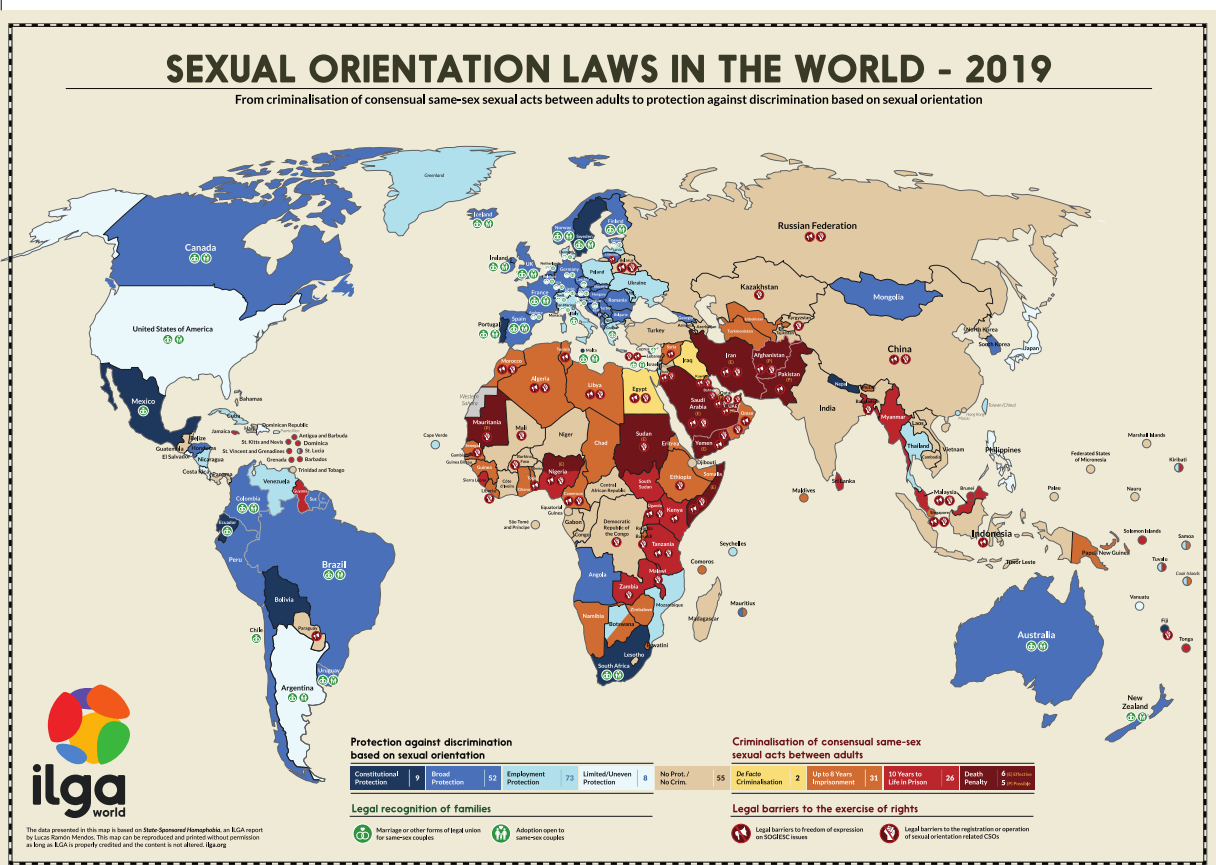


Figure 1 The International Lesbian, Gay, Bisexual, Trans and Intersex Association - Maps, Sexual Orientation Laws 2019. <https://ilga.org/maps-sexual-orientation-laws>

In the map we can see that in 2019, the death penalty for LGBTQ people is still enforceable in 6 countries worldwide, in 26 countries the penalty is the imprisonment from 10 years to life sentence, in 31 countries the imprisonment is up to 8 years and the “de facto” criminalization happens in 2 countries⁶⁹. This situation is what a lot of people born in any of those countries face in the everyday life, and that is the reason why so many people have the need to flee their country in order to ask for international protection in another one.

With the situation being such, it is clear that a lot of asylum requests will be placed in different countries, since the persecution against the community is clearly something that happens nowadays. The criminalization of the same-sex relationships and the gender issues clearly creates an atmosphere of persecution and danger for people of the LGBTQ community, which may have the need of leaving their country of origin looking for a better future. Regarding this criminalization, the issue that the

⁶⁹ The International Lesbian, Gay, Bisexual, Trans and Intersex Association. (ILGA). Mendonça, L. R. (March 2019) State Sponsored Homophobia. 13th Edition. P. 536.

mentioned “Fleeing Homophobia” report finds is that the interpretation that the countries make about this change from some to others, meaning that not all countries grant the asylum protection just because of the fact that the sexual orientation or gender identity of the asylum seeker is criminalized in his or her country of origin. Some EU countries need the enforcement of such a criminalization to grant the asylum to the seeker, and others do not. Regarding this, even if the enforcement is not in practice anymore, the applicant may be able to demonstrate a well-founded fear of persecution⁷⁰ because he or she is part of the LGBTQ and the criminalization is still applicable in theory.

Such countries like France, Belgium or Sweden require the enforcement of the criminalization to grant the protection to the seeker, or at least the need for some regularity in the enforcement of this criminalization⁷¹. And on the other hand, some countries such as Italy consider that just the criminalization of the sexual orientation or gender identity is enough to argue that the person has fear of persecution and that he or she cannot go back to the country, so that the asylum could be granted. There are other countries that do not have a clear spot on this, and others which even argue that the enforced criminalization is not enough to grant the international protection⁷².

About this criminalization of the sexual orientation or gender identity, it has to be said that there is a quite spread way of working among states of using the so-called safe-countries lists, which list the countries that are considered safe when talking about persecution and the international protection⁷³. These lists are used to speed-up the asylum cases and procedures, but the issue is that they do not make a difference between the reasons why a person may suffer persecution, these are just lists that are used as a general tool to argue that a specific country is not dangerous for the people. They do not focus on specific dangers or risks that people may suffer. The danger that this creates is that those countries may be safe for some people and they may not suffer

⁷⁰ UNHCR. (2008) Guidance note on Refugee claims relating to sexual orientation and gender identity. P. 20.

⁷¹ Jansen, S. & Spijkerboer, T. (2011). Fleeing Homophobia. P. 22. In total, this applies to 11 EU countries: Austria, Belgium, France, Germany, Italy, Ireland, Lithuania, the Netherlands, Poland, Sweden, the United Kingdom.

⁷² Ibid, 24.

⁷³ European Union Agency for Fundamental Rights (FRA). (2017). Current migration situation in the EU: Lesbian, gay, bisexual, transgender and intersex asylum seekers. P. 6.

any kind of persecution, but it can be that the LGBTQ people do suffer persecution in that specific country and that is not displayed on the list.

Even if how the criminalization is applied in each country is still a matter of discussion, it is clear that the criminalization of actions regarding the LGBTQ people in their countries of origin is a clear sign that they are not able to live there. The issue appears to be in the fact that the criminalization is enforceable or not, since that makes the difference about the case in some countries. In this thesis, the approach taken for cases like these ones, is that the simple criminalization in the country or origin is enough to argue that the applicant needs protection of a third country.

State protection against non-state persecution

This is a quite common reason why some states refuse to grant the international protection to the asylum-seekers, arguing that they could have asked for the protection of their own state against the persecution that they were suffering from non-state actors. This is a quite common issue when groups of people not related to the country of origin of the applicant persecute him or her due to his membership to the LGBTQ community for whichever reason. The fact that non-state actors can be important when talking about persecution is actually stated in the qualification directive previously mentioned, in article 6⁷⁴, saying that these will be considered persecution actors when there is proof that the country and other local institutions cannot provide protection against the actions of this group.

This is a tricky and complicated topic, since the non-state persecution has to be proved at the same time of proving the failure to protect against discrimination. When this two situations collide (the non-state persecution and the lack of protection by the country and the organizations), it is clear that the claim is substantiated in a good way, and should be considered as a valid one. The UNHCR Guidance Note previously mentioned argues this the same way, saying that the applicant may be hesitant to contact

⁷⁴ Qualification directive article 6: “Actors of persecution or serious harm include: [...] (c) non-State actors, if it can be demonstrated that the actors mentioned in points (a) and (b), including international organizations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7”.

the local police when suffering the non-state persecution, since they could see him or her as the problem or issue instead of the victim that has to be protected⁷⁵.

Regarding the European state practice on this subject it has to be said that it really varies on this point, since some of them like Austria, Denmark or Spain⁷⁶ demand that the applicant has asked for protection previously even if LGBTQ people are criminalized in the country, and others like Netherlands or France⁷⁷ do not have that requirement of having asked for protection in their country of origin. The fact that this varies this much is an important issue regarding the persecution of non-state actors, since the countries are not interpreting the need to ask for the state protection the same way, and this can lead to discrimination and treating the same case differently.

It can be stated that one of the interpretations that we will make ours is that when the sexual orientation or the gender identity is criminalized or has a lot of backlash and hate from the society in the country of origin (being this the case of non-state actors of persecution), the applicant cannot be required or obliged to ask for the protection of the authorities of that same country, since these can possibly be homophobic or transphobic also⁷⁸. The fact that a country would make an applicant ask for help in the authorities of his or her country of origin means that the person could be in danger if those are at the same time persecutors. Meaning that if the person is suffering persecution in the country of origin and nothing is changing to stop that, we cannot expect the authorities of that country to fix that just because the person goes to them to try to seek help, since that would not be a reality in general.

⁷⁵ UNHCR Guidance Note on Refugee Claims relating to sexual orientation and gender identity. Par. 22. “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”.

⁷⁶ Jansen, S. & Spijkerboer, T. (2011). *Fleeing Homophobia*. P. 29.

⁷⁷ Ibid.

⁷⁸ Biekša, L. (2011). *The Refugee Qualification Problems in LGBT Asylum Cases*. P. 1562.

Concealment of the sexual orientation or gender identity / discretion

The concealment of the sexual orientation or gender identity is what in practice is called to stay in the closet, not to reveal that a person is gay, lesbian, trans or any other way that the LGBTQ community englobes. This can be done due to the fear of being persecuted or fear of suffering any kind of aggression or violence because of it depending on where that person was born. The question and issue regarding this topic is if the countries where the asylum application has been issued can ask or require the applicants to hide their sexual orientation or gender identity in order to avoid the possible or likely threats or violence that they would suffer if they did reveal it.

Regarding this question and the fact that this is a discussed theme when going through the asylum processes, we first have to focus on the laws, rules and interpretations that the universal institutions such as the United Nations have regarding this specific issue, since that is one of the most important sources to check at the time of interpreting. It has to be said that the UNHCR has already given an answer to it, so that the countries can interpret it in that way when making decisions about specific cases. The paragraph 25⁷⁹ clearly states that “*A person cannot be expected or required by the State to change or conceal his or her identity in order to avoid persecution*”. This is a clear statement done by the highest institution regarding refugee protection guiding the states to follow that meaning and apply it in the specific cases. In general, if such an institution gives a clear example of how to interpret this issue, this should be the way to go for the states, but as stated before, this is an interpretation area that is at the end up to the countries.

And apart from the UNHCR, the Qualification directive for the European countries implies it also at the time of defining the membership of a particular social group in article 10, stating that “*the members share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it*”⁸⁰. So, following what the directive says in article 10, if the person hides that part of him or her, he or she is actually renouncing to the characteristic that links to the LGBTQ community that deserves the international protection that the directive and the

⁷⁹ UNHCR Guidance Note on Refugee Claims relating to sexual orientation and gender identity. Par. 25.

⁸⁰ Qualification directive, article 10.1.d) I.

Refugee Convention is offering. This interpretation goes the same way as the one given by the UNHCR, empowering it through the European regulation. But, is this actually applied?

Unfortunately, it has to be said that the discretion reason that is used in courts when going through asylum procedures is still applicable and used in several European countries, even if the UNHCR and the Directive clearly say that this interpretation is not the one to do, since the applicant should not be enforced to hide one important part of him or herself. This can be clearly seen in the Jansen & Spijkerboer research, and they list several countries⁸¹ where the discretion argument is still in place and in full use when making decisions about asylum applications. There are others where this discretion need is not clear when analyzing the cases⁸² and others that have abolished this requirements for their asylum systems. This is the case of the United Kingdom and Netherlands. This first country (United Kingdom) has stopped using this restrictive requirement due to a Supreme Court case, and they only apply the discretion when it is voluntary, meaning that the applicant would like to keep living in his or her country of origin due to his decision, or pressured by his family or social surroundings⁸³. That is the only case when discretion will be applied and the application rejected, due to the voluntary essence of the case. But in all the other cases, this restrictive measure cannot be taken into consideration in the UK.

The case of the Netherlands is slightly more complicated, because they actually banned the so-called discretion requirement from their jurisdiction saying that “*people with a homosexual preference are not required to hide this preference upon return in the country of origin*”⁸⁴, but at the same time even if they stated that it would not be used anymore, it can be seen that it still is being used in certain individual cases⁸⁵. This makes us categorize the Netherlands as somewhere in the middle, but since they still

⁸¹ Jansen, S. & Spijkerboer, T. (2011). *Fleeing Homophobia*. P. 34-38. These are the countries that still use the discretion reasoning: Austria, Belgium, Bulgaria, Cyprus, Denmark, Finland, France, Germany, Hungary, Ireland, Malta, the Netherlands, Poland, Romania, and Spain.

⁸² Czech Republic, Greece, Lithuania, Portugal, Slovakia and Slovenia.

⁸³ Supreme Court 7 July 2010, HJ (Iran) and HT (Cameroon) v. Secretary of State for the Home Department, UKSC 31. “*If the tribunal concludes that the applicant would choose to live discreetly simply because that was how he himself would wish to live, or because of social pressures, e.g., not wanting to distress his parents or embarrass his friends, then his application should be rejected*”.

⁸⁴ Vreemdelingen circulaire (Aliens Circular) 2000 C2/2.10.2.

⁸⁵ Regional Court. Dordrecht, 9 November 2010, 09/4135.

apply the discretion requirement in some cases, it has to be added to the first group previously mentioned.

It has to be said that the discretion argument that some countries still use in the practical everyday life is even considered antithetical by some scholars, who say that this way of interpreting is contrary to the “*Refugees Convention’s aim to uphold everyone’s liberty to exercise fundamental freedoms and to protect those who are threatened for doing so*”⁸⁶.

Internal protection

The internal protection is based on the thought that the applicant could live safely in another part of his or her country of origin, and since that is a possibility, the jurisdiction denies the international protection request. The internal protection that can be expected from certain countries of origin of some applicants is regulated in article 8 of the Qualification directive, and it states that the applicant would not be entitled to international protection if in a part of the country of origin he or she would not have a well-founded fear of suffering the persecution, or that in that part the applicant would have the option to access some kind of protection against it⁸⁷.

As in the previous cases, the UNHCR has already issued a statement regarding the internal protection that the applicants may get in some specific countries, and how this should be applied in the national procedures. This institution makes a difference between two scenarios that have already been seen previously, the case when the state is the actor of persecution and when a non-state actor is the persecutor. In paragraph 33 the High Commissioner clearly states that “*as homophobia, whether expressed through laws or people’s attitudes and behaviour, often tends to exist nationwide rather than merely being localized, internal flight alternatives cannot normally be considered as applicable in claims related to sexual orientation and gender identity*”⁸⁸. This is already a big step into the argument that the internal protection is not really an option for

⁸⁶ Den Heijer, M. (2014). Persecution for reason of sexual orientation: X, Y and Z. *Kluwer Law International. Common Market Law Review*. P. 1226.

⁸⁷ Qualification directive, Article 8.

⁸⁸ UNHCR Guidance Note on Refugee Claims relating to sexual orientation and gender identity. Par. 33.

LGBTQ applicant cases. This is directly applied to when the persecutor is the state itself, since if that would be the case, the whole country would be dangerous for the applicant, and he or she could not be asked to move to any other part of it since the danger would be the same.

And regarding when the persecutor is a non-state actor, it can be understood that the state is not going to protect the citizen differently in another part of the country if the non-state actor of persecution is present in the country itself. If the country would be willing to help the applicant, it should be able to help and protect him or her in any part of it, the relocation to another part would not make a difference in that way⁸⁹.

A lot of cases have been found in several European countries where the asylum application was denied due to the fact that the applicant was expected to move to another part of the country of origin in order to avoid the well-founded fear of persecution for being a member of the LGBTQ community⁹⁰. This is unfortunately still being argued in many European countries even if the UNHCR clearly states that in these cases the internal protection is rarely applicable if what we are looking for is the effective and real protection of the international protection applicant.

As Laurynas Biekša states in her work, the qualification directives have to be interpreted in the way that when the applicant's country of origin criminalizes sexual orientations or gender identities, or faces a very high amount of hate towards the LGBTQ community by the society, the asylum seeker cannot be expected to ask for internal protection in that state, since the reality is that it would not be realistic to be safe in that same country⁹¹.

⁸⁹ Ibid. Par. 34.

⁹⁰ Jansen, S. & Spijkerboer, T. (2011). *Fleeing Homophobia*. P. 43. These are the countries: Finland, Germany, Ireland, the Netherlands, Romania, Denmark, Malta, Norway and Poland.

⁹¹ Biekša, L. (2011). *The Refugee Qualification Problems in LGBT Asylum Cases*. P. 1562.

Credibility assessment

This is a very broad and complicated area that deserves a whole other research work that is not going to be done in this thesis due to the limited space and topic itself. Proving the fact of being a member of the LGBTQ community is a long process that has to be done through the asylum processes, and the domestic laws and directives regulate how this should be done and how to prove it in order to get the international protection granted.

Here we will just make a mention on how the credibility should be interpreted, taking into account the fact that the applicants may have never explained their situation to strangers or may not even know about the terminology or specifications that are used in more modern or open countries. Proving how someone is gay for example is not something easy to do in a process, and that is something that as I say can be researched intensely in a whole other research work. An important detail or statement that is important to take into consideration is that quite usually the decisions are based on stereotypes, and this is something to avoid since the only thing that it carries is more discrimination. We would be arguing such an important decision on a stereotype that does not have any kind of credibility, since the only thing that it does is to discriminate the non-effeminate gays, the lesbians that do not act masculine or many other different cases for example⁹². Actually, LGBTQ groups point that it is quite common that the judges have a “lack of understanding and knowledge of the specific situation of LGBTQ persons”⁹³.

Since this is one of the most complicated parts of the process and one that can carry problems with it, I will just mention the article 4.5 of the Qualification directive that says that in case that there is not documental or other type of evidence to support some part of the story of the applicant, some other details have to take into consideration for doing so, such as: the genuine effort to substantiate the application, that all relevant elements have been handed and a good explanation has been given to make up for the ones that were not possible to give, that the statements are coherent,

⁹² Jansen, S. & Spijkerboer, T. (2011). *Fleeing Homophobia*. P. 7.

⁹³ FRA (2017). *Current migration situation in the EU: Lesbian, gay, bisexual, transgender and intersex asylum seekers*. P. 6.

that the application for protection has been done as fast as possible and that there is a general credibility that has to be taken into consideration⁹⁴.

This is just to note that the proof of something as personal as this will definitely carry a lot of baggage and will be difficult to elaborate, but that the interpretation stated in the directive have to be taken into account and carefully examine the case before denying it due to a formal error for example.

Late disclosure

Asylum seekers suddenly face the obligation to start sharing all kind of details of their personal life with strangers in a country that is not theirs and where they do not know how they will be accepted or rejected, as soon as they ask for the international protection when arriving to that country. It is important to remember that in their country of origin they most likely never or very few times have talked about this part of themselves with anyone, and that is something that can create quite a shock or a need of time in order to process how the procedure works and what are they supposed to do. This can be due to shame, fear or any other reason that they may have. Lyra Jakulevičienė and the co-authors of her work say that there may be some valid reasons why the applicant is not able to reveal his or her sexual orientation or gender identity right at the beginning of the process, such as “*feelings of difference, stigma, shame, fear to disclose sexual orientation or gender identity to an officer or doubts what could happen if it becomes known in accommodation centres; the process of ‘coming-out’ or not knowing that it may be relevant to their claim*”⁹⁵.

Due to this first shock of having to suddenly share all the details of their personal life, the history of their relationships or any other very intimate information, it is quite common that some details or facts of the applicant’s personal life that should be part of his or her case would appear late in the process, not everything will be said in the first part of the asylum procedure. This can be negative depending on in which country

⁹⁴ Qualification directive. Article 4.5.

⁹⁵ Jakulevičienė, L., Biekša, L. & Samuchovaitė, E. (2012). Procedural problems in LGBT asylum cases. Mykolas Romeris University, Faculty of Law. Jurisprudence 2012, 19(1), P. 202.

the international protection is asked for, as with the other interpretation problems previously explained.

The Qualification directive in its article 4 says that “Member States may consider it the duty of the applicant to submit as soon as possible all the elements needed to substantiate the application for international protection”. This is a clear statement that says that all the information needed for the procedure should be given as soon as possible by the applicant, and this is something that the states will use to penalize the late disclosure of information regarding the membership of the person to the LGBTQ community for example. But in order to know how the late disclosure should be interpreted, we have to go to the UNHCR guidance notes also, which always give a specific approach to each case.

When focusing on those, the paragraph 38 states a very important clarification regarding this: “*The applicant will not always know that sexual orientation can constitute a basis for refugee status or can be reluctant to talk about such intimate matters, particularly where his or her sexual orientation would be the cause of shame or taboo in the country of origin. As a result, he or she may at first not feel confident to speak freely or to give an accurate account of his or her case. Even where the initial submission for asylum contains false statements, [...] the applicant can still be able to establish a credible claim*”⁹⁶. This is very important since it actually justifies in a way that the late disclosure of important information for the asylum process can happen due to fear or other issues that the applicant may be facing at the time of firstly asking for international protection in a third country.

We can actually find cases where the Court of Justice of the European Union argues this way, stating that because of the sensitive nature of the sexual orientation or personal identity, it is not acceptable to conclude that since that declaration was not done at the very beginning of the process, that means that the sexual orientation lacks credibility⁹⁷.

⁹⁶ UNHCR Guidance Note on Refugee Claims relating to sexual orientation and gender identity. Par. 38.

⁹⁷ CJEU Joined cases C148-150/13, A, B and C v. Staatssecretaris van Veiligheid en Justitie, 2 December 2014, Par. 69.

Regarding which countries apply it in which way, it has to be said that we can find examples of cases that are successful even if they disclosed their sexual orientation late, and cases that are denied in the same situation. Jansen and Spijkerboer state that in their research after comparing and obtaining information from all the European countries. They say that they have found the suspicion when the late disclosure happens of trying to improve their situation if they see that their application is going to be rejected⁹⁸.

Country of origin information

And lastly, we find the country origin information, which refers to having information regarding the specific situation of the LGBTQ community in the country of origin of the applicant. In order to decide about the case of an asylum seeker that argues that he or she has a well-founded fear of persecution, the most important part when deciding is to have updated information of the situation of the country of origin, to decide in consequence. For that end, and to examine the applications, the countries have to have up-to-date information that can be obtained from different sources (like EASO, UNHCR or other relevant international organizations) to know about the specific situation in the countries of origin, and this information has to be handed to the workers that actually examine these applications⁹⁹.

LGBTQ associations argue that this information that the countries have is outdated and that the NGOs should be the ones actually gathering this information since they do have more updated information. It is stated that Member States usually do not know about this, and that when they do know, they do not want to rely on the information that these can offer¹⁰⁰.

As was mentioned before, it is important to remember that the frequently used safe-countries-of-origin lists are part of the problem in LGBTQ cases too, since those

⁹⁸ Jansen, S. & Spijkerboer, T. (2011). *Fleeing Homophobia*. P. 67-69.

⁹⁹ Directive 2013/32/EU Of The European Parliament And Of The Council of 26 June 2013 on common procedures for granting and withdrawing international protection. Article 10.3. b).

¹⁰⁰ FRA (2017). *Current migration situation in the EU: Lesbian, gay, bisexual, transgender and intersex asylum seekers*. P. 6.

countries may be safe for some of the persecutions that the Refugee Convention state in its definition, but it does not go into specific risks or dangers that can be faced in those if you are from a particular social group for example. This lists are very frequently used by countries with the objective of speeding up the asylum processes, but as stated before, this can lead to important dangers to people that face specific risks.

Conclusion

As we have seen throughout this thesis, the researched topic has been and still is a very discussed and up-to-date one, since the refugee protection and the asylum systems are topics that always are in the public eye, and that usually bring debates to the society and the public life of countries and international institutions. The right to ask for international protection in a third country is a right that is applicable worldwide, and that is something that will then always be enforceable somewhere, since the conflicts and persecutions for all kind of reasons are situations that are always present in different parts of the globe.

Once after analyzing the refugee definition that the UN 1951 Convention gives, this thesis has focused on the specific part of the definition that the membership of a particular social group embraces and protects, since that is the spot that the LGBTQ community can take in order to ask for the mentioned protection. After analyzing the Convention itself and the tools that we have in-hand for its interpretation, we have been able to confirm that the protection that the Convention grants should be applicable and accepted for the people that suffer a well-founded fear of being persecuted because they are part of the LGBTQ community. This means that they are part of a particular social group that is this community, and that the Refugee Convention should then be applicable to them. This is what can be deducted from the interpretation tools that the UNHCR itself gives, which is the main institution regarding the rights of refugees worldwide.

An important differentiation to make is that the Convention itself does not make a direct mention to the LGBTQ people, the Convention is more general and open for interpretation in that way, since its well known that not all the UN member states would sign a direct protection clause for this community. But the guidelines that the UN institution for refugees that is the UNHCR actually gives, specifies this and says that the protection should be applicable. If the states would follow the guidelines that this institution gives in order to interpret the Refugee Convention, all countries should be accepting the applications that fulfill the requirements of this group of people. The guidelines that the UNHCR gives for interpreting the Refugee Convention are without a

doubt accepting the fact that the LGBTQ community members should get the international protection after going through the process and proving so.

What is the problem? That these guidelines that the UNHCR is giving to all the countries worldwide are not obligatory rules that the State Parties of the Convention have to follow, these are just guidelines that are offered to advise in which way this treaty should be interpreted. That is why not all the asylum and refugee applications that in general fulfill the requirements to get the protection are receiving it.

After analyzing the Refugee Convention of the United Nations, the thesis has focused on the European area and in how the European states interpret the Convention and the European Qualification Directive that regulates and specifies how the states in the EU should interpret the international protection. The main focus has still been the international one, taking the Refugee definition that the 1951 UN Convention gives as the base, and going from there. There is a big improvement when analyzing the European directive, which is that this one actually makes a direct mention to the LGBTQ community and connects it to the refugee protection that the UN Convention gives.

This is an important step into the protection of this group of people by the European states, but then it has to be checked if this protection actually applies to the real cases in the everyday life and processes throughout them. After analyzing it, it has to be said that there still is a lot of work to do until we arrive to an effective protection of the LGBTQ community worldwide, and even in the Europe. Eight issues or problems that usually appear when making decisions about asylum and refugee cases have been analyzed in this chapter of the thesis, trying to find which the better interpretation would be for applicants asking for protection in a third country.

One of the main conclusions that can be taken from this work is that the interpretations that the UNHCR gives of the Refugee Convention and of how this should be applied and implemented in the countries, is the way to follow to achieve the protection that so many people need nowadays. The guidelines, guidance notes and experts opinions that this institution gives with the objective to interpret the universal protection for unprotected people are from the most importance when talking about the

protection of the LGBTQ community and for the protection of people in general. That should be the way to go when interpreting and applying the protection to the specific cases in the countries, and in order to do that, some parts should be made directly enforceable to states, by inserting them into the Convention itself.

It is clear that in order to protect the unprotected in a more efficient way, the way to go should be to add more specific details to the Convention or to make the guidelines and interpretation advises mandatory for the signing states. This may sounds as something that is not easily doable, and it certainly is not, but if we want to live in a fairer world where people actually get the protection that they deserve when needed, some steps have to be taken.

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